



Kenya Union of Domestic Workers, Hotels, Educational Institutions and Hospital Workers Union(KUDHEIHA) v Board of Management - Magui Secondary School (Employment and Labour Relations Cause E014 of 2024) [2024] KEELRC 2639 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2639 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E014 OF 2024**

**JW KELL, J
OCTOBER 24, 2024**

BETWEEN

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

AND

**THE BOARD OF MANAGEMENT - MAGUI SECONDARY
SCHOOL 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 7th May 2024 filed the Memorandum of Claim dated 25th April 2024 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 give a wage increment to its workers and refusal to come up with an appropriate effective date for an already negotiated Collective Bargaining Agreement (CBA). Vide the Memorandum of Claim, the Claimant has prayed for the following reliefs:
 - a. That the Respondent to review their proposal of zero per-cent towards the salary increment and if possible issue the increment offered by the Claimant of 30% first year and 20% Second year.
 - b. That the Claimant’s proposal date of 1st July 2023 to 30th June 2025 to be adopted by the respondent.



4. Also filed together with the Memorandum of Claim is the Claimant's list of Documents dated 25th April 2024 and its Bundle of Documents.
5. The Respondent filed the Memorandum of Appearance dated 11th June 2024 through the Office of the Attorney General, Principal State Counsel Stafford Nyauma, and filed its Response to the Memorandum of Appeal dated 11th July 2024. The response to the claim was accompanied with a list of witnesses dated 11th July 2024, a list of documents of an even date, and the respondent's bundle of documents.

Claimant's Case

6. It was the claimant's case that Rule 3(app kw 1) of its constitution mandates it to represent workers in educational institutions and to that end, the Claimant recruited more than half of the respondent's employees vide the check-off system.
7. The said recruitment culminated in the signing of a recognition agreement with the Respondent(app kw 2) pursuant to section 54 of the *Labour Relations Act*, paving way for the collective bargaining process under Section 57 of the *Labour Relations Act*.
8. That vide a letter of 18th August 2021, the Claimant forwarded a proposed Collective Bargaining Agreement (CBA) to the Respondent requesting the Respondent to provide its counter-proposal before CBA negotiations (app kw 3).
9. After receiving no response from the Respondent, the Claimant through the letter of 18th October 2021(app kw 4) booked the date of 25th November 2021 for CBA negotiations with the respondent.
10. Through the letter of 28th March 2022(app kw 5), the Claimant stated that they had attended the 25th November 2021 scheduled negotiation meeting and the Respondent's management had indicated they would consult amongst themselves and invite the Claimant before the end of January 2022. In the said letter, the Claimant requested for a meeting on or before 15th April 2022.
11. That no invitation was received and the Claimant vide its letter of 25th April 2022(app kw 6) requested for negotiations at the school on 24th May 2022.
12. That through a letter of 10th October 2022(app kw 7), the Claimant confirmed having attended the meeting of 24th May 2022, the Respondent had indicated that they had not constituted a team of negotiators and the Claimant proposed further negotiations of 31st October 2022.
13. That the scheduled meeting of 31st October 2022 did not proceed and the Claimant's Branch Secretary forwarded the issue to the Claimant's Secretary-General vide a letter of 15th November 2022(app kw 8) for transmission to arbitration as per the law.
14. The Claimant's Secretary General vide the letter of 29th November 2022(app kw 9) reported the matter as a dispute to the Cabinet secretary pursuant to Section 62(1) of *Labour Relations Act*, 2007.
15. A conciliator (Charles Nyerere) was appointed by the Chief Industrial Officer vide the letter of 3rd April 2023(app kw 10), who requested that the parties to share their memorandum of dispute with the conciliator. The Claimant vide its letter of 8th May 2023(app kw 11) forwarded its memorandum of dispute.
16. Vide letter of 16th May 2023(app kw 12), the Conciliator invited the parties to a Conciliation meeting scheduled for 20th June 2023.



