Kenya Quarry and Workers Union v Mineral Enterprises Limited (Cause E891 of 2022) [2023] KEELRC 681 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 681 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E891 OF 2022

BOM MANANI, J

MARCH 16, 2023

BETWEEN

KENYA QUARRY AND WORKERS UNION .... CLAIMANT

AND

MINERAL ENTERPRISES LIMITED .... RESPONDENT

RULING

Introduction

1. The application before me seeks for orders compelling the Respondent to sign a draft Collective Bargaining Agreement (CBA) between the parties. It is the Applicant's case that despite the parties agreeing on the draft CBA, the Respondent has failed to sign the agreement resulting in an impasse. Consequently, the Applicant has moved the court for orders to compel the Respondent to sign the document and pay employees' arrears in benefits arising from the delayed process.

2. The Respondent has disputed the action. It is the Respondent's case that the draft CBA has yet to be fully agreed on. There are a number of clauses in respect of which negotiations are yet to be finalized. Consequently, it is not possible to execute the instrument in its current form. The Respondent further argues that to issue an order compelling it to sign the draft CBA as prayed in the application would amount to unilaterally imposing the terms in the document on the employer with the consequence that the CBA will not be a voluntarily negotiated instrument.

Background to the Dispute

3. The parties in the case stand in the position of a Trade Union and employer respectively. The Applicant, the Trade Union in the cause has a recognition agreement with the Respondent. The parties agree that pursuant to this agreement, they have negotiated and concluded several CBAs.

4. It appears that the last of these CBAs expired in December 2019. Before the parties could negotiate the CBA for 2020, the Covid 19 pandemic struck resulting in the suspension of most activities including negotiations by social partners on terms and conditions of service.

5. As the effects of the pandemic begun wearing out in 2021, the parties appear to have revisited the CBA negotiations later that year. A draft CBA was tabled for review at a meeting held on 9th November 2021 when a number of the proposals presented by the Applicant were accepted by the Respondent. However, a few issues remained unresolved.

6. The parties agree that they subsequently convened a number of meetings where discussions on the outstanding issues were held. However, not all the matters were finalized.

7. Around 21st June 2022, the Applicant forwarded a draft CBA to the Respondent for signature. However, the Respondent was unwilling to sign the instrument.

8. According to the Applicant, the matter was referred to the Ministry for arbitration following which a conciliator was appointed. Although the conciliator made some recommendation on resolving the CBA negotiation impasse, the Applicant accuses the Respondent of refusing to abide by these recommendations prompting this court action. On the other had the Respondent states that the parties did not resolve the outstanding issues in the draft CBA to enable its execution.

Analysis

9. I will start by commenting on the apparent challenge raised on the competence of the application by counsel for the Respondent. Counsel argues that the application is founded on nonexistent legislation, that is to say, the Industrial Court Act 2011 and the Industrial Court (Procedure) Rules. It is suggested that the aforesaid statute and rules were discarded and replaced by the *Employment and Labour Relations Court Act*, 2011 and the Employment and Labour Relations Court (Procedure) Rules, 2016.

10. This observation is inaccurate. There was no repeal of the Industrial Court Act in the manner that is suggested. Parliament only amended the statute to change its title and introduce several other adjustments to it. This was through the Statute Law (Miscellaneous Amendments) Act, 20I4.

11. Among the changes introduced to the Act was to rename the court from the Industrial Court to the Employment and Labour Relations Court. With this came the change in the title to the court's procedure rules. Otherwise, the law continued in force and remains substantially the same.

12. Admittedly, the application is not elegantly drafted. The Notice of Motion itself does not disclose the date it was signed. One is only left to guess that the date on the Certificate of Urgency and affidavit in support of the application is perhaps the date of the Notice of Motion. Further, it is only assumed that by referring to the *Employment and Labour Relations Court Act*, 2011 and the Employment and Labour Relations Court (Procedure) Rules, 2016 using their discarded names, the Applicant intended to refer to these pieces of legislation in their current form.

