Bakery Confectionery Food Manufacturing and Alled Workers Union v Capwell Industries Limited (Cause E693 of 2024) [2025] KEELRC 1787 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1787 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E693 OF 2024

CN BAARI, J

JUNE 19, 2025

BETWEEN

BAKERY CONFECTIONERY FOOD MANUFACTURING AND ALLED WORKERS UNION ..... CLAIMANT

AND

CAPWELL INDUSTRIES LIMITED ..... RESPONDENT

JUDGMENT

1. For determination is the Claimant's Memorandum of Claim dated 29th August, 2024 wherein, the Claimant seeks the following reliefs:

    a. A declaration that the Claimant's union members have been unfairly, wrongfully and unlawfully terminated from employment;

    b. An order quashing the termination notices meted out against the Claimant's union members dated 8th August, 2024;

    c. An order reinstating the Claimant's union members to employment or in the alternative, an order for the maximum compensation of the Claimant's union members pursuant to the provisions of Section 49 of the *Employment Act* of 2007;

    d. Interest on (c) above from the date of the Judgment till payment in full; and

    e. Costs of the suit to the higher scale in favour of the Claimant.

2. The Respondent filed a Response to the Memorandum of Claim dated 31st March, 2025 denying the Claimant's averments.

3. The Court on the 6th February, 2025, directed parties to canvass the claim by way of written submissions thereby giving the parties twenty one (21) days each to file and serve their written submissions.

4. Submissions were received from both parties.

The Claimant's case

5. It is the Claimant states that the crux of the dispute between the parties emanates from the Collective Bargaining Agreement (CBA) adopted by the parties on the 25th January, 2024.

6. The Claimant avers that Clause 31 of the said agreement provided that an agreed number of casual employees would be converted to permanent employees on a first come first served basis.

7. It states that contrary to the foregoing clause of the agreement, the Respondent opted to place the 1st batch of its employees on fixed term contracts for a term of three months with effect from 1st January, 2024.

8. The Claimant states that the Respondent has now issued individual termination notices dated 8th August 2024 to the Claimant's union members, indicating that their contracts shall not be renewed after the effluxion of time (term contract date), with their last working day being 31st August 2024.

9. The Claimant asserts that the termination notices are fundamentally flawed in both substance and procedure as enshrined in law, and are contrary to the CBA currently in force between the Respondent and the Claimant. It further contends that the terminations amount to the violation of the employee's rights to fair labour practices and the right to fair terms and conditions of service as enshrined under Article 41 of *the Constitution* of Kenya 2010.

10. It is the Claimant's case that the Collective Bargaining Agreement (CBA) currently in force, does not make a provision for the employment of the Respondent's longest serving casual employees under fixed term contracts.

11. It is the Claimant's assertion that upon the recognition of a union, its members enjoy the terms that have been negotiated with the union and their employer, and that an ongoing CBA remains in force in its terms and conditions until parties register a new CBA giving effect to new terms and conditions.

12. It is the Claimant's further contention, that unless both parties enter into an agreement to adopt a new CBA with new terms and conditions of service, the Respondent herein, is bound by the terms of the current CBA and any deviation from the terms set out therein, amounts to a violation and breach of the terms of the current CBA.

13. The Claimant states that since the Respondent issued the above batch with the said contracts, the same have never been renewed and the said employees have continued to work for the Respondent ever since without being issued with any other contract.

14. The Claimant avers that the renewal of the grievants' contracts though not express, occurred on 31st March 2024, through the conduct of both parties and the operation of the law.

15. It is the Claimant's case that the Respondent should thus be estopped from alleging that the grievants' contracts lapsed by effluxion of time.

The Respondent's case

16. The Respondent states that under the CBA, it is only obligated to convert 20 casual employees into permanent employment within this year on a first come first served basis, and that it has no obligation to convert more than twenty casual employees to permanent service.

17. The Respondent further states that having converted the requisite 20 causal labourers to permanent service, it was in full compliance with clause 31 of the CBA, and is therefore, under no contractual and/or legal obligation to convert any additional casual labourers to permanent staff.

18. It is the Respondent's case that there was no express or implied renewal of any of the terminated contracts that occurred on 31st March 2024 as the same is not provided for under the CBA apart from the conversion of the requisite 20 casual labourers which the Respondent had already complied with.

