



**Bomi Engineering and Construction Company v Kenya Concrete,
Structural, Ceramic Tiles, Wood Ply and Interior Design Workers Union
(CBA E204 of 2022) [2023] KEELRC 898 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 898 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CBA E204 OF 2022
MA ONYANGO, J
APRIL 18, 2023**

BETWEEN

BOMI ENGINEERING AND CONSTRUCTION COMPANY EMPLOYER

AND

**KENYA CONCRETE, STRUCTURAL, CERAMIC TILES, WOOD PLY AND
INTERIOR DESIGN WORKERS UNION UNION**

RULING

1. Bomu Engineering and Construction Company, the Employer and applicant herein, negotiated a collective bargaining agreement (CBA) with the Kenya Concrete, Structural, Ceramic Tiles, Wood Ply and Interior Design Workers Union which the parties signed and dated 17th August 2022.
2. The CBA was forwarded to the court by a letter from the Principal Secretary, Ministry of Labour dated 22nd August 2022. The letter, which is standard for all CBAs received by the Court from the Ministry of Labour, states that the Cabinet Secretary had received the CBA for registration under Part VII Section 60, sub-section 6(a) and 6(b) of the *Labour Relations Act*, 2007; Rule 36(1-3) of the Employment and Labour Relations Court Procedure Rules, 2016 of the Laws of Kenya, being the 1st Agreement between the parties signed on 17th August, 2022 by the parties.
3. The letter further states that the Ministry had analyzed the agreements with regard to their conformity with the Wages Guidelines issued on 29th August, 1973 and subsequent amendments especially the latest one of 23rd November, 2005. That on the basis of the analysis the Ministry had found no reason to object to the registration of the Agreement. The agreement was therefore forwarded to the court for further action.
4. Upon receipt of the letter and the forwarded agreement, the court, as is standard procedure, fixed the same for registration on 28th September, 2022.



5. On the said date Mr. Odongo appeared on behalf of the union while Mr. Korir appeared for the Ministry of Labour. There was however no appearance for the Employer.
6. Mr. Odongo for the Union informed the Court that the union had received a letter from the employer addressed to the Deputy Registrar and copied to the union in which the employer stated that it had no objection to the registration of the CBA. That the letter was signed by the Project Manager, Mr. Yoo Do Hyun.
7. Upon confirmation by the representatives of the union and ministry that they had no objection to the registration of the CBA, the court recorded the following orders:

CBA dated 17/8/2022 is admitted for registration subject to sight of the letter of no objection from the employer.
8. A certificate of registration of the CBA was subsequently issued on 26th September, 2022 certifying that the CBA had been entered in the Register of Collective Agreements maintained by the court under entry number RCA. No. 249 of 2022.
9. By an application by way of Notice of Motion dated 24th October, 2022 filed under certificate of urgency through Dead & Company Advocates the Applicant moved the court seeking the following orders: -
 - a. That this Honourable Court be pleased to certify this Application as extremely urgent and to be heard on a priority basis service thereof being dispensed with in the first instance.
 - b. That this Honourable Court be pleased to set aside, vacate, vary and/or review the Collective Bargaining Agreement dated 17th August 2022 that was entered into between Kenya Concrete, Structural, Ceramic Tiles, Wood Ply And Interior Designs Workers' Union (hereinafter referred to as "the Union") and the Respondent/Applicant herein and in the Register of Collective Agreements entered by the Honourable Court under entry RCA No. 249 of 2022 in respect of the Parties herein.
 - c. That this Honourable Court be pleased to issue an order declaring the strike arranged and about to be orchestrated by the employees of the Claimant/Applicant illegal, unprocedural and against the provisions of the Law.
 - d. That the costs of this Application be borne by the Respondent.
 - e. That this Honourable Court be pleased to grant any other order that it may deem fit and just to grant in the interest of justice.
10. The application is supported by the grounds on the face thereof and the affidavit of Jeong Kwang Su, the site Manager of the Applicant. In summary the Applicant states that it executed the CBA and signed every page. That the CBA that was subsequently presented to court has an additional 5 pages which it did not sign and which have been fraudulently added to the CBA by the union and/or the Central Planning and Monitoring Unit, which is a department in the Ministry of Labour that analyzes the CBAs for compliance with Wages Guidelines before releasing the CBAs to the Court for registration.
11. It is further the averment of the Applicant that it was coerced into executing the CBA before the last 5 pages were fraudulently added.
12. The Applicant further avers that upon perusal of the court file it discovered that on the date of registration of the CBA Mr. Odongo, counsel for the union misguided the court by stating that the



union had received a letter from the Applicant dated 19th September, 2022 signed by the Project Manager Yoo Do Hyun stating that the Applicant had no objection to the registration of the CBA. That such letter does not exist and the Applicant is not aware of any correspondence between its Project Manager and/or any other representative and the Deputy Registrar.

