



Kenya Union of Domestic Workers, Hotels, Educational Institutions and Hospital Workers Union (KUDHEIHA) v Board of Management - Kaimosi Teachers Training College (Employment and Labour Relations Cause E024 of 2023) [2024] KEELRC 821 (KLR) (16 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 821 (KLR)

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E024 OF 2023**

JW KELL, J

APRIL 16, 2024

BETWEEN

**KENYA UNION OF DOMESTIC WORKERS, HOTELS,
EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS UNION
(KUDHEIHA) CLAIMANT**

AND

**THE BOARD OF MANAGEMENT - KAIMOSI TEACHERS TRAINING
COLLEGE RESPONDENT**

JUDGMENT

1. The Claimant is a trade union registered and recognized under the Laws of Kenya to represent domestic workers, non-teaching staff in schools, non-medical workers in hospitals, and workers in the hotel industry.
2. The Claimant on 21st November 2023 filed the Memorandum of Claim dated 20th November 2023 supported by the Verifying affidavit sworn on even date by the Branch Secretary- Kakamega of the Claimant, Mr. Thomas Mboya.
3. The suit had been triggered by the Respondent’s refusal to negotiate and conclude a Collective Bargaining Agreement (CBA). Vide the Memorandum of Claim, the Claimant has prayed for the following reliefs:
 - a. That the respondent be compelled to proceed with the Collective Bargaining Agreement not later than seven days when this judgement is delivered.
 - b. That cost of this suit be borne by the respondent.



- c. That none of the claimant's members within the respondent's employment be subjected to intimidation, coercion or threats of any form due to their union membership.
 - d. That the respondent to pay the claimant a total cost of one hundred thousand shillings for unwarranted delays to the respondent(sic* ought to read Claimant) and her members.
 - e. That the court to issue an order it deems just and fit.
4. Also filed together with the Memorandum of Claim is the Claimant's list of Documents dated 20th November 2023 and its Bundle of Documents.
 5. The Respondent on 18th January 2024, through the Hon. Attorney General, Senior State Counsel Gilbert Tarus, filed its Response to the Memorandum of Appeal dated 12th January 2024 and its list of documents dated 16th January 2024.

Claimant's Case

6. The Claimant states that on diverse dates, it recruited forty four employees through check-offs No. 000704, 000705, 00720, and 004297(APP KW 2); which is the simple majority of unionisable employees.
7. The parties entered into the Recognition Agreement dated 22nd January 2021(App kw 3) under Section 54 of the *Labour Relations Act* (LRA), 2007), after a dispute had been reported to the Cabinet Secretary for conciliation.
8. That vide a letter of 6th April 2021, the Claimant forwarded a proposed Collective Bargaining Agreement (CBA) to the Respondent according to Section 57 of *LRA* requesting the Respondent to provide its counter-proposal (APP KW4).
9. The Claimant on 12th July 2021, requested for the Respondent's Counter-proposal and requested the Respondent to invite them for CBA negotiations meeting of not later than 31st July 2021(APP KW 5).
10. On 27th July 2021, the respondent confirmed that they had received and proceeded to forward the draft CBA to their Board members and a board meeting would be convened upon opening of schools (APP KW 6).
11. On 9th November 2021, the Claimant reminded the Respondents that schools had been opened and requested to meet the respondent's negotiators on 15th December 2021 at the college to commence the negotiations (APP KW 7).
12. Through a letter of 11th November 2021, the respondent informed the claimant that their letter had been received and the matter had been forwarded to the Chairperson of the Student Welfare and Human Rights BOM Sub-Committee to handle the issue, and sought for more time to handle the issue (APP KW 8).
13. The claimant having not heard from the respondent on 11th January 2022, proposed to meet the Respondent's negotiators on 15th February 2022 for the negotiations (APP KW 9).
14. Vide a letter of 10th February 2021, the respondent requested that the respondent's sub-committee be accorded more time to advise the full Board of management after which the claimant would be called for negotiations (APP KW 10).



15. On 1st March 2022, the Claimant informed their Secretary General on status of the matter for purposes of escalating the issue to arbitration as per the law as the respondent refused to open up for negotiations of a CBA (App Kw 11).
16. On 7th March 2022, the Claimant's Secretary General reported the matter to the Cabinet Secretary, Ministry of Labour under Section 62 of LRA (APP KW 12).
17. A Conciliator (Daniel Gikuhi) was appointed on 21st March 2022(App Kw 13).
18. Before the conciliator could invite the parties for the first meeting, the respondent vide a letter of 23rd March 2022(app kw 14) invited the claimant to a meeting at its boardroom slated for 1st April 2022.
19. The claimant vide their letter of 4th April 2022 stated that when they appeared for the meeting at 9.30am on 1st April 2022, they were kept in waiting until 1.30 pm, when they were informed they would be given an opportunity at a later meeting; and the Claimant again implored the respondent to invite them not later than 30th April 2022(aPP KW 15).
20. The respondent in response to the claimant's letter of 4th April 2022, informed the claimant that the claimant's officials had left when a Board meeting was ongoing and requested for the claimant's patience, in anticipation of the Full Board meeting that would be held the coming term (APP KW 16).
21. Vide a letter of 6th May 2022, the Claimant requested the Conciliator to invite Parties for a conciliation meeting and enclosed the Memorandum of dispute to the said letter (App Kw 17).
22. On 16th June 2022, the claimant again reminded the Conciliator to invite parties for conciliation before him, having failed to act on the first letter.
23. On 8th July 2022, the Conciliator invited both parties to appear before him on 19th July 2022(APP KW 19).
24. During the meeting before the Conciliator, the respondent sought for time to consult and afterward invited the Claimant for negotiations. Seven months later, the Claimant in the letter of 15th March 2023 sought to meet the respondent's negotiators on 11th April 2023(App Kw 20).
25. The Respondent on 5th April 2023, stated that the school had financial constraints due to low enrolment and thus could not finance a full board meeting and sought that the meeting be rescheduled from 11th April 2023 to the next term. (APP KW 21).
26. On 18th July 2023, the Claimant again reminded the Respondent of the protracted delays and proposed a meeting for 9th August 2023(APP KW 22).
27. The Respondent reverted and indicated that 9th August 2023 would be inconvenient and proposed 22nd August 2023(APP KW 23).
28. On 22nd August 2023, parties met and agreed on several clauses and left out monetary clauses, and agreed to resume negotiations soonest. The Claimant proposed 16th October 2023 as a meeting date (APP KW 24).
29. On 9th October 2023, the respondent stated that the 16th October 2023 was inconvenient as the student welfare and Human Rights Sub-committee had not met to deliberate on the negotiations due to school commitments and that the claimant would have to wait until the sub-committee met and then the respondent would invite them for negotiations on a date to be communicated (APP KW 25).



30. On the lapse of a month, the claimant states that it concluded that the respondent was engaged in time wastage antics and on 11th November 2023 the claimant informed the respondent and the Conciliator that due to the extended time that had elapsed, the claimant would escalate the matter to the next level of arbitration (APP KW 26).
31. The Claimant states that the period from when they forwarded the CBA proposal until the conciliation meeting had been 19 months, while the period after the conciliation meeting to when the claimant confirmed the elapsed extended period was 14 months, it being cumulatively 33 months during which period the respondent had attempted to solve the matter through Alternative Dispute Resolution.
32. The Claimant states that having been recognized by the Respondent, the refusal to negotiate a Collective Bargaining Agreement infringes on the right to fair labour practices under Article 41 of the Constitution and Sections 54 and 57 of LRA.
33. The Claimant states that every employee has a right to join a union and the respondent having recognized the claimant ought to negotiate a CBA with the claimant for the benefit of the claimant's members, and for better terms and conditions of service.
34. The claimant states that its members having joined the union have never benefitted from the membership despite their monthly subscription.
35. The claimant states that the respondent's delay tactics in the CBA negotiations and conclusion infringe on its members' rights.

Respondent's Case.

36. It is the Respondent's case that they have never frustrated the CBA negotiations and that they have had several negotiations namely on 22nd November 2024 when the Branch Secretary, Thomas Mboya appeared; and on 9th November 2023 when the Organizing Secretary Ms. Philistus Amоче appeared and they sought for more time to consult as evidenced by the Minutes of 22nd August 2023 and 9th November 2023 produced by the Respondent.
37. The Respondent stated that they have not refused to negotiate, and are ready to negotiate the said CBA, and that on 3rd August 2023, its Students' Welfare and Human Rights Sub-Committee discussed the CBA and the same was to be approved by the full board of the management before the same is to be submitted as a counter-proposal to the Claimant.
38. The respondent states that the claim is premature as the claimant rushed to court on 30th November 2023 when the respondent had sought for more time on 9th November 2023 to finalize the CBA.
39. That the prayer of costs of 150,000/- has no legal basis and the court should dismiss it.
40. The Respondents state that no demand was served on them to entitle the Claimant to costs and prays that the suit be dismissed.

Written Submissions

41. The court on 22nd January 2024 directed that the claim be canvassed by way of written submissions. The Claimant's written submissions dated 5th February 2024 were filed by Michael Oyata, a representative of the Claimant on 6th February 2024. The Respondent's written submissions dated 28th February 2024 were filed by Senior State Counsel, Gilbert C. Tarus on an even date.



Determination

Issues for determination

42. The claimant identified the following issues for determination in the claim: -
- a. Whether the respondent is uncooperative towards the collective bargaining negotiations and therefore should be compelled to do so.
 - b. Whether the respondent should pay the claimant the cost of this suit.
43. The Respondent identified the following issues for determination in the claim: -
- a. Whether the Respondent have refused to negotiate the Collective Bargaining Agreement.
 - b. Whether the Claimant is entitled to the reliefs sought.
44. The court having considered the pleadings by the parties and their written submissions will address the following issues: -
- a. Whether the claim is premature
 - b. Whether the Claimant is entitled to the orders sought.

Issue a. Whether the claim is premature?

45. The issue whether a suit is premature goes to the question whether the court's jurisdiction can be invoked.
46. The Claimant referred a trade dispute to the Cabinet Secretary, Ministry of Labour and Social Protection on 7th March 2022, after the respective parties had attempted to negotiate a Collective Bargaining Agreement via written communication and physical meetings, but to no avail. The issue sent for resolution was "Refusal by the management to negotiate 46 clauses of the Collective Bargaining Agreement contrary to section 57 of the *Labour Relations Act, 2007*".
47. A Conciliator was appointed vide the letter of 21st March 2022, through which letter the parties were directed to file their respective proposals within seven days from the date of the said letter.
48. Before the Conciliator could call the parties for the first meeting, the Respondent called the Claimant for a meeting slated for 1st April 2022, which meeting did not materialize. The claimant forwarded their Memorandum of dispute to the Conciliator on 6th May 2022 and asked that parties be invited before the conciliator, and later sent a follow up letter to the Conciliator on 16th June 2022.
49. The Conciliator invited parties for a meeting on 19th July 2022 vide letter of 8th July 2022.
50. A letter of 15th March 2023 indicates that parties had a joint meeting on 13th October 2022 before the Conciliator, and the claimant sought to meet the respondent's negotiators on 11th April 2023 (APP KW 20).
51. The Respondent on 5th April 2023, stated that the school had financial constraints due to low enrolment and thus could not finance a full board meeting and sought that the meeting be rescheduled from 11th April 2023 to the next term. (APP KW 21).
52. On 18th July 2023, the Claimant again reminded the Respondent of the protracted delays and proposed a meeting for 9th August 2023 (APP KW 22).



53. The Respondent reverted and indicated that 9th August 2023 would be inconvenient and proposed 22nd August 2023 (APP KW 23).
54. On 22nd August 2023, parties met and agreed on several clauses and left out monetary clauses, and agreed to resume negotiations soonest. The Claimant proposed 16th October 2023 as a meeting date (APP KW 24).
55. On 9th October, the respondent stated that the 16th October 2023 was inconvenient as the Student Welfare and Human Rights Sub-committee had not met to deliberate on the negotiations due to school commitments and that the claimant would have to wait until the board sub-committee met and the respondent would invite them for negotiations on a date to be communicated (APP KW 25).
56. On the lapse of a month, the claimant states that it concluded that the respondent was engaged in time wastage antics and on 11th November 2023 the claimant informed the respondent and the conciliator that due to the extended time that had elapsed, the claimant would escalate the matter to the next level of arbitration (APP KW 26) and on 21st November 2023 filed the present suit.
57. The Respondent confirms that they are willing to finalise negotiations and the draft CBA was considered by its Board's Sub-Committee and awaiting the approval by the full Board.
58. While the dispute was before the conciliator, the parties have engaged in different meetings and the claimant confirmed that indeed the clauses that remain unnegotiated are those that relate to financial aspects. The respondent states that, the suit is premature as it is willing to negotiate a CBA once the parties agree on the financial clauses, and in any event the conciliator had not issued a certificate of unresolved dispute to entitle the claimant the right to file the suit as per section 57(5) of the [Labour Relations Act](#).
59. The respondent contends that the claimant has neither sworn an affidavit of reasons of filing the suit as contemplated by Rule 5(3) of the [ELRC \(Procedure\) Rules](#), 2016 and thus the court cannot properly adjudicate on the same and relied on the courts position in ELRC NO. 6 of 2023, [Kenya Union Of Domestic Workers, Hotels, Educational Institutions and Hospital Workers Union v Board of Management Of- Salvation Army Kolanya Girls High School](#).
60. The claimant filed the present suit on 21st November 2023, suspending the progress of any Conciliation process.
61. Section 69 of [LRA](#) provides that a dispute is deemed unresolved after conciliation if: -a. Conciliator issues a certificate that the dispute has not been resolved by conciliation or; b. the Thirty days' period from appointment of conciliator or any longer period as agreed by the parties expire.
62. The parties were negotiating before the Conciliator and agreed on various clauses of the CBA and while still negotiating on the other clauses relating to finances. The Respondent in their letter of 9th October 2023 sought for more time as their sub-committee was to delve into the unresolved CBA terms. The Respondent confirms that the Sub-committee approved the terms and what is pending is the full Board's input.
63. The Conciliator did not issue a certificate that the dispute has not been resolved by conciliation to have allowed the Claimant to deem that the conciliation has failed.
64. By virtue of Rule 5(3) of the [Employment and Labour Relations Court \(Procedure\) Rules](#) 2016, if conciliation has not taken place, the statement of claim is to be accompanied by an affidavit sworn by the claimant or by the representative of that claimant attesting to the reasons why conciliation has not



taken place. Conciliation in the instant case commenced and parties are still negotiating to necessitate the filing of an affidavit sworn by the representative of the claimant.

65. In view of the foregoing, the conciliation process as far as one can tell, is not finalized. By dint of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, Rule 5 which requires that where a dispute has been subject of conciliation, the Claim shall be accompanied by a Conciliator's Report, Certificate of Conciliation or an Affidavit sworn by the Claimant, attesting to the reasons why Certificate of Conciliation has not issued, the same are not available. The issue cannot be properly adjudicated upon by the Court, while it is pending the consideration of the Conciliator.
66. The Claimant has not availed a copy of the Conciliator's Report stating that the dispute has not been resolved.
67. In upholding this courts position in *Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Board of Management Kolanya Girls National School* (Employment and Labour Relations Cause 6 of 2023) [2023] KEELRC 3161 (KLR) (30 November 2023) (Judgment) to wit, "... the court discerned that the conciliation process was pending. By dint of the Employment and Labour Relations Court (Procedure) Rules, 2016, Rule 5 which requires that where a dispute has been subject of conciliation, the Claim shall be accompanied by Conciliator's Report, Certificate of Conciliation or an Affidavit sworn by the Claimant, attesting to the reasons why Certificate of Conciliation has not issued, the same are not available. The issue cannot be properly adjudicated upon by the Court, while it is pending the consideration of the Conciliator. (emphasis given)

Article 159(2) of the *Constitution* stipulates that in exercise of judicial authority, the Court shall promote alternative forms of dispute resolution. It is the opinion of the court that once a Party has invoked the conciliation Mechanisms under the *Labour Relations Act* section 65, that Party must exhaust those mechanisms, before coming to Court. It is improper for the Claimant to abandon the conciliation process mid-stream, and initiate judicial process..... In this dispute, there is an ongoing conciliation process. The Conciliator has not issued any Certificate, to indicate failure of conciliation. It is not known if in the end, Parties will record settlement." The court finds that the claimant abandoned the conciliation process midway.

Conclusion

68. In the upshot, considering that the Claimant abandoned the conciliation process even before the Conciliator issued a Certificate of Unresolved issues, I believe that the Claim herein is premature and improperly brought before the Court. The Claimant ought to have complied awaited the respondent's sub-committee to come up with a counter proposal since the respondent had sought for more time notwithstanding the long time it has taken to negotiate, which is the nature of negotiations which require a give and take. The foregoing leads me to conclude that the instant suit is premature for abandoning the conciliation process unprocedurally.

Issue b). Whether the Claimant is entitled to the orders sought.

69. The Claimant had sought for reliefs: -
 - f. That the respondent be compelled to proceed with the Collective Bargaining Agreement not later than seven days when this judgement is delivered.
 - g. That cost of this suit be borne by the respondent.
 - h. That none of the claimant's members within the respondent's employment be subjected to intimidation, coercion or threats of any form due to their union membership.



- i. That the respondent to pay the claimant a total cost of one hundred thousand shillings for unwarranted delays to the respondent and her members.
 - j. That the court to issue an order it deems just and fit.
70. The court recognizes the right of the employees to join unions and to enjoy the benefits on unionization offered by the union which include representation at shop floor and collective bargaining. The right is anchored in international law, the Constitution and statutes. See Article 8 International Covenant on Economic, Social and Cultural Rights: - "1. The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;" ; The International Labour Organization Convention 87 (1948), Right to Organize and Collective Bargaining; Convention 98 (1949); Article 41 of the Constitution to wit: "1) Every person has the right to fair labour practices. (2) Every worker has the right— (a) to fair remuneration; (b) to reasonable working conditions; (c) to form, join or participate in the activities and programmes of a trade union; and (d) to go on strike. (3) Every employer has the right— (a) to form and join an employers organisation; and (b) to participate in the activities and programmes of an employers organisation. (4) Every trade union and every employers' organisation has the right— (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining." The Labour Relations Act section 4 to wit: - " 4. Employee's right to freedom of association (1) Every employee has the right to— (a) participate in forming a trade union or federation of trade unions; (b) join a trade union; or and section 5. "Protection of employees (1) No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act."
71. The court finds Conciliation is a suitable mechanism for resolution of trade dispute specifically the instant dispute on the negotiation of a Collective Bargaining Agreement (C.B.A).
72. Considering that the Conciliation process was not finalized and is pending and in the spirit of promoting alternative forms of dispute resolution in the exercise of judicial authority encompassed in Article 159(2) of the Constitution, the Court orders the parties to proceed to Conciliation to resolve the pending aspects on Finance in the proposed CBA.
73. The Claimant did not produce any evidence that any of its members have been harassed or intimidated due to their membership, and in any event the Respondent transmitted union fees from the claimant's members to the Claimant as acknowledged by the Claimant.

Conclusion

74. The Court appreciates that the parties ought to collectively bargain after recognition of the union according to Section 54 of the Labour Relations Act to wit:- "(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees." The Court holds that under the International Labour Organization Convention 87 (1948), Right to Organize and Collective Bargaining; Convention 98 (1949); Article 41 of the Constitution, and Section 54 of the Labour Relations Act, the Claimant has a right to expect collective bargaining with the Respondent.



75. The Court having found the claim premature based on the pending conciliation process and on considering the unresolved agreement on the financial aspects of the proposed CBA, the Court hereby refers the matter to the appointed Conciliator on the unresolved trade dispute to finalise the conciliation process on the collective bargaining within 30 days of this judgment. The Respondent to cause the negotiated CBA to be registered with the Court within 15 days of the parties' signing.

76. It is so Ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 16TH APRIL 2024.

JEMIMAH KELI,

JUDGE

In the Presence Of: -

Court Assistant: Macheso

For Claimant:

For Respondent: -