13. I take cognizance of section 20 of the *Employment and Labour Relations Court Act*, 2011 which requires that the court disregards undue technicalities in its processes. Having regard to this provision, I am minded to save the application and dispose of it on the merits.

14. As indicated above, the intent of the application is that the court compels the Respondent to sign the draft CBA between the parties. Consequential to this request, the Applicant prays that the court orders the Respondent to pay arrears of benefits under the draft CBA to workers.

15. The process of collective bargaining is anchored on *the Constitution* of Kenya 2010 as read with the *Labour Relations Act*, 2007. These pieces of legislation are complemented by the International Labour Organization's (ILO) Convention number 98 (the Right to Organise and Collective Bargaining Convention). Kenya ratified the Convention on 13th June 1964.

16. Article 4 of the Convention requires member states of the ILO to put in place measures that will promote and protect the right of employers' and workers' organizations to voluntarily negotiate terms and conditions of employment through collective agreements. On the other hand, article 41 of *the Constitution* protects the rights of workers, workers' unions, employers' unions and individual employers to fair labour practices and to freely and voluntarily engage in collective bargaining processes. These rights are also echoed in the *Labour Relations Act*, 2007.

17. The court is alive to the voluntary nature of the collective bargaining process. Whilst the law imposes a duty on every employer that has a recognition agreement with a Trade Union to negotiate and conclude Collective Bargaining Agreements as appropriate, the Trade Union cannot unconventionally coerce the employer to accept any term of service in the process. The process must remain truly voluntary. As long as the employer is acting in good faith, he should be allowed some latitude and reasonable time to conclude the process with the Trade Union.

18. Of course the social partners have other legitimate mechanisms at their disposal to push a reluctant party to conclude the process. These include using the available dispute resolution channels and mounting lawful strikes and lockouts.

19. The court's role in the process is extremely limited. It is not for the court to impose terms of the agreement on the parties. Where necessary, the court's role is essentially supervisory to ensure that the process is amicably concluded and the resultant agreement implemented.

20. As is correctly pointed out by George Ogembo in his book, ''Employment Law Guide for Employers", Revised Edition, if the court were to consider its role in the process as more than supervisory, collective bargaining will cease to be a voluntary process. In the event that the process was to end up this way, the end product will not be a CBA. It will be a court imposed instrument.

21. Having regard to the foregoing, the court will usually confine its role in the process to enforcing the duty to bargain where the employer has demonstrated reluctance to negotiate in good faith or negotiate at all (seeKenya Union of Printing, Publishing, Paper Manufacturers & Allied Workers v Highlands Paper Mills Ltd [2013] eKLR). Often, this will be through guiding the process through some form of supervised conciliation.

22. Where the points of disagreement are matters with economic implications, the court may suggest the input of expert evidence (see Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] eKLR Civil Appeal No. 207 of 2017). This may include analyses by personnel from the Central Planning and Monitoring Unit at the Ministry of Labour. This unit is expected to conduct a survey on the economic implications of implementing the disputed items and come up with implementable recommendations. Should the employer remain reluctant to accede to these recommendations, then the court may, invoking its minimalist interventionist mandate, issue an order requiring compliance with the expert recommendations as there is a legal duty on the employer to ensure conclusion of the process (see Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union) (supra).

23. I have considered the documents filed by the parties in support and opposition to the application. From the minutes of the meeting held between the parties on 9th November 2021, it is clear to me that

although there was agreement on most items in the proposed CBA, issues relating to inter alia: housing allowance; compensation in the event of death of an employee; minimum wage; and casual employee rates per day were not resolved.

24. The parties indicate that they held several follow up meetings after the meeting of 9th November 2021 in a bid to iron out the thorny issues. However, there is no evidence that all the outstanding issues in the draft CBA were resolved. The fact that several issues remained unresolved is self evident from the letter from the Ministry of Labour and Social Protection, Department of Labour dated 12th October 2022.

25. It does appear that notwithstanding that there were several outstanding areas for resolution, the Applicant, in June 2021, forwarded a draft CBA to the Respondent to sign. As mentioned earlier, the Respondent declined to execute the instrument.

