



Kenya Chemical & Allied Workers Union v Kenya Flexogravure Limited (Employment and Labour Relations Cause 127 of 2016) [2023] KEELRC 1267 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1267 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 127 OF 2016**

DN NDERITU, J

MAY 18, 2023

BETWEEN

KENYA CHEMICAL & ALLIED WORKERS UNION CLAIMANT

AND

KENYA FLEXOGRAVURE LIMITED RESPONDENT

RULING

I. Introduction

1. In undated memorandum of claim filed in court on 6th April, 2016, the Claimant (Applicant) prayed for the following –
 1. That the Respondent is in breach of Parties collective Bargaining Agreement as negotiated, agreed, and registered by this Honourable Court at RCA No. 241 of 2013.
 2. That Respondent withdraws immediately the inferior monthly wages which are not in tandem with provisions of Clause No. 27 and 28 of the Parties current collective Bargaining Agreement and replace them with rightful Collective Bargaining Agreement rates.
 3. That the Respondent calculate all salaries/Wages arrears and other benefits accruing from the underpayments necessitated by Respondent failure to adhere to Collective Bargaining Agreement rates as stipulated in Clause No. 27 and 28 of the Parties Collective Bargaining Agreement and pay to all affected employees on priority basis.
 4. Special damages in terms of benefits and salaries/Wages arrears to all unionised employees who unlawfully continue earning inferior monthly wages contrary



to the ones negotiated in the Collective Bargaining Agreement and any other suitable remedy which the Honourable Court may deem necessary to meet ends of justice.

5. Costs of this suit be provided for.
2. A consent order dated 21st February, 2017 was filed in court on 22nd February, 2017, executed by a representative of the Applicant and the Counsel for the Respondent by then on record, Wachira Wanjiru & Co Advocates, in the following terms –
 1. That each Respondent employee classified as unionisable shall be paid his/her leave entitled equivalent to one month's salary where annual leave is not taken in accordance with Clause 6 of CBA, together with Kshs.2000/= being the existing Leave Travelling Allowance on or before 31st December annually.
 2. That Respondent will issue to all unionisable employees uniforms, overalls, or protective gear as provided by Clause No. 21 of the current Collective Bargaining Agreement with effect from March, 2017.
 3. That Respondent shall adjust monthly wages of all employees classified as unionisable to match Collective Bargaining Agreement rates as provided for in Clause No. 28 of the Parties Collective Bargaining Agreement, and any underpayment found if any, will be computed and paid as arrears on or before 30th May, 2017. The Respondent shall also issue appointment letters to all unionisable employees by May 2017.
 4. That in default of any all items agreed hereinabove, Claimant will be at liberty to institute contempt of Court proceedings against Respondent's Director.
3. After a prolonged period of unyielding negotiations, the Respondent entered appearance through Ikua, Mwangi & Co Advocates on 11th December, 2018, and vide a notice filed in court on 12th July, 2019 the Respondent changed its advocates to Frank Mwangi & Co Advocates.
4. I have not located a defence or response to the claim by the Respondent in the court file.
5. Further to the consent order of 21st February, 2017 the court (Mbaru J.) issued the following orders on 13th December, 2018, as per a formal order in the file issued on 4th August, 2021 –
 1. That: parties to go back to shop floor; agree on salary arrears and file consent where this is achieved.
 2. That: where no consent is achieved the matter to go to County Labour Office for computation.
6. It would appear from the record that the matter then went dormant until 14th October, 2021 when the same was listed before this court for a notice to show cause why the same should not be dismissed for want of prosecution. The court noted that the matter had progressed to some extent based on the above consent and order of the court and hence the court declined to dismiss the cause.
7. On 10th November, 2021 the cause came up for mention in the presence of Mr. Hezron Opiyo, holding brief for Mr. Gwako, for the Claimant. The matter was fixed for hearing on 16th February, 2022 and the Claimant was ordered to serve the Respondent.