17. By a subsequent letter of 21st June 2023(app kw 13), the conciliator invited parties to a second conciliation meeting on 11th July 2023 noting that the respondent's Principal failed to attend the first meeting.
18. The School Principal did not either attend the second meeting and the conciliator invited parties to a further meeting scheduled for 26th July 2023 vide the letter pf 14th July 2023(app kw 14).
19. At the conciliation meeting held on 26th July 203 parties agreed to meet and report to the Conciliator on or before 15th September 2023 on the progress made.
20. The parties met on 10th September 2023 and agreed on several clauses but failed to agree on others and the parties agreed to sign a certificate of Disagreement on 12th February 2024(app kw 15).
21. The Claimant states that the conciliator issued a Certificate of unresolved dispute dated 3rd April 2024(app kw 16) on two unresolved issues: -
 - a. Clause 28. -general wage increment, the union had proposed 30% salary increment for the first year and 20% salary increment for the second year. However, the management proposed zero increment.
 - a. Clause 45- effective date; the union proposed the effective date to be a 2-year period from 1st July 2023 to 30th June 2025 while the management had proposed the effective date to be from 1st July 2024 to 30th June 2026.”
22. The Claimant states that owing to the unresolved issues, it came to Court for reprieve asserting that every person has a right to join a union by dint of Article 41 (2) (c)of *the Constitution* and that the main purpose of collective bargaining is to improve the existing terms and conditions of its trade union members, which it states, it proposed salary increment, which the Respondent remained adamant and refused to offer any increment and which they state undermines the spirit of collective bargaining within the employer-employee relationship.

Respondent's Case.

23. It is the Respondent's case that it indeed entered into Recognition Agreement with the Claimant and indeed participated in the conciliation meetings with the Claimant with a view of coming up with a mutually agreeable Collective Bargaining Agreement (CBA).
24. The Respondent asserts that while a CBA is meant to improve on existing terms and conditions of service of the trade union members, the said improvement must only be gradual but the same must also consider the financial capacity of the Respondent.
25. It was the Respondent's position that it was not in a position to give the unionised workers a wage increment because of the underfunding of secondary schools by the government, and any unplanned wage increment had the effect of rendering the Respondent insolvent.
26. It is the respondent's case that, its insistence on the effective date for the CBA to be from 1st July 2024 to 30th June 2026, is informed by the fact that the income it receives from the government in the form of capitation is never granted to them in arrears but rather, the same is done within a current financial new year. It was the respondent's case that it could not commit to paying benefits to any school worker in arrears since the Respondent had no other source of income to pay those workers.



27. It was the respondent's case that it would be in a good position to pay any benefit accruing to its employees who are the claimant's members going forward and not in arrears since it would have planned for the expenditure henceforth.
28. The Respondent asserts that since the parties are commencing a journey that has been mutually agreed upon, then the same should be commenced on a clean slate devoid of any financial implication albeit in arrears.
29. It was the Respondent's case that, it was ready to have the Court order the Central Planning and Monitoring Unit to assess the capacity and ability of the Respondent to commit itself to the two issues of wage increment and effective date of the CBA and have a report filed in court.
30. It was the respondent's case that the adoption of the proposed wage increment and effective date would affect the quality of education to be delivered to students thus infringing the basic interests of the child, and for that reason, the Respondent asserts that the Claimant's claim ought to be dismissed with costs.

Written Submissions

31. The Court directed that the claim be canvassed by way of written submissions. The Claimant's written submissions dated 15th August 2024 were filed by Michael Oyata, a representative of the Claimant. The Respondent's written submissions dated 17th September 2024 were filed by State Counsel, Dan Simiyu, on an even date.

Determination

Issues for determination

32. The Claimant identified the following issues for determination in the claim: -
 - a. Whether the Respondent should give an increment to the worker's salary as per the claimant's proposal which is 30% increment for the first year and 20% second year or to adopt their salary increment proposal which is 0% first year and 0% second year.
 - b. Whether the Respondents should agree on the claimant's proposal on effective date of 1st July 2023 to 30th June 2025 or to adopt their proposal of 1st July 2024 to 30th June 2026.
33. The Respondent identified the following issues for determination in the claim: -
 - a. When the Collective Bargain shall ideally begin.
 - b. Whether the union recommended general wage increment is acceptable.
34. The Court having considered the parties' submissions, discerned the issues placed by the parties before Court for determination were: -
 - a. Whether the Respondent should give an increment to the worker's salary as per the claimant's proposal which is 30% increment for the first year and 20% second year or to adopt their salary increment proposal which is 0% first year and 0% second year.
 - b. Whether the Respondent should agree on the claimant's proposal on effective date of 1st July 2023 to 30th June 2025 or to adopt their proposal of 1st July 2024 to 30th June 2026.



Whether the Respondent should give an increment to the worker's salary as per the claimant's proposal which is 30% increment for the first year and 20% second year or to adopt their salary increment proposal which is 0% first year and 0% second year.

35. The negotiations by employers with unions representing employees of collective bargaining agreements is voluntary. The International Labour Organization Convention 98 on Right to Organise and Collective Bargaining Convention, 1949, Article 4, provides for voluntary negotiation of collective bargaining agreements as follows:-

‘Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.’ (Emphasis given) The parties in the instant case had commenced the negotiations but were unable to agree on two issues being on increment of salary and effective period of the CBA.