13. The Affiant states that the Applicant later received a letter from the union drawn by the General Secretary, Mr. Dishon Angoya addressing alleged non-compliance with the CBA on the part of the Applicant which the Applicant responded to.
14. The Affiant states that the employees of the Applicant were at the time of filing the application engaged in an illegal strike and had blocked third parties from supplying materials on the site which had impeded daily routine work for the management. That as a result the Applicant had been forced to close down the site and send employees home pending resolution of the dispute.
15. The Affiant states that the Applicant is heavily prejudiced and likely to incur colossal loss and damage.
16. By an amended notice of motion dated 1st November, 2022 the Applicant seeks the following orders: -
 - a. That this Honourable Court be pleased to certify this Application as extremely urgent and to be heard on a priority basis service thereof being dispensed with in the first instance.
 - b. That this Honourable Court be pleased to set aside, vacate, vary and/or review the Collective Bargaining Agreement dated 17th August 2022 that was entered into between Kenya Concrete, Structural, Ceramic tiles, wood ply and interior designs workers' union (hereinafter referred to as "the union") and the Respondent/Applicant herein and in the Register of Collective Agreements entered by the Honourable Court under entry RCA NO. 249 of 2022 in respect of the Parties herein.
 - c. That this Honourable Court be pleased to issue an order declaring the strike arranged and about to be orchestrated by the employees of the Respondent/Applicant Employer/Applicant illegal, unprocedural and against the provisions of the Law.
 - d. That the costs of this Application be borne by the Respondent.
 - e. That this Honourable Court be pleased to grant any other order that it may deem fit and just to grant in the interest of justice.
17. The amended affidavit of Yoo Do Hyun in support of the Amended application basically reiterates the averments in the earlier affidavit of Jeon Kwang Su.
18. The parties appeared before the court on 1st November 2022 and after hearing representations by the court made the following orders:
 1. Respondent to file a replying affidavit within 7 days. In the meantime, the implementation of the CBA is suspended. Parties are directed to meet under the chairmanship of Labour Commissioner on his/her representative who shall file a report to the court within 14 days.
 2. Mention for further directions on 15/11/2022
 3. In the meantime, the strike is suspended and all workers are to resume work under the terms prevailing before the registration of the CBA.
19. The conciliator convened meetings with the parties and filed a report dated 6th December 2022. The findings of the conciliator are reproduced below:

Findings



The C.B.A negotiation was born out of involvement of multi sectoral stakeholders meeting convened on 6th July, 2022 to address complaints of recurrent strikes, intimidation, fights, violence and generally matters of industrial relations.

The C.B.A document was negotiated mutually with the involvement of both parties. It was a bipartite document, mutually agreed upon by a negotiation team constituted by both parties.

Both parties were fully involved and were given equal opportunity during the negotiation and the process was devoid of intimidation and threats.

During the process of registration of C.B.A at the industrial court, the claimant (BOMI) was fully involved and aware and assented to the same vide "No objection letter" reference BM(KAIST)22-09-21-02 dated 19th September, 2022.

The attached salary addendum table as contained in the C.B.A document was born out of an all inclusive bipartite committee constituted mutually, which carried out bench marking and harmonization of salaries increment and the same was legally anchored on section 32 and 33 of the parties C.B.A.

The final document as contained in the CBA between the claimant(BOMI) and respondent union was born out of mutual agreement between the parties and in an atmosphere of give and take devoid of threats and intimidation.

20. The conciliator further made recommendations as follow:

Recommendations

The formal registration of the collective bargaining agreement between BoMI Eng and Construction Company vs Kenya Concrete Structural, Ceramic, Tiles, wood ply and interior design workers union by the industrial court be upheld since it followed due process the suspension of its implementation be lifted in order to pave way for its formal implementation.

21. Following the filing of the report of the conciliator both parties filed responses thereto by way of affidavits.

22. In the supplementary affidavit of Jeon Kwang SU sworn on 19th December 2022, he states that the conciliation meeting held under the directions of the Labour Commissioner pursuant to the orders of this court made on 1st November 2022, a number of issues raised by the Applicant/employer were not addressed. He lists the issues at paragraph 5 of the affidavit as follows:

- i. That of the issues that the Conciliator failed to address, was the one on coercion to execute the CBA Agreement dated 17th August 2022, such as the following:
 - a. The Korean Employees of the Employer/Applicant were assaulted by over 250 individuals within the premises, who may have been workers sent by the Respondent.
 - b. The Officers from the Directorate of Criminal investigation who made allegations that employees of the Employer/Applicant were in the possession and use of Taser guns against 2 workers, prompting them to conduct a search in the premises of the Employer/Applicant without a warrant.