19. It is the Respondent's case that the staggered conversion as agreed under the CBA was agreed upon on the consideration that the conversion must also accommodate the Respondent's ability to absorb the staff members having economically prepared and adjusted for the same. It avers that the casual labourers represented by the Claimant and not falling within the criteria laid out in clause 31(b), were legally and rightly terminated as a result of effluxion of time of their contracts.

The Claimant's Submissions

20. It is the Claimant's submission that the urgency in this matter necessitated the filing of the matter before this Court as the grievants were keen on halting the operation of the termination notices. It submits that the urgency of the matter required that it be urgently filed before this court even as the Claimant referred the matter to conciliation.

21. It is the Claimant's further submission that the dispute resolution mechanism provided in the CBA did not envision a situation where injunctive orders may be required to resolve an immediate issue that arises between the parties owing to the fact that the grievants herein were seeking to stop their termination pending all other legal processes. It placed reliance in the case of Roy Trans motors Limited & another v Kenya Bureau of Standards (Commercial Case E301 of 2023) [2024] KEHC 2952 whereby the Court dismissed a preliminary objection when it found that the Claimant's case fell within the exceptions to the exhaustion of remedies rule as there was no mechanism to address the issue before it.

22. It is therefore the Claimant's submission that this case falls within the exception to the exhaustion of remedies doctrine, and therefore, the court should find that this claim is properly before this Honourable Court owing to the urgency of the matter.

23. On the issue of res judicata, the Claimant cites Section 7 of the *Civil procedure Act* to submits that the instant suit is not res judicata within the forgoing provisions of the Act. It submits that a Conciliator is not a Judicial officer and as such, their report cannot be deemed to be final in labour matters. It is further submitted that nothing in the *Labour Relations Act* precludes the Claimant from having this matter heard before this Honourable court.

24. It is the Claimant's submission that the Conciliator's report is evidence of conciliation and which in its view is not the final port of call. The Claimant submits that it is not satisfied with the outcome of the conciliation, and as such, would like the rights between the parties to be determined by this Honourable Court.

25. It is therefore, the Claimant's submission that nothing in this suit is remotely res judicata as the issues between the parties herein, have never been ventilated before any court of competent jurisdiction.

26. The Claimant further submits that the claim is merited for reasons that on 8th August 2024, the Respondent issued notices to the grievants herein, notifying them that their contracts were not going to be renewed at the end of their current contract.

27. It is the Claimant's submission that the grievants herein had qualified and met the threshold for their contracts to be converted to permanent employment, but that the Respondents, instead, issued the grievants with termination notices contrary to the law.

28. The Claimant while relying in the holding in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) as quoted in the case of Transparency International - Kenya v Omondi [2023] KECA 174 (KLR) submitted that the grievants had legitimate expectations that their contracts would be converted to permanent terms owing to the fact that they had served the Respondents for a very long time.

29. In light of the forgoing, the Claimant submits that its members were unfairly, wrongfully and unlawfully terminated from employment.

30. The Claimant submits that for reason that the Respondent unfairly, unlawfully and wrongfully terminated the grievants, they are entitled to the maximum compensation offered by the law.

31. It further submits that owing to the fact that a significant amount of time has passed between the termination of termination and now, the Claimant seeks that the grievants be granted 12 months wages on the gross monthly salary as compensation for unlawful termination together with all moneys accruing that they were yet to be paid as at the time of termination which includes leave days and overtime payments.

32. It is the Claimant's submission that the grievants were unfairly and unlawfully terminated and since costs follow the event, the Respondents should be compelled to pay the costs of this suit which should be assessed at a higher scale.

33. The Claimant finally urges the Court to grant the orders sought in the Memorandum of Claim.

The Respondent's Submissions

34. The Respondent submits that Clause 3 of the Recognition and Negotiation Procedure (hereinafter referred to as the Recognition Agreement) provides for an alternative dispute resolution mechanism which is conciliation. It submits further that Clauses 3(b), (c) and (d) of the Recognition Agreement stipulates the negotiation procedure to be followed in cases for collective claims, collective grievances and what happens when there is a failure to reach an agreement.

