



**Ogwedhi Properties t/a Vittoria Suites Kisumu v Kenya Hotels and Allied Workers Union  
(Cause E077 of 2023) [2024] KEELRC 13342 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13342 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E077 OF 2023  
JK GAKERI, J  
DECEMBER 4, 2024**

**BETWEEN  
OGWEDHI PROPERTIES T/A VITTORIA SUITES KISUMU ..... CLAIMANT  
AND  
KENYA HOTELS AND ALLIED WORKERS UNION ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced the instant suit by a memorandum of claim filed on 4<sup>th</sup> October 2023 alleging that the respondent union had abandoned negotiations and issued a strike notice dated 28<sup>th</sup> September 2023 prematurely.
2. It is the Claimant's case that the parties have a registered Collective Bargaining Agreement (CBA) and had been in communication since 4<sup>th</sup> May 2022 on amendments to the CBA and the Claimant responded to the unions letter on proposed amendments to the CBA vide letter dated 13<sup>th</sup> May 2022, noting that it was experiencing economic low times in business and was not in a position to negotiate the CBA.
3. The Claimant avers that by letter dated 27<sup>th</sup> May 2022, the respondent sought a meeting on 3<sup>rd</sup> June 2022 and the claimant vide letter dated 9<sup>th</sup> June 2022 with a counter proposal and all issues were settled excluding service charge, general wages, house allowance and leave travelling allowance and meetings were held with the help of the Ministry of Labour and Federation of Kenya employers (FKE) in an endeavour to settle the issues with the last one on 17<sup>th</sup> August 2023 where parties agreed that the claimant would have a meeting with unionisable employees and a report be compiled before the next meeting but the meeting scheduled for 12<sup>th</sup> September 2023 did not take place as the shop steward asked for a general meeting on other issues. That the Claimant's attempt to have the shop steward call an inhouse meeting on 22<sup>nd</sup> September 2023 fell through as the shop steward stated that he was arrested on that day but did not provide details.



4. That subsequent attempts by the Claimant's General Manager to have an inhouse meeting were unsuccessful as the shop-steward disclosed that the union officials had advised him not to participate in the meeting, only to be issued with a seven (7) days strike notice on 28<sup>th</sup> September 2023.
5. The Claimant avers that from the conduct of the shop steward and the respondent it would appear that they were intent on frustrating negotiations and the intended strike is premature, unlawful and unprotected.
6. It is the Claimant's case that the Respondent has not participated in the negotiations in good faith.

The Claimant pays for:

- i. The seven (7) days' notice issued by the respondent on 28<sup>th</sup> September 2023 be declared premature and unlawful for want of compliance with the law.
- ii. Respondent be ordered to fully participate in structured negotiation for the amendment of the CBA proposed.
- iii. Any other order that the court deems fit and appropriate in the circumstances.
- iv. Costs of the suit.

Respondent's case

7. The Respondent admits that the parties had been negotiating since 2022 and it received the Claimant's counter-proposal but denies having been party to the in-house meeting alleged by the Claimant stating that it is indeed the Claimant that is frustrating negotiations.
8. The Respondent avers that the Claimant did not respond to the request for a meeting on 3<sup>rd</sup> June 2022 but admits that joint meetings were held on 8<sup>th</sup> September 2022 and 18<sup>th</sup> October 2022 but parties could not agree on the outstanding items, and no meeting took place until 30<sup>th</sup> May 2023 and outstanding items remained unresolved.
9. That the meeting of 17<sup>th</sup> August 2023 agreed that in-house meeting be held between management and staff to discuss what was feasible.
10. The Respondent prays for dismissal of the Claimant's suit with costs, parties be directed to conclude the CBA amendment negotiations within 30 days failing which the respondent be at liberty to issue a strike notice or such other or further relief as the court may deem fit to award.

#### **Claimant's evidence**

11. CW1, Mr. John Otieno confirmed on cross-examination that the CBA between the parties lapsed in 2022 and the two had engaged on its renewal but there were unagreed issues meetings notwithstanding.
12. The witness confirmed that he summoned a staff meeting but the shop-steward was unavailable owing to his arrest as alleged and later told that members would not participate in the meeting but did not write to the Secretary General of the union.
13. The witness testified that the strike notice was illegal because negotiations were still taking place and the issues at hand were capable of being resolved and the Claimant was still willing to engage, though no meeting was held after 12<sup>th</sup> September 2023 and the previous CBA was still operational. That the Claimant ought to have reported the dispute to the Ministry of Labour and Social Protection and the Claimant had no objection to the court giving time frame for negotiations.