- c. The Officers from the Directorate of Criminal Investigations confiscated 5 Passports of the employees of the Employer/Applicant and as a result of that, the Employer/Applicant's Project Manager, DOI-NUN YOO could not manage to travel and attend a very pertinent business meeting.
 - d. There had been fake news spread that tainted the image of the Employer/Applicant.
 - e. The Employer/Applicant had already raised the workers' salaries above the minimum wage as at 13th June 2022, yet the Respondent/Union had not deemed it fit to appreciate that fact.
 - f. The Respondent/Union forwarded the CBA without the Employer/Applicant's full participation while in the course of the negotiation process.
 - g. The Letter of no objection was drafted and dated 17th August 2022, the Respondent/Union guided the Employer/Applicant that the same was part of due procedure. Amongst some particulars on the documents subject to the registration were forged with the intent to defraud the Employer/Applicant.
23. Mr. Jeon Kwang Su states that there were several strikes between 10th June and 15th July 2022 where some Korean staff of the employer were assaulted, that the union kept demanding for union dues since May 2022 when there was no recognition agreement. He urged the court to grant the orders sought in the application.
24. The Union filed Grounds of Opposition dated 4th January 2023 together with a verifying affidavit of Dishon Angoya, the General Secretary sworn on 4th January verifying the Grounds of Opposition. It opposes the application and states that the same is misconceived, has no merit, is an abuse of court process and offends the provisions of Order 18 of the Civil Procedure Rules.
25. The union states that there is no substantive suit for it to respond to, that the orders sought in the amended application, which amendment was without leave of court, cannot issue at interlocutory stage. That the application as amended is fatally defective.
26. The union further filed a Supplementary Affidavit of Dishon Angoya sworn on 4th January 2023 in which he supports the findings and recommendations of the conciliator.
27. Mr. Angoya annexed to his affidavit the recognition agreement signed by the parties dated 22nd July 2022, minutes of meetings held by the parties on 15th July, 2022 where the Applicant made several undertakings on issues that were creating friction between the employer and employees and a copy of the letter of no objection to the registration of the CBA dated 19th September 2022 signed by Yoo Do Hyun, the employer's Project Manager.
28. The letter is addressed to the Deputy Registrar, Employment and Labour Relations Court, Nairobi and is reproduced below:

The Deputy Registrar

Employment & Labour Relations Court

Nairobi

19th September, 2022

Dear Sir, /Madam

RE: Registration Of Collective Bargaining Agreement E204/2022



In the matter of Collective Bargaining Agreement Between;
BoMI Engineering and Construction Consortium and
Kenya Concrete Structural, Ceramic tiles, Wood ply and Interior Design Workers Union
(KCSCW&I workers union)

Kindly register the CBA, the management of BOMI has no objection to the same.

Sincerely.

Yoo Do Hyun

Project Manager

Cc. Dishon Angoye –Secretary General (KCSCW&I worker’s union)

29. Having considered the application by the employer and the affidavits in support thereof, the responses by the union, the documents attached to the same and representations made by both parties in court, the only issue for determination is whether the registration of the CBA dated 17th August 2022, should be revoked and the prayers in the application dated 24th October, 2022 as amended on 1st November, 2022, granted.
30. According to the Applicant, the reasons they seek to have the registration of CBA set aside are that 5 pages were fraudulently added to the CBA after it was signed, that the court was misled to believe the applicant wrote a letter of no objection to the registration of the CBA, which letter does not exist, and that the workers were on strike due to non-implementation of the CBA.
31. The Applicant does not deny that it entered into the CBA. In both the grounds in support of the application and the supporting affidavit it is admitted that the Applicant negotiated and executed the CBA. The last 5 pages of the CBA that the Applicant states were added thereto are not part of the CBA. The form that is contained in the 5 pages is clearly marked as Schedule to CBA.
32. A close interrogation of the form shows that it is a summary or analysis of what is contained in the CBA. For example, page 1 of the schedule contains the occupations covered by the CBA in column 1 with the numbers in each occupation stated in column 2. Column 3 and 4 are for entry of the present wage for each category and the wage proposed in the CBA respectively. Column 5 and 6 indicate changes in working hours per week current and in the proposed CBA while column 7 and 8 indicate number of working hours current and in the proposed CBA. The 3rd page contains wages and salaries prevailing before the CBA and the rate proposed in the CBA. The new rates are to be entered in 9 to 19. They are the basic monthly wage, average wage, proposed wage, housing allowance and overtime. The next page is for entry of fringe benefits as existing before the CBA as compared to those agreed in the CBA.
33. The last page which is titled CBA section 32 APPENDIX SALARY TABLE is derived from paragraph 32 of the CBA while the last two (2) columns are derived from paragraph 33 of the CBA. What is stated in that page not be accurate the Applicant is free to correct it based on actual salaries paid and increments as agreed in paragraph 33 of the CBA.
34. The averments of the Applicant that the union fraudulently added 5 pages to the executed CBA is therefore unfounded. It is however understandable that the Applicant who is entering into a CBA for the first time may not have been aware of the requirement to have the Schedule forms filled and presented together with the CBA to the Ministry of Labour for analysis before the CBA is sent to this court for registration.



