



Kenya Building Construction Timber & Furniture Employees Union v Creative Joiners Limited (Cause 674 of 2017) [2024] KEELRC 216 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 216 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 674 OF 2017
JK GAKERI, J
FEBRUARY 13, 2024**

BETWEEN
KENYA BUILDING CONSTRUCTION TIMBER & FURNITURE EMPLOYEES UNION CLAIMANT
AND
CREATIVE JOINERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim on 10th April, 2017 alleging refusal by the Respondent to negotiate 2 clauses of a Collective Bargaining Agreement (CBA).
2. It is the Claimant’s case that the parties have a recognition agreement and a valid CBA from 2013 to 31st July, 2015.
3. That efforts to renew the CBA have been frustrated by the Respondent since September 2015 as it took the parties almost one (1) year to agree on the new CBA save for two items, namely salary increment and house allowance.
4. It is the Claimant’s case that the Respondent refused to either accept its offer of 14% salary increment and 25% for housing allowance or make a counter proposal which culminated in the impasse.
5. The Claimant prays for;
 - i. An order compelling the Respondent to negotiate the remaining two issues of the CBA within a time frame set by the court.
 - ii. In the alternative, the Honourable Court be pleased to adopt the Claimant’s proposal of 14% and 25% increments on minimum rates of pay and housing allowance respectively in the new CBA.



- iii. In the event of B above, a further order compelling the Respondent to sign the new Collective Bargaining Agreement.
- iv. Costs of this claim.

Respondent's case

6. From the record, it is clear that the Respondent did not file a response to the claim despite the court's directions on 25th June, 2019 and did not appear in court again.
7. Records reveal that as early as 15th August, 2015, Claimant union had written to the Respondent proposing a joint meeting on 9th September, 2015 to discuss the proposed CBA but the Respondent was unable to attend as evidenced by letter dated 9th September, 2015 and suggested a meeting on 23rd September, 2015 at 11.00 am but postponed the meeting unilaterally and indefinitely by letter dated 21st September, 2015.
8. Owing to the Respondent's conduct, the Claimant reported the dispute to the Cabinet Secretary for Labour vide letter dated 23rd September, 2015, who appointed Mr. Kimeu as the Conciliator who called a meeting on 11th July, 2016 at 10.00 am and another meeting on 25th October, 2016.
9. Strangely, by letter dated 14th September, 2016, the Conciliator certified that the dispute remained unresolved.
10. According to the Conciliator, all efforts to resolve the dispute through Conciliator had been unsuccessful.
11. The letter precipitated the instant suit.
12. Following the court's directions, 2nd February, 2023, the Ministry of Labour and Social Protections Central Planning and Project Monitoring Department prepared a report based on submissions by both parties dated 30th June, 2023.
13. The claim was canvassed by written submissions.

Claimant's submissions

14. Basing its submissions on the Memorandum of Claim and the CPPMD report, the Claimant's counsel submitted that members of the Claimant union had no pay increment since 2015 and notwithstanding the fact that the Respondent requested for time to reorganize its operations, its employees continued to suffer owing to erosion of purchasing power due to Consumer Price Indices (CPI) and required cushioning.
15. Counsel urged the court to intervene to ensure that a new CBA was negotiated.

Central Planning and Project Monitoring Department (CPPMD) Report

16. In its survey, the Ministry of Labour and Social Protection found that by 2022, the Respondent's unionisable employees stood at 22 having risen from 13 and the labour cost stood at Kshs.5,059,048/= having risen from Kshs.4,036,406/= in 2018.
17. Similarly, the Respondent's total annual labour force stood at 41 having fallen from 49 in 2018 and the annual labour costs had dropped from Kshs.25.2 million in 2018 to Kshs.16.9 million in 2022.