14. On Re-examination CW1 testified that the only outstanding issues were service charge, salary increment, effective date of commencement of the CBA and all financially related issues.
15. That by the date of issue of the strike notice, the dispute had not been reported to the Minister and had not been to date.
16. That the shop steward informed CWI that he had been arrested and did not attend the second meeting as directed by the union.
17. The witness blamed the union for walking out of the negotiations and was thus to blame for the delay.

### **Respondent's evidence**

18. RW1 Mr. Ngame confirmed having attended negotiations with the Claimant and minutes were taken for instance the meeting held on 6<sup>th</sup> March 2024 and the outstanding items were travelling allowance, general wage increment, house allowance, service charge and effective date of the CBA as the Claimant alleges that the business was not doing well but employees thought otherwise and no balance sheet had been provided though none was requested for.
19. The witness admitted that it had been agreed that the Claimant would meet unionisable staff and a meeting took place but they could not agree and meeting with shop stewards did not materialise and none of the shop stewards swore an affidavit on the issue.
20. That the law does not require the union to report the dispute to the Minister but the same was reported and the Claimant sought 6 months and a conciliator had already been appointed and a certificate of unresolved dispute was issued but the witness had no copy of the certificate and none was filed.
21. On re-examination, RW1 testified that the Claimant had not availed evidence of its performance. That conciliation process was ongoing when the suit was filed.

#### Respondent's Submissions

22. When the suit came up to confirm the filing of submissions on 13<sup>th</sup> November 2024 none of the parties had filed submissions but the Claimant filed on the same day at 11.31 a.m.
23. Mr. Ombati for the Respondent sought 14 days but the request was not granted and had not filed by 21<sup>st</sup> November 2024 when the court accessed the CTS for the last time purposes of confirming that submissions had been filed.

### **Claimant's submissions**

24. As to whether the Claimant is entitled to the reliefs sought, counsel relied on the decision in Mukiria Farmers Co-operative Society Ltd. V. Jacob Rukaria & 5 others (2017) eKLR and the provisions of the [Labour Relations Act](#) to submit that a collective agreement is only binding on the parties for the period of the agreement.
25. Counsel submitted that the conduct of the shop stewards was intended to frustrate the negotiations and the strike notice was premature, unlawful and unprotected as the respondent initiated conciliation by reporting the dispute to the Cabinet Secretary.
26. Reliance was made on the sentiments of the court in Janet Mwacha Mwaboli V. Modern Shop Factory Ltd (2019) eKLR on the binding nature of mediation to urge that the Respondent did not comply with the provisions of Section 69 of the [Labour Relations Act](#) and should bear the costs of this suit.



## Analysis and determination

27. The fact that the parties have a recognition agreement and concluded a Collective Bargaining Agreement (CBA) in 2019 is not disputed
28. Similarly, parties have admitted that negotiations had been taking place until 12<sup>th</sup> September 2023 as no meeting was held thereafter.
29. It is equally admitted that the Respondent issued a seven (7) days' strike notice dated 28<sup>th</sup> September, 2023 citing the Claimant management's failure to conclusively negotiate the 2022/2023 CBA despite the unions efforts and the Ministry invited, the parties for a conciliation meeting on 5<sup>th</sup> October, 2023 and the instant suit was filed on 4<sup>th</sup> October 2022.
30. Copies of minutes provided by the Claimant reveal that significant progress was made in the course of the negotiations from May 2022 and the disputed issues were only four (4) namely; effective date, general wage increase, house allowance and service charge.
31. Minutes of the Joint CBA negotiation meeting held on 13<sup>th</sup> October 2022 at the Federation of Kenya Regional Conference Room in Kisumu, show that the parties could not agree on four (4) and one (1) was a new proposal not in the previous CBA and the respondent appeared uncomfortable with it owing to business uncertainty as it was a new charge, and in two (2) others, the differences between the parties were nominal namely; Kshs. 300 for leave travelling allowance and Kshs. 1000 for house allowance.
32. In a nutshell the only seriously contested issues were three (3) namely service charge, general wage increase and effective date.
33. In the court's view, based on the minutes provided, the divide between the parties was bridgeable if parties had negotiable in good faith and under the guidance of an experienced conciliator.
34. Regrettably, both parties appear to have stuck to their positions to the detriment of unionisable employees and took precipitate action which jeopardized negotiations in the of the strike notice and the conciliation process and instituting the instant suit. Both actions imperilled the social capital the parties had previously.
35. As held by Radido J. in Kenya Engineering Workers Union V. Abyssinia Spon & steel (2016) eKLR,  

“... Industrial relations require utmost good faith. Capital requires labour. Without labour there would be no profit for capital.”
36. What appears to have displeased the claimant is the respondent's strike notice dated 28<sup>th</sup> September 2023 as according to the claimant the room for negotiations had not been closed and RW1 expressed the claimant's amenability to further negotiations to resolve the impasse.
37. Other than the declaration of the strike notice premature and unlawful, the substantive relief sought by the parties is similar in that both seek a mechanism or structure to conclude the CBA negotiations.
38. While the claimant seeks a structured negotiation process for amendment of the CBA, the Respondent prays for an order directing the parties to conclude a CBA within 30 days failing which the Respondent be at liberty to issue another strike notice.
39. Courts typically issue conditional orders grounded on need to ensure justice is done coupled with equality of arms.