36. On the increment, the claimant's proposal was 30% increment for the first year and 20% second year of the CBA, while that of the Respondent was salary increment proposal of 0% first year and 0% second year.

37. The Court reiterates that the negotiation of a CBA is voluntary and founded on social dialogue between the employer and employee trade union. The Court of Appeal expounded on the voluntary nature of the CBA in *Teachers Service Commission (TSC) vs. Kenya Union of Teachers (KNUT) & 3 Others* [2015] eKLR, wherein Odek, J.A stated:-

“It is my considered view that collective bargaining is neither compulsory nor automatic. It is the source of voluntarily 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 Constitution* in Article 41 (5) recognizes the right to engage in collective bargaining. The right is founded on the concept of social dialogue, freedom of contract and autonomy of parties in collective bargaining. Article 41 (5) recognizes that collective bargaining is the preferred method of determining terms and conditions of employment. The Article emphasizes the ability of the employer and trade unions to operate as partners rather than adversaries.”

38. In the instant claim, the parties were unable to resolve the dispute before the conciliator paving way to jurisdiction of the court.

39. Section 26(2) of the *Employment Act* provides that:-

“Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.” The parties may therefore negotiate and agree on wages above the minimum wage as set out in the Wages Order and the Court upholds the more favourable terms pursuant to section 26 of the *Employment Act*.



40. What is the role of the Court where the parties are unable to agree on the terms of the CBA? On the role of the Court in the event of an economic dispute like the instant one the Court of Appeal Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] eKLR upheld the decision by Rika, J in Kenya Chemical and Allied Workers Union vs. Leather Life EPZ Limited [2014] eKLR that:-

“The Wage Orders fix the wage floors. Collective Bargaining between Employers and the Workers” Representatives on wage increment aims at fixing the cost of labour above the market benchmark, this benchmark being the minimum wage fixed under the Wage Orders. Traditionally, the Government has set the wage floor annually... In seeking to move beyond the benchmark regulated by the Government, Employers and Employees examine the compensable factors within the workplace, and are guided by economic indicators. The Court, whenever called upon to intervene in economic disputes is similarly guided by the relevant compensable factors, and economic indicators.” The said Court of Appeal while upholding the decision by Rika J further observed: “47. 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. In this case the applicable guidelines were the revised guidelines which came into force on 1st November, 2005. We note that those guidelines were brought to the attention of the ELRC then known as the industrial Court by the Ministry of finance vide a letter dated 23rd November, 2005.

48. 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. Rika, J. in Kenya Ferry Services Limited vs. Dock Workers Union (Ferry Branch) [2015] eKLR was of the opinion that the ability by the employer to pay is a principal criteria in wage determination.”

41. The Court of Appeal (Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] e KLR then stated the manner of exercise of the court’s jurisdiction in economic dispute thus:-

“50. 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.” (emphasis given)

42. The Court of Appeal(Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] e KLR , supra) appreciated the place of expert of opinion in determination of inflation and rate of wage increment by reliance on authority in The learned authors of Phipson on Evidence 17th Edition at paragraph 33-10 where it was observed:-

“Expert witnesses have the advantage of a particular skill or training. This not only enable them to form opinions and to draw inferences from observed facts, but also to identify facts which may be obscure or invisible to lay person.”

43. The Court is not an expert on matters of economy and specifically on labour costs. The respondent’s position is against any wage increment stating it would collapse the institution. In order to resolve this issue, the Court cannot replace its preference with that of the parties’ freedom to agree on terms of employment. The Court for lack of expertise to assess the ability of the Respondent to pay the



proposed increment and at the same time appreciating that the purpose of CBA is to improve existing terms and conditions of service of the trade union members returns that this is a proper issue to be referred to the Central Planning and Monitoring Unit of the Ministry of Labour and Social Protection to prepare an expert report to assist the Court in determination of the issue, namely:- Whether the Respondent should give an increment to the worker's salary as per the claimant's proposal which is 30% increment for the first year and 20% second year or to adopt their salary increment proposal which is 0% first year and 0% second year taking into account all relevant parameters. It is so Ordered.

On Whether the Respondents should agree on the claimant's proposal on effective date of 1st July 2023 to 30th June 2025 or to adopt their proposal of 1st July 2024 to 30th June 2026.