18. Relatedly, the report states that the wage bill for unionisable employees rose from Kshs.2.54 million in 2021 to Kshs.4.35 million in 2022 owing to the increase in the annual labour force. Overall however, the Respondent's annual wage bill fell from Kshs.19.94 million in 2018 to Kshs.15.27 million in 2022.
19. As regards the Respondent's revenues, the survey reported that the revenue declined from 195.9 million in 2018 to Kshs.157.8 million in 2019, Kshs.144.5 million in 2020 and Kshs.98.7 million in 2021.
20. The survey isolated the challenges facing the Respondent such as competition, unreliable financing options in the market, lack of properly skilled labour force, fluctuation in turnover and price fluctuations from tendering point to the cost recognition
21. On compensable factors, the survey revealed that the Consumer Prices Indices had risen from 142.82 in 2013 to 162.74, a rise of 13.94% but the Respondent's financial position had maintained a declining trend.
22. Significantly, the survey is explicit that the Respondent's inability to pay higher wages would be a factor in determining the level and timing of wage awards.
23. As regards wage increases, while the Claimant union demanded 14% increase per year for 2 years, the CPI entitlement is 14% over 2 years. The overall impact of the proposed increases would be Kshs.1,303,587/= and Kshs.630,472/= respectively.
24. On housing allowance, the survey recommended an increase of 7% as dictated by the CPI.
25. Finally, the CPPMD observed that Respondent had indicated that it needed time to reorganize its operations and cash flow and collections for affordability and sustainability of any salary increases.

Determination

26. I have considered the Memorandum of Claim, documentation on record, report by the CPPMD and the Claimant's submissions.
27. The singular issue for determination is whether the Claimant union is entitled to the reliefs sought.
28. The Claimant seeks one of the two orders, namely; compelling the parties to negotiate a CBA or award salary and house allowance increments as proposed by the Claimant and signing of the CBA.
29. As the Respondent did not file a response to the claim, the documentary evidence on record is unchallenged.
30. As regards conclusion of the CBA 2015 to 2017, the Claimant union seeks a Court Order to compel the Respondent to negotiate the contentious two (2) clauses within a specified duration.
31. From the documentary evidence on record, it is discernible that the Respondent has not been particularly keen on the conclusion of the CBA.
32. The Claimant initiated the process of renewal of the CBA early enough but the Respondent did not demonstrate any enthusiasm in having the CBA concluded specifically by its refusal to respond to the Claimant's proposal on how to resolve the contentious clauses.
33. Puzzling, the Respondent did not even care to provide a counter proposal.
34. It is common ground that the parties have an operative Recognition Agreement and concluded a CBA for the period 2013 to 2015 and having so agreed, there is sufficient space for compromise.



35. Under Section 2 of the *Labour Relations Act*, 2007, a Collective Agreement means;
- “A written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organization of employers.”
36. Section 57(1) of the Act makes it obligatory for employers and/or employer’s organizations that have recognized a trade union to conclude CBAs with such unions and do so in good faith and in a transparent manner.
37. Needless to emphasize, a collective agreement binds the parties to the agreement, all unionisable employees of the employer, group of employers or members of the employers’ organization for the period of the agreement and its terms are incorporated into the contract of employment of the employees covered by the collective agreement.
38. Under Section 59(3) of the *Labour Relations Act*, 2007;
- “A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.”
39. From the foregoing, it is unambiguous that a collective agreement is a contract *stricto sensu* enforceable by or against the parties thereto.
40. It is underpinned on the consensus *ad idem* of the parties and the court as a general rule has no role to play in the negotiations as observed by Nzioki Wa Makau in *Amalgamated Union of Kenya Metal Workers V Vehicles Manufacturers Ltd* (2018) eKLR as follows;
- “The court cannot descend to the arena of negotiations of terms of employment at the work place. This court guided by the Court of Appeal decision in *Teachers Service Commission V Kenya National Union of Teachers & 3 others* has no business setting terms of the CBA.”
41. Further, in *Teachers Service Commission V Kenya National Union of Teachers*, the Court of Appeal expressed itself as follows;
- “The very essence of a collective agreement is that the terms and conditions therein contained are voluntarily agreed upon between the employer and the union . . .
- If the labour court fixes basic salary in a collective agreement as the labour court did in this case, the collective agreement ceases to be a collective agreement as envisaged by the law.”
42. In the words of Otieno Odek, J.A.
- “It is my considered view that collective bargaining is neither compulsory nor automatic. It is the source of voluntary negotiated terms and conditions of service for employees. Collective bargaining is a platform upon which trade unions can build to provide more advantageous terms and conditions of service to their members . . .
- The right is founded on the concept of social dialogue, freedom of contract and autonomy of parties to collective bargaining . . . The Article emphasizes the ability of the employer and trade unions to operate as partners not adversaries. The constitutional recognition of the right to collective bargaining is not a right to blackmail a party into a collective bargaining.”
43. The court is guided and is in agreement with these sentiments.



44. It would appear to follow that to the question as to whether the Respondent should be compelled to negotiate a CBA with the Claimant union, the court returns that having negotiated and concluded a previous CBA, the parties have capacity to negotiate another CBA and must do so transparently and in good faith.
45. The Respondent is however encouraged to appreciate and realize that enhancement of terms and conditions of employment is an integral part of the employment relationship and cannot be wished away and it behoves the Respondent to take collective bargaining seriously.
46. The court is satisfied that in light of the declining fortunes of the Respondent company in terms of profitability and competitiveness, it is in the best interest of the parties to endeavour to arrive at an amicable resolution of the two (2) contentious issues and will be accorded time to do so.
47. As to whether the court should adopt the Claimant's proposal of 14% and 25% increments on minimum rates of pay and housing allowance respectively and the concomitant order to compel the Respondent to sign a new CBA, the law is clear that the court will seldom interfere with the exercise of power of other organs and in particular where consensus is the prescribed approach in the resolution of any dispute arising between the parties.
48. It is also not in contest that courts of law are seldom sufficiently apprised of the economic and financial status of corporations and the likely consequences of decreeing a wage increase which ought to be guided by economic and financial considerations to ensure affordability and sustainability of the employer.
49. The foregoing finds support in the sentiments of Rika J. in *Kenya Chemical & Allied Workers Union V Leather Life EPZ Ltd* (2014) eKLR, where the learned judge stated as follows;
- “Traditionally, the Government has set the wage floor annually . . . In seeking to move beyond the benchmark regulated by the Government, employers and employees examine compensable factors within the work place and are guided by economic factors.
- The court whenever called upon to intervene in economic disputes is similarly guided by the relevant compensable factors and economic indicators.”
50. The role of the Employment and Labour Relations Court in the resolution of economic disputes and in particular where the parties have not agreed in the terms of the CBA was considered by the Court of Appeal in *Kenya Tea Growers Association V Kenya Plantation and Agricultural Workers Union* (2018) eKLR;
- “However, the power to do so by the ELRC ought to be exercised judiciously and on a case by case basis where parties are unable to agree on the terms of a CBA. The court should ensure it does not substitute its preference with that of the parties' freedom to agree on the terms of employment. The court ought to be guided by the Wage Guidelines issued by the Government . . .
- Under the guidelines, the prime elements of determining wages are listed as realized productivity gains, the ability of the economy and employers to sustain increased labour costs and the cost of living.”



51. In *Kenya Ferry Services Ltd V Dock Workers Union (Ferry Branch)* (2015) eKLR, Rika J. expressed the view that the ability of the employer to pay was a salient consideration in wage determination as follows;

“The CIP for the period 2011 to 2013 shows an average annual inflation of 5%. Whereas the employers should be compensated for the loss of money value, it is important such compensation does not result in an unsustainable wage bill.”

52. Abuodha J. expressed similar sentiments in *Kenya Game Hunting & Safari Workers Union V Micato Safaris* (2016) eKLR.

53. Finally, according to the Court of Appeal in *Kenya Tea Growers case* (Supra);

“Consequently, a court faced with a question of wage increment ought to take into account productivity, cost of living and the ability to pay by the employer.”

54. In the instant case, the Report by the Central Planning and Project Monitoring Department (CPPMD) of the Ministry of Labour and Social Protection, productivity had not improved the CPI for 2013 to 2015, was about 14% and the Respondent’s financial position has been on a downward trend yet the annual wage bill for unionisable employees had risen from Kshs.2.51 million in 2018 to Kshs.4.35 million in 2022.

55. Similarly, the Respondent, according to the report was grappling with numerous challenges and the report provided no guidance as to whether the Respondent was in a position to sustainably accommodate the Claimant union’s proposal of 14% and 25% annual for salary and house allowance increments or 7% annually, which in the court’s view reduces the persuasiveness of the report.

56. Relatedly, the Claimant provided no evidence of an expert either to embellish or disprove contents of the report.

57. Intriguingly, the Respondent made no effort to respond to the Ministry’s report either by way of affirmation of its contents or controverting.

58. Its response would have appraised the court on its current status and its view of the proposed increments.

59. For the foregoing reasons, the court is satisfied that it is only fair that the parties be accorded time to negotiate the outstanding clauses of the CBA and execute the same in preparation for its approval by the Ministry and subsequent registration.

60. Consequently, parties are accorded 45 days to negotiate any outstanding clauses of the CBA for 2015 to 2017, failing which members of the Claimant are awarded salary and house allowance increment of 7% respectively annually for the period 2015 to 2017.

61. Costs of this suit are awarded to the Claimant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2024

DR. JACOB GAKERI

JUDGE



Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