35. The Respondent citing the case of Adipo v Secretary/ CEO Law Society of Kenya & Anor [2024] KEHC 12811 (KLR), submitted that the Claimants did not exhaust all alternative dispute resolution mechanisms as they never approached the Union's management and Negotiating Committee as provided and required under Clauses 3(b) and (c) of the Recognition Agreement.

36. The Respondent submits that the Claimant ignored Clauses 3(b) and (c) of the Recognition Agreement and moved directly to 3(d) and yet a negotiating procedure would mean a chronological sequence of steps to which an internal dispute should be resolved.

37. It is the Respondent's case that the Claimant, against the doctrine of exhaustion of remedies, approached this Court on the same day that it made a report to the Ministry of Labour & Social Protection requesting dispute resolution.

38. The Respondent further submits that the Claimant should only have approached this Court after the conciliator rendered his decision. The Respondent submits further that the Claimant filed a Supporting Affidavit dated 29th August 2024 in support of its Memorandum of Claim in contravention of Rule 5(b) of the Employment & Labour Relations Court (Procedure) Rules, 2016.

39. The Respondent submits that the urgency in matter did not amount to an exemption from the exhaustion doctrine. It submits further, that in the absence of an application for exemption on the grounds provided under Section 9(4) of the *Fair Administrative Action Act*, the administrative remedy was not available to the Claimant.

40. The Respondent submits that should this Honourable Court render a decision in this matter, the same would amount to usurpation and undermining of the Conciliator's decision dated 5th December 2024 as the Claimant is not appealing the Conciliator's decision yet has brought similar issues to those heard and determined by the Conciliator.

41. On the issue of whether the Claimant's Memorandum of Claim violates the doctrine of res -judicata, the Respondent submits the Conciliator's ruling dated 5th December 2024 was final and binding as the same has not been appealed or reviewed.

42. It is the Respondent's submission that the Conciliator had jurisdiction over the subject matter, and parties pursuant to Clause 3(d) of the Recognition Agreement.

43. The Respondent submits that there is nothing in the CBA that bars it from engaging casual labourers. That Clause 27 and 31 of the CBA provides for the engagement of casual labourers and the terms thereof are provided.

44. It is the Respondent's submission that it was in compliance with the CBA where it converted 20 casual labourers into permanent employment and therefore, it was not under any contractual or legal obligation to convert any additional casual labourers into permanent staff.

45. The Respondent contends that the casual labourers represented by the Claimant did not fall within the criteria laid out in Clause 31(b) of the Recognition Agreement, hence, their contracts were legally and rightly determined as a result of effluxion of time.

46. On the issue of whether the termination of the Claimant's union members violated the law and the CBA between the parties, the Respondent submits that the employer need not give an employee under a fixed term contract reasons for termination as the only reason is the effluxion of time. The Respondent cited the case of Mbatia v Kirinyaga & Sanitation Company (KIRIWA SCO) [2023] KELRC 3364 (KLR) to support this assertion.

47. It is the Respondent's submission that the termination of the Claimant's union members was not unlawful as reason given being effluxion of time was enough. It further submits that the termination of Claimant's union members contracts did not violate the CBA between the parties as the Respondent had already converted the obligated 20 casual employees into permanent employment.

48. The Respondent urges the Court to dismiss the Claimant's claim with costs.

Analysis and Determination

49. Upon careful consideration of the pleadings and the parties' submissions, the following issues crystallize for determination:-

    i. Whether the claim violates the doctrine of exhaustion

    ii. Whether the suit is res judicata

    iii. Whether the grievants were unfairly terminated

    iv. Whether the Claimant deserves the reliefs sought.

Whether the claim violates the doctrine of exhaustion

50. The Respondent's position is that the claim herein violates the doctrine of exhaustion on the premise that the Claimant lodged the suit before the same was conciliated as required under the CBA and the *Labour Relations Act*, 2007.

51. On its part, the Claimant contends that the suit was filed under certificate of urgency as it sought interim orders and hence the exceptions to the exhaustion doctrine applies to the case, and was thus not bound to exhaust other available alternative dispute resolution mechanisms.

52. It is evident from the record that the Claimant reported a trade dispute to the Cabinet Secretary (Minister) for Labour in their letter dated 29th August, 2024. It is also not disputed that the Cabinet Secretary wrote to both parties on 12 September, 2024, notifying them of the appointment of Mr. J. H. Ouko as a Conciliator in a matter.

53. Simultaneously with lodging of the trade dispute, the Claimant filed the instant claim under certificate of urgency seeking amongst others, temporary orders of injunction to stop the Respondent from effecting termination of union members pursuant to termination notices issued by the Respondent on 8th August, 2024.

54. The question then is whether there was an alternative dispute resolution mechanism capable of availing the Claimant the reliefs it sought under the claim.

55. In the case of Adipo v. Secretary/CEO Law Society of Kenya & Another (2024) KEHC 12811 (KLR) the Court had this to say on exhaustion of alternative dispute resolution mechanisms:-

> "The basis for that view is first that article 159(2)(c) of *the Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. .....to the extent that *the Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather undermining a clear constitutional objective."

56. There is no doubt that conciliation of labour disputes is both a Constitutional and a statutory dictate as well as a requirement under the recognition agreement and Collective Bargaining agreement between the parties herein. To therefore overlook the centrality of conciliation in the resolution of such disputes amounts to a violation of the doctrine of exhaustion.

57. In the instant case, the Claimant's members were evidently staring at imminent termination having been issued with definite time bound termination notices, and which it argues the dispute resolution mechanism provided under the CBA was not sufficient to address.

58. Indeed, as submitted by the Claimant, the alternative dispute resolution mechanism that was available to the parties, did not envisage a situation where either of the parties required injunctive reliefs as those sought herein.

59. The Court of Appeal in National Assembly of Kenya V. Kina & Another KECA 548 (KLR) held thus on exhaustions:-

> " ....on exhaustion of other legal relief or other constitutional remedies, where an alternative remedy would entail delay or uncertainty in providing a remedy, then such alternative remedy is not available or effective and the doctrine of exhaustion does not apply...."

60. In the same breath, I return that for reason that the Claimant sought interim injunctive reliefs that were not available under conciliation, the alternative dispute resolution mechanism that was available to the parties was not effective, hence the doctrine of exhaustion does not apply in this matter.

61. I should also mention that this matter was actually conciliated during the pendency of this claim, and a decision reached by the Conciliator before this judgment.

62. I return that the claim as filed did not violate the doctrine of exhaustion.

Whether the suit is res judicata

63. The Respondent argues that the suit herein is res judicata premised on the Conciliator's decision delivered in the matter on 5th December, 2024.

64. The Claimant's position is that a Conciliator is not a Judicial officer and as such, his report cannot be deemed to be final in the matter. The Claimant further contends that nothing in the *Labour Relations Act* precludes it from having this matter heard before this Honourable Court.

65. Section 7 of the *Civil Procedure Act*, provides thus on res judicata: -

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit (emphasis own) or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

66. In the case of John Florence Maritime Services Limited & Another v. Cabinet Secretary Transport & Infrastructure & 3 Others (2021) KESC 39 (KLR) the Court held thus:-

> " For res judicata to be invoked in a civil matter, the following elements must be determined: -
>
> a. There is a former judgment or order which was final;
>
> b. The judgment order was on merit;
>
> c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d. There must be between the first and the second action identical parties, subject matter and cause of action."

67. The only decision that exist on the matter as between the parties herein, is a recommendation rendered by the conciliator. I have no doubt on my mind that a decision of a Conciliator is not and cannot be considered a judgment, and neither is the decision final in its nature as to render the suit res judicata.

68. I therefore. find and hold that the suit herein is not res judicata.

Whether the grievants were unfairly terminated

69. The grievants who were members of the Claimant union were issued with notices of termination dated 8th August, 2024 and whose effective date was 31st August, 2024. The Respondent cited effluxion of time as the ground for the termination.

70. It is not denied that the grievants were earlier issued three (3) months fixed term contracts from 1st January, 2024, meaning that termination of the said contracts by effluxion of time would have occurred on 31st March, 2024 and not August, 2024.