8. On 16th February, 2022 Miss Kamau appeared for the Respondent but there was no appearance for the Claimant. Counsel for the Respondent was ready to proceed with the hearing and as such considering all relevant factors the court proceeded to dismiss the cause for non-attendance under Order 12 Rule 3 of the *Civil Procedure Rules*.
9. The Applicant is now seeking to set aside the above dismissal in the undated notice of motion filed in court on 6th June, 2022. The application is expressed to be brought under the provisions of Section 33(3) of the Employment and Labour Relations Court (Procedure) Rules and any other enabling provisions of the law.
10. The application is based on the grounds on the face of it and supported by the affidavit of Peter Ouko Onyango, the National Secretary General of the Applicant.
11. Paragraph 2 of the said affidavit is clearly at variance with the prayers in the application as it seeks to reinstate an application dated 4th April, 2016, which was allegedly dismissed on 16th February, 2022 for non-attendance on the part of the Claimant. Mr. Onyango alleges that he had technical challenges in joining the virtual court and that when he managed to do so at 0905hrs the court had already dismissed the cause.
12. In paragraph 8 of the said supporting affidavit the deponent pleads that the order dismissing the application (sic) be set aside and that the application(sic) be heard on merits.
13. The application is opposed and in so doing the Respondent filed a replying affidavit sworn by Francis Mwangi Njuguna, Advocate, sworn on 2nd August, 2022.
14. The Respondent takes the view that no reason has been advanced by the Applicant for its failure to attend court on 16th February, 2022, and that the cause should stand dismissed as ordered.
15. On 3rd November, 2022 when the application came up in court it was directed that same be heard by way of written submissions. The Applicant filed submissions on 27th October, 2022 but the Respondent opted not to file any written submissions but relied on the contents of the filed replying affidavit.

II. Determination

16. Upon careful consideration and analysis of the pleadings, evidence, and submissions from the Claimant and the replying affidavit from the Respondent, there is only one issue for determination by this court – Should this cause, which was dismissed for non-attendance on 16th February, 2022, be reinstated?
17. This court has in the past decried the casual and at times pedestrian manner in which union officials and officers approach court matters. This court has suggested to unions that they engage professional and qualified advocates to prosecute their matters in court to avoid situations where matters may be dismissed, not on mere technicalities, but because of improper pleadings being filed or clear lack of legal knowledge on the part of an officer or official conducting the matter. In any event, and this court has held so, union officials or officers are not qualified advocates and as such do not qualify to practice law in the courts except appearing as representatives of the unions. This court holds that while union officials or officers may tender evidence as witnesses, the business of lawyering and advocating in court should be the preserve of duly qualified advocates.
18. As noted above, the application herein is undated and as such does not qualify as a proper pleading. That aside and without being too technical, the deponent to the supporting affidavit is seeking to



reinstate an application that was allegedly dismissed on 16th February, 2022 when as a matter of fact it is the cause that was dismissed. The deponent claims in the supporting affidavit to be in conduct of this matter yet the record does not show that he ever appeared in this matter for the Claimant.

19. The deponent alleges to have communicated with the judge on 16th February, 2022 yet the court record does not support that proposition. The deponent does not explain what technical challenges he experienced in joining the virtual court and what link he finally used to join the court. This clearly demonstrates that the application is an opportunistic attempt by the Applicant, without being forthright, to cajole this court to reinstate the cause that the Applicant clearly failed to take seriously and prosecute when given the opportunity to do so.
20. This cause has been pending in court since April, 2016 without any serious efforts on the part of the Applicant to have it disposed of. How much more time does the Applicant need or deserve to conclude the same?
21. To a large extent, therefore, there are no adequate reasons to persuade this court to exercise its discretion in favour of the Applicant and reinstate the cause based on the application. The non-attendance to court by the Applicant has neither been explained nor justified.
22. In the converse, except for a blank allegation that it will suffer prejudice if the application is allowed, the Respondent has not demonstrated what substantial loss or damage it shall suffer if the application is allowed.
23. While the application as presented by the Applicant is not merited and the same is neither signed nor supported on factual basis, this court has to bear in mind that behind the cause and the application are members of the Applicant union who have suffered and continue to suffer the effect of the Respondent failing and or refusing to oblige to a properly executed consent that was filed in court. This court has a duty and indeed an obligation to do justice at all times, especially to innocent parties who may not be aware of the nitty gritty of what is going on in their matters in court and who may not be aware of the lack of legal knowledge on the matter of the union officials, officers, or representatives which may, as is the case here, prejudice the members.
24. This court has unfettered discretion in reinstating a cause. If this court denies the reinstatement, it is not the Respondent who shall suffer but rather the members thereof. Such denial shall cause undue hardship and prejudice to such members – See *Mbogo v Shab* [1966] EA 93.
25. Although, as noted above, the application is not merited, in its current form and state, this court shall, suo motto, in the interests of justice reinstate the cause in the following terms.

III. Orders

- a) That the undated notice of motion by the Claimant filed in court on 28th February, 2022 be and is hereby dismissed for want of merit with no order as to costs.
- b) However, suo motto, the cause herein which was dismissed for non-attendance on 16th February, 2022 is reinstated in the interests of justice.
- c) The parties and their respective counsel or representative, as the case may be, shall engage the County Labour office, Nakuru, to ensure that the matter is settled in terms of the consent order of 21st February, 2017, and the court order of 4th August, 2021.
- d) The order in (c) above shall be complied within 30 days of the date hereof.
- e) Either party may apply to court for enforcement of the said consent order.



f) There is no order as to costs of the application.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 18TH DAY OF MAY 2023.

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DAVID NDERITU

JUDGE

