



Kenya Chemical and Allied Workers Union v East African Portland Cement Company Ltd (Cause 354 of 2019) [2023] KEELRC 1149 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1149 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 354 OF 2019**

**B ONGAYA, J
MAY 12, 2023**

**BETWEEN
KENYA CHEMICAL AND ALLIED WORKERS UNION CLAIMANT
AND
EAST AFRICAN PORTLAND CEMENT COMPANY LTD RESPONDENT**

JUDGMENT

1. The claimant filed the memorandum of claim on May 30, 2019 through its Secretary General Were Dibo Ogotu, OGW. The parties are in a recognition agreement and have negotiated several collective bargaining agreements (CBA) through the years. The parties at the material time were in the negotiations for the CBA to be effective from August 1, 2015 to run for 3 years ending on or about August 1, 2018 so as to replace the out-going CBA in force from 2012 to 2015. There were 14 items reported as a trade dispute to the Cabinet Secretary on June 14, 2017. After conciliation, 7 items were not concluded and are now before the court for determination. They included:
 - a. Wage increase where the claimant proposed increase of 10% in 1st year, 9% in 2nd year, and 10% in 3rd year. The respondent proposed 5% in 1st year, 5% in 2nd year and 3rd year 7%.
 - b. Safari Allowance the claimant proposing 1st year Kshs. 6, 800.00, 2nd year Kshs. 8, 300.00, and 3rd year Kshs. 9, 800.00 while the respondent urged that the Kshs. 5, 000.00 in the out-going CBA be retained.
 - c. Baggage Allowance the claimant proposed up to 50Kms Kshs. 35, 000.00; Between 51 – 100Kms Kshs. 60, 000.00; Between 101 – 200Kms Kshs. 70, 000.00, between 201 – over 300Kms Kshs. 80, 000.00 while the respondent urged for Kshs. 20, 000.00, Kshs. 25, 000, Kshs. 30, 000.00 respectively and then, between 201 – 300Kms Kshs. 35, 000.00 and, over 300Kms Kshs. 40, 000.00.



- d. Leave Travel Allowance the claimant proposed Kshs. 50, 000.00 and the respondent urged the prevailing CBA rates of Kshs. 18, 500.00 be retained.
 - e. The claimant urged the respondent to provide Commuter Allowance at 15% monthly basic wage to promote efficiency and motivation of unionisable staff.
 - f. The claimant urged for Inconvenience Allowance at flat rate of Kshs. 10, 000.00 per month for Kabini Hills Quarry employees and other who may be stationed by the company to work in more remote areas which are not classified by the Government of Kenya as hardship areas.
 - g. On retirement benefits, normal retirement and retirement on medical grounds, redundancy, resignation, death or termination the unionisable employee be entitled to terminal benefits and payment on pro rata basis where the employee had not completed a year.
2. The claimant prayed for:
- a. A favourable finding by the court giving due consideration that the CBA will lay the foundation on terms and conditions of employment for workers of the respondent company from which future negotiations will follow as the base.
 - b. The honourable court not to be used to deny workers of the respondent the right to have better terms and conditions of employment from negative employers like the respondent.
 - c. An economic criteria intended to improve terms and conditions of employment be fairly determined by the honourable court as it falls within the adjudications and its jurisdiction to reflect the workers economic and social status beneficial to their families.
 - d. The respondent to pay costs of the suit.
3. The respondent filed the statement of response on August 21, 2019 through Marende & Nyaundi Associates. The respondent pleaded that the proposals by parties are as set out in the claimant's memorandum of claim. The respondent further pleaded as follows:
- a. The counter-proposal on wage increase was 1st year 5%, 2nd year 5% and 3rd year 7%. However, the respondent was in a financial crisis and had been forced to undertake a restructuring and re-organisation program which would subsequently lead to various jobs and employees being declared redundant. Redundancy notices had issued due to the poor financial performance and it would therefore not be able to meet its counter-proposal and would abide by the advisory of the Salaries and Remuneration Commission to retain nil, nil and nil wage increase over the period.
 - b. For Safari Allowance the figures in the current CBA clause 15(a) be retained.
 - c. For Baggage Allowance the respondent proposed the position remain per prevailing clause 247 of the out-going CBA as per respondent's proposals pleaded by the claimant.
 - d. For Leave Travelling Allowance, the same be retained at Kshs.18, 500.00 per year per out-going CBA.
 - e. The respondent opposed Inconvenience Allowance at Kshs. 10, 000.00 per month for staff deployed in remote areas not having been declared as hardship areas as such areas have not been gazetted as hardship areas and there is no justification.