71. Fixed term contracts ordinarily carry no promise of renewal. In the instant case however, the employer/ Respondents did not communicate to the grievants the fate of their contracts after 31st March, 2024. Although the Respondent did not expressly renew the grievants' contracts, they continued working as if the contracts had been renewed for a further 5 months.

72. This in my view implied renewal of the contracts for two more times which without doubt gave rise to legitimate expectation on the part of the grievants that their contracts will continue to be renewed.

73. The manner in which the Respondent terminated the grievants' contracts thus amounted to unfair termination, and so I hold.

74. On whether the Respondent was under obligation to confirm the Claimant's members to permanent employment, Clause 31 of the CBA provides thus;

> " The company shall convert not less than twenty (20) casual employees into permanent employment with effect from 1st January 2024 and another thirty (30) w.e.f. 1st January 2025, and issue letters of appointment in accordance with the Agreement.
>
> The agreed number of casual employees will be done on 'first come, first converted' that is to say the longest serving casual employee will be converted to permanent first and so forth."

75. It is evident from the record that the Respondent complied with the first part of this clause of the CBA, having confirmed 20 of the casual workers to permanent employment on 1st January, 2024. The Respondent however moved to terminate the grievants long before the next phase of confirmation (1/1/2025) without assigning any reasons to the drastic decision contrary to the terms of the CBA.

76. In light of the foregoing, I find and hold that the Respondent's decision to terminate the grievants violated the express terms of the CBA between the parties herein, and hence the termination is unfair and unlawful, and so I hold.

Whether the Claimant is entitled to the remedies sought

77. The Claimant seeks a declaration that its members were unfairly, wrongfully and unlawfully terminated from employment, an order quashing the termination notices against the Claimant's union members dated 8th August, 2024, an order reinstating the Claimant's union members to employment and/or in the alternative, an order for the maximum compensation of the Claimant's union members pursuant to the provisions of Section 49 of the *Employment Act* of 2007.

78. On the claim of reinstatement, the Labour Appeal Court (LAC) of South Africa in the case of Passenger Rail Agency of South Africa and Others v Ngoye and Others [2024 45 ILJ 1228 (LAC), when dealing with a claim for specific performance in the face of an unlawful termination of an employment contract, stated thus:-

> " The granting of specific performance where breach of contract has occurred is subject to the court's discretion, which must be exercised judiciously.
>
> Employment contracts are different to commercial contracts in that they are personal contracts. As such, exercising the discretion to grant reinstatement as specific performance may entail satisfying the court that the continued employment relationship is tenable or that granting specific performance in the form of reinstatement will not lead to conflict within the workplace, particularly where the former employee was a senior employee or was required to interact with senior management.
>
> Financial prejudice that former employees may suffer as a result of losing their income does not constitute a basis for granting specific performance."

79. Closer home, the Court of Appeal in Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR held that the remedy of reinstatement should only be granted in very exceptional circumstances.

80. In considering a prayer for reinstatement, the Court is expected to determine whether or not it is practicable to grant an order for reinstatement. In the case of New Zealand Educational Institute v. Board of Trustees Auckland Normal Intermediate School, the Court of Appeal of New Zealand defined practicability in the following words:-

> " Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequences."

81. The Claimant did not lead any evidence to demonstrate that reinstatement of the grievants is the most efficacious remedy. There was also no prove of exceptional circumstances to warrant reinstatement, and this claim fails on this account.

82. On the alternative remedy, the Court having found that the grievants were unfairly terminated, goes to confirm that they are entitled to compensation. The court was told that the grievants were long serving casual workers who were later employed on fixed term contracts.

83. Further, the grievants were terminated for no fault of their own and the Respondent not having pointed to financial constrains as the ground for the termination, I deem an award of 8 months' salary as sufficient compensation for the unfair termination and it hereby granted.

84. In the upshot, the claim succeeds as follows: -

    a. A declaration that the termination of the grievants is unfair and unlawful

    b. An order for payment of 8 months' salary to each of the grievants on account of the unfair termination

    c. I make no orders on costs in the interest of social partnership.

85. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 19TH DAY OF JUNE, 2025.

C. N. BAARI

JUDGE

Appearance:

Ms. Ochieng h/b for Mr. Onyony for the Claimant

Mr. Okwach present for the Respondent

Ms. Esther S – C/A