35. The second reason given by the Applicant in support of the application is that the court was misled to believe that it wrote a no letter of objection to the registration of the CBA. As is evident from paragraph 28 above, there is a letter written by the Applicant to the Deputy Registrar to that effect. As was recorded by the court, the CBA was registered subject to sight of the letter. Now that the letter is on record, this is not a valid ground for setting aside the registration of the CBA. The Applicant has not contested the authenticity of the no objection letter produced by the union.
36. The last ground in support of the application is that the Applicant's its employees were on strike. It prays is that the strike be declared illegal, un-procedural and against the provisions of the law.
37. Section 77 of the *Labour Relations Act* provides that a dispute concerning a strike may only be referred to this court by an employer after a dispute in respect thereof has been reported to the Minister.
38. A strike constitutes a completely separate course of action that ought to be reported to the Minister separately. The Applicant has not indicated how resolving the issue of the strike would resolve the dispute before the court or why the two disputes should be handled together. The Applicant has not demonstrated that it has reported a dispute on the strike to the Minister. The same is therefore prematurely before this court.
39. The Applicant has also raised a further issue about having been coerced into signing the CBA. Coercion is defined in Black's Law Dictionary as: -

“compulsion, constraint, compelling by force or arms or threat.”

It is to compel a person to do an act which is against his will, or a situation where one person is under a state of subjection to another person so that he is constrained to do what his free will would refuse. It is sometimes also referred to as duress.

Duress is defined in the Black's Law Dictionary as;

“Any unlawful threat or coercion used by a person to a manner she or he otherwise would not (or would). [it is] subjecting a person to improper pressure which overcomes his will and coerces him to comply with a demand to which he would not yield if acting as a free agent.

40. The Court of Appeal had the opportunity to explain the meaning of duress in the case of Mohamed Ahmed Abdun & another v Mini Bakeries (MSA) Limited MSA CA Civil Appeal No. 88 of 2018 [2019] eKLR , where the court stated as follows:

Almost a month after the signing of the agreements, the appellants made payment of Kshs.70,000.00 to the respondent without suggesting that they had been coerced into entering into the agreements. It was not until the respondent filed suit against the appellants in 2005 for the outstanding balance of Kshs.331, 860.00 that the appellants in their defence claimed to have been coerced into entering into the agreements despite the fact that they had earlier opportunity to disclaim the agreements. Had the agreements been procured by duress, one would have expected that the appellants would have disowned the agreements at the earliest opportunity. Instead, a month after signing the agreements they made payment and did not raise any complaint until suit was filed against them in 2005. It is also noteworthy that in the statement of defence, the 1st appellant denied signing the agreement dated 15th July 2004 but resiled from that position during the trial.



41. In the recent decision in John Mburu vs. Consolidated Bank of Kenya [2018] eKLR this Court echoed the words of the Privy Council in Pao On vs. Lau Yiu Long (above) that in determining whether duress is established,

“Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law and be regarded as coercion of his will so as to vitiate his consent...In determining whether there was coercion of will such that there was no true consent it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it.”

42. The evidence before the court does not demonstrates any coercion. Until the application was filed, there was no claim of coercion by the Applicant. The threat of strike by the Union as alleged by the Applicant does not constitute coercion as strike action is an acceptable strategy for trade unions to compel employers to accede to workers demands.
43. For the forgoing reasons I find no merit in the application by the employer and dismiss the same. In view of the nature of the dispute, there shall be no orders for costs.

DATED AND DELIVERED VIRTUALLY IN ELDORET THIS 18TH DAY OF APRIL 2023.

MAUREEN ONYANGO

JUDGE