- f. On prorate payment for not completed years of service for retirement benefits upon normal retirement, retirement on medical grounds, redundancy, resignation, death or termination the respondent urged the same to remain as per clause 21 of the out-going CBA.
4. The respondent pleaded that it had been suffering financial difficulties due to increased competition, low production due to old and dilapidated plant, reduction in market share, high staff costs, low sales and unavailability of raw materials and the claimant had been informed throughout the negotiations. The respondent pleaded that the claimant's demand if allowed will bring the respondent to its knees in view of the financial difficulty in meeting the increments as claimed and proposed by the claimant. The respondent prayed that the claim be declined with costs.
5. The court directed the Central Planning and Monitoring Unit (CPMU) of the Ministry of Labour and Social Protection to render an economic report. The report dated April 14, 2020 was filed on June 22, 2021. The findings were as follows:
- a. The annual labour cost for the unionisable staff kept an increasing trend for relevant period of 2016, 2015 and 2018 being Kshs. 1, 037, 076, 000.00, Kshs. 1, 197, 639, 000.00 and to Kshs, 2, 440, 453, 000.00 respectively. Over the same period, the population of the unionisable staff kept declining from 284, 266, and to 247 respectively. Considering that employment and annual labour trends, the Court observes that despite declining numbers of the unionisable staff, the annual labour costs kept increasing. The numbers of management staff marginally decreased and with a marginal increase in annual labour costs. The ratio of management staff to union employees was 2:1 – two managers for each unionisable staff.
- b. The employment and annual wage bill trends show a gradual decline on annual wage bill for the unionisable employees in 2016, 2017 and 2018 being Kshs, 1, 036, 745, 220.00, Kshs.1, 006, 358, 020.00, and Kshs. 888, 155, 040.00 respectively – the decline likely attributed to the declining staff numbers.
- c. The respondent's annual revenue for the three years was on a declining trend being Kshs. 8.87 billion in 2016, Kshs. 6.92 billion in 2017 and Kshs. 5.18 billion in 2018 and with declining gross profits being Kshs. 1.66 billion, Kshs. 0.96 billion and Kshs. 0.30 billion respectfully.
- d. The challenges the respondent is facing included outdated plant and machinery, competition, and servicing of big loans from banks and debtors.
- e. The report noted that the consumer price index (CPI) serves to restore purchasing power of basic consumer goods and services which may have been eroded by inflation over the lifespan of an outgoing CBA. The out-going CBA was for the period August 1, 2012 to July 31, 2015 which formed the period of compensation for purposes of the CPI. Further the claimant's members lie in the New Kenya Income Group Indices and over the three years' period, the percentage rise in the CPI was 22.10%.
- f. Further compensation would arise from growth of firm productivity per the Wage Guideline No.2 requiring that productivity forms the major factor for any additional wage compensation consideration.
- g. The analysis was that if the claimant's wage increase proposals are upheld, the respondent would shoulder additional wage bill of Kshs. 283, 371, 199.00 for the three years of the incoming CBA. Further, if the CPI is upheld, the respondent would shoulder a sum of Kshs. 211, 199, 169 for the entire period of the proposed CBA.



- h. At the parties' joint meeting on February 19, 2020 the respondent informed the meeting that it was unable to sustain the wage bill per the prevailing (out-going) CBA and it had embarked on the redundancy exercise of all its employees. All employees declared redundant had been asked to reapply for their positions on condition that those who would be successful would agree to take a pay-cut of up to 40%. Further, the respondent conveyed to the meeting that it was selling approximately 12, 000 acres of land at Athi River and use the proceeds to pay severance benefits to workers declared redundant and to refurbish the plant as part of the restructuring measures. It was the respondent's design that the restructuring would lead to recovery and resumption of renegotiation of the CBA.
6. By consent order the suit was to be determined on the basis of the material on record. The court has considered all the material including the report by the CPMU. The court returns as follows:
- a. The report indicates the desperate financial status of the respondent said to result in massive redundancies with those re-employed thereafter to receive 40% pay cut. In the circumstances it appears to the court that the redundancies having, on a balance of probability, taken place on the basis of the terms and conditions of the prevailing CBA, the just consequence is to allow the parties to be bound by those prevailing terms for the period of the in-coming CBA. While making that finding the Court has considered the running of time and marked with the COVID 19 situation as the Court takes judicial notice of consequences of that situation on enterprises generally. It appears to the court that all employees in issue were declared redundant and their separation dues should in the circumstances of the case be governed by the outgoing CBA.
- b. The Salaries and Remuneration Commission's advisory for nil salary increment over the three years of the in-coming CBA, in the circumstances, is found reasonable as justified because the respondent has established inability to meet the increment as manifested in the redundancies.
- c. The claimant has not offered the justifications for the other proposals as made. These will therefore be declined.
- d. As the three years in issue have since long lapsed and the respondent must have undertaken the redundancy exercise, restructured and refurbished its plant towards profitability the incoming CBA be concluded forthwith inclusive the disputed clauses drawn per the respondent's proposals. Parties should then proceed and start the negotiations for the next CBA. The court reckons that the redundancies were subject to re-employment of some of the affected staff at 40% pay cut. Thus terms of the next CBA in issue as found by the Court should constitute the fair and most favourable base for the claimant to renegotiate the next CBA in the cycle, the 3 years of the in-coming CBA in the instant case having long lapsed. Further, the court finds that the in-coming CBA as found should constitute a fair base for future negotiations in view of the CPI per the CPMU report and the employees would deserve consideration of such compensation in the next cycle of negotiations – notwithstanding the 40% pay cut that is said to have accompanied re-employment after the said redundancies.
- e. As parties are in a continuing industrial relationship, each to bear own costs of the suit.
- In conclusion judgment is hereby entered for the parties with orders:
1. The parties to forthwith conclude the in-coming CBA for 2015 – 2018 with the disputed clauses herein drawn as per the respondent's proposals and the advisory by the Salaries and Remuneration Commission on nil wage increase for each of the three years of the CBA.



2. In line with the respondent's design of restructuring and refurbishment for a better economy or flourishing performance, the parties after concluding the CBA in order (1) above, to forthwith embark