44. The Claimant submits that they had proposed the effective date to be 1st July 2023 and 30th June 2025 because the Claimant first sent a proposal to the Respondent on 18th August 2021 and it was the Respondent who caused the delay in the negotiation process, hence the Respondent's proposal was unwarranted.
45. On the other hand, the Respondent submits that under section 59 of the *Labour Relations Act*, a collective agreement becomes enforceable and shall be implemented upon registration by the industrial Court and be effective from the date agreed upon by the parties. The Respondent submits that it was not in dispute that the Claimant sent the CBA on the 18th of August 2021 for the commencement of negotiations which were concluded in 2024. The Respondent submits that the period between 18th August 2021 and 2024 the CBA in question was a matter of law an inchoate contract. That inchoate contract as defined under the Blacks Law Dictionary to wit:- "an inchoate contract is a contract which is still under negotiation. Generally, the parties to such a contract are yet to arrive at consensus ad idem on all aspect of their agreement. That as such , the rights that flow from such a contract are incapable of enforcement." The definition was applied on *Mtana v Sopa Lodges (2024)e KLR* to effect that an enchoate claim is a right that was in progress and was neither ripe or vested.
46. The Respondent submits that the CBA was an inchoate claim between the period 18th August 2021 to 2024 and therefore the proposal by the Claimant for the effective date of the CBA as 1st July 2023 to June 2025 was against the interest of justice, punitive and very prejudicial to the respondent. The Respondent relied on the decision in *Mukiria Farmers Cooperative society Ltd v Jacob Rukaria & 5 others (2017)e KLR* where the Court stated the interpretation of the effective date would depend on the way the clause is phrased. The Respondent contended that the CBA being a contract, the Court is expected to enforce the intention of the parties as the contrary would be a violation of that legal principle. It was the intention of the parties that the CBA would be effective upon completion of all negotiations and urged the Court to adopt its proposal for CBA period dates to be 1st July 2024 to 30th June 2026.
47. Section 59 of the *Labour Relations Act* provides:- "59. Effect of collective agreements
- (1) A collective agreement binds for the period of the agreement—
 - (a) the parties to the agreement;
 - (b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or
 - (c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.



- (2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employers' association.
 - (3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.
 - (4) A collective agreement shall be in writing and shall be signed by—
 - (a) the chief executive officer of any employer, the chief executive or national secretary of an employers' organisation that is a party to the agreement or a representative designated by that person; and
 - (b) the general secretary of any trade union that is a party to the agreement or a representative designated by the general secretary.
 - (5) 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.”
48. The CBA is a contract binding on the parties from the effective date. The CBA has economic consequences to both parties but the employer bears the negative burden of the labour costs. It was not in dispute the parties concluded negotiations in 2024 and agreed on all other terms save for the two issues before court. The Court agreed with the inchoate legal principle that the rights and terms under the CBA had not vested before the conclusion of the negotiations. The parties have not agreed on the effective date. The Court finds the parties agreed the CBA is for two years. There was no dispute that the negotiations were concluded in 2024. Unless the parties agree the Court cannot backdate the CBA. The Court finds that the proposal by the employer of 1st July 2024 to 30th June 2026 is correct and also reasonable taking into account the financial burden consequences of the CBA on the Respondent and adopts the same.

Conclusion and Disposition

49. The Court on the issue of the effective period of the Collective Bargaining Agreement between the parties holds the period to be 1st July 2024 to 30th June 2026.
50. The Court on the dispute on salary increment being:- Whether the Respondent should give an increment to the worker's salary as per the claimant's proposal which is 30% increment for the first year and 20% second year or to adopt their salary increment proposal which is 0% first year and 0% second year. The Court returns that is not an expert on matters of economy and specifically on the capacity of the Respondent to absorb the proposed labour costs increment.
51. The Respondent's position is against any wage increment stating it would collapse the institution. The Court cannot replace its preference with that of the parties' freedom to agree on terms and conditions of employment. The Court lacking expertise to assess the ability of the Respondent to pay the proposed increment and at same time appreciating that the purpose of CBA is to improve existing terms and conditions of service of the trade union members, finds that this is a proper issue to be referred and is hereby referred to the Central Planning and Monitoring Unit of the Ministry of Labour and Social Protection to prepare an expert report taking into account all the relevant parameters to assist the Court in determination of the issue. The report to be filed in Court in 30 days. The parties to be supplied with the report. The parties to appear before the Court on the 27th November 2024 to canvass on the report and for determination of the issue by the court.



52. It is so Ordered.

DATED, SIGNED & DELIVERED VIRTUALLY AT NAIROBI THIS 24TH OCTOBER 2024.

JEMIMAH KELI

JUDGE.

In the presence of: -

Court Assistant: Caleb

For Claimant: Oyatta

For Respondent: - Absent