40. It is essential to reiterate that unions and employers must recognize and acknowledge that a collective bargaining agreements (CBA) is first and foremost an agreement between the parties thereto analogous to any other agreement but only becomes enforceable as a contract upon registration as ordained by the provisions of Section 59 (5) of Labour Relation Act.
41. It is however, a highly regulated contract from negotiation, approval, registration and enforceability and in certain circumstances a proposed CBA may not be registered by the court.
42. In *Teachers Service Commission V. Kenya National Union of Teachers & 3 others* (2015) eKLR, the Court of Appeal put it plainly as follows;

“The essence of a collective agreement is that the terms and conditions thereon contained are voluntarily agreed upon between the employer and the union.

If the Labour Court fixes basic salary in collective agreement as the Labour Court did in this case, the collective agreement ceases to be a collective agreement as envisaged by the law.”

In the words of Odek JA:

“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 built to provide more advantageous terms and conditions of service to their members...

The right is grounded on the concept of social dialogue, freedom of contract and autonomy of parties in 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 collective bargaining.”

The court is guided accordingly.

43. This is the reason why a court of law can only accord the parties loose timelines to negotiate the CBA. It is their agreement and the court has no role to play in the negotiations. It is for the parties to set the pace but must negotiate in utmost good faith.
44. As correctly observed by Nzioki Wa Makau J in *Amalgamated Union of Kenya Metal Workers V Kenya Vehicle Manufacturers Ltd* (2015) eKLR;
- “The court cannot descend to the arena of negotiations of terms of employment at the work place...”
45. In this case, it is clear that the conciliator was not accorded an opportunity to weigh in on the dispute between the parties and although RW1 confirmed on cross-examination that the conciliator issued a certificate of unresolved dispute, he admitted that he had no copy of the document.
46. It is trite law that conciliation is a constitutionally ordained dispute resolution mechanism and once parties resort to it and in particular trade unions and employers, they are bound by it and its process.
47. The binding nature and place of conciliation as a constitutionally mandated dispute resolution mechanism was exquisitely captured in *Mukiria Farmers Co-operative Society Ltd V. Jacob Rukaria & 5 others* (supra).



48. In this case, the claimant bolted before the 1<sup>st</sup> meeting was held by the conciliator on 5<sup>th</sup> October 2024. The Respondent did not testify that it attended the meeting either.
49. In sum, neither of the parties accorded conciliation the opportunity to reconcile their disagreements, resorting to other processes which they may have perceived as quick fix, which is typically not the case, the effect which is to slacken the momentum the parties had accumulated in previous dealings.
50. Under Section 76 of the *Labour Relations Act*, a person may participate in a strike or lock-out if-
- a. the trade dispute that forms the subject matter of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;
  - b. the trade dispute is unresolved after conciliation-
    - i. under this Act, or
    - ii. as specified in a registered collective agreement that provides for the private conciliation of disputes; and
  - c. Seven days written notice of the strike or lock-out has been given to the other parties and to the Cabinet Secretary by the authorized representative of
    - i. the trade union, in the cases for strike;
    - ii. the employers of employers' organization, in the case of a lock-out.
51. To the extent that the respondent failed to evidentially demonstrate that the provisions of section 76 of the *Labour Relations Act* had been complied with prior to the issuance of the strike notice, the strike notice dated 28<sup>th</sup> September 2022 was premature and unlawful.
- The court so finds and holds.
52. Similarly, the fact that the Claimant filed the instant suit on the eve of a meeting convened by the conciliator to conciliate the disagreement did not augur well with the enhancement of social dialogue in industrial relations and ought to have accorded conciliation a chance.
53. In the upshot since the Claimant's witness indicated its willingness to engage to resolve the pending clauses of the draft CBA and the respondent has not expressed any opposition, it is only fair that the parties be allowed to re-engage in further conciliation in good faith for purposes of concluding the disagreed clauses.
54. In the end the Claimant's suit against the Respondent succeeds to the extent that the strike notice dated September 28, 2023 is declared premature and unlawful, and parties are encouraged to re-engage in conciliation under the aegis of the Ministry of Labour and Social Protection with a view to resolving the contentious clauses of the proposed CBA.
55. As both parties contributed to this state of affairs, there shall be no orders as to costs.
56. 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 4TH DAY OF DECEMBER, 2024.**

**DR. JACOB GAKERI**

**JUDGE**