26. Apparently, it is this development that triggered the process of conciliation to try and resolve the dispute between the parties. At the Applicant's instance, the Ministry of Labour and Social Protection appointed a conciliator through its letter dated 20th July 2022 to mediate the dispute.

27. The conciliator rendered his decision on the matter on 12th October 2022 by which he recommended that the Respondent signs the draft CBA. It would appear that the Respondent was aggrieved by this recommendation.

28. In the Respondent's opinion, the conciliator failed to discharge his mandate as prescribed under section 67(2) of the *Labour Relations Act*. It is argued by the Respondent that the conciliator did not attempt to mediate between the parties. All that he did was to ask them to go and have their own meetings and report back to him with a settlement. At the tail end of the process, the conciliator is said to have come up with his recommendation on 12th October 2022 without deliberating on the matter. The Respondent suggests that it is this conduct that prompted it to take the decision not to sign the draft CBA.

29. I have looked at section 67(2) and (3) of the *Labour Relations Act*. It provides as follows in relation to the powers of a conciliator:-

    a. For the purposes of resolving any trade dispute, the conciliator or conciliation committee may:-

        i. mediate between the parties;

        ii. conduct a fact-finding exercise; and

        iii. make recommendations or proposals to the parties for settling the dispute.

    b. For the purposes of resolving any trade dispute, the conciliator or conciliation committee may:-

        i. summon any person to attend a conciliation;

        ii. summon any person who is in possession or control of any information, book, document or object relevant to resolving the trade dispute to appear at the conciliation; or

        iii. question any person present at a conciliation.

30. A reading of the above provisions leaves no doubt in my mind that the discretion to the conciliator to determine how to adjudicate a dispute presented to him is wide. Although mediation requires parties

to try and reach their own agreement which is not dictated by the mediator, the process requires the mediator to assist the parties find a solution to their differences through sessions guided by the mediator. To the extent that the conciliator left the parties to their own devises, there is a sense in which it appears that he failed to offer them critical assistance and guidance in their efforts to resolve the outstanding issues in the draft CBA.

31. The Respondent having openly expressed the position that it is still committed to finding an amicable solution to the dispute, the court considers that this is a matter that can still benefit from the alternative dispute resolution procedures available in law. This is particularly important in order to maintain the sanctity of the voluntary spirit that undergirds the collective bargaining process.

32. Whilst it appears to me that only the Cabinet Secretary, Ministry of Labour and Social Protection is mandated to appoint a conciliator under the *Labour Relations Act*, this court has power, under section 15 of the *Employment and Labour Relations Court Act*, to refer to conciliation a matter that has been referred to it under Part IX of the *Labour Relations Act*. The aforesaid provision of the *Employment and Labour Relations Court Act* provides, in part, as follows:-

> ''Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of *the Constitution*.''

Determination

33. In view of the court's reluctance to pursue an overly interventionist approach in adjudicating on the dispute, I decline to issue the orders sought in the application. To issue the orders at this stage will upstage the role of the parties in the process given that there are clauses in the draft CBA that have yet to be agreed on between the parties.

34. In exercise of the power granted to the court under section 15 of the *Employment and Labour Relations Court Act* and with a view to promoting the voluntary nature of the process of collective bargaining, I am minded to refer the dispute between the parties to conciliation.

35. Consequently, I order that a conciliator be appointed by the Ministry of Labour to assist the parties to resolve the outstanding issues in the draft CBA through sessions to be attended and guided by the conciliator.

36. I order that the appointed conciliator works in liaison with the Central Planning and Monitoring Unit at the Ministry of Labour and Social Protection to iron out the disputed clauses in the draft CBA.

37. I order that this process be completed within a period of ninety (90) days from the date of this order.

38. Meanwhile, I order that these proceedings be stayed for the above duration of time. The Respondent is reminded of its obligation to maintain good faith in the process in order to bring the dispute to a close.

39. The parties are at liberty to apply.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF MARCH, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.... for the Applicant

..................for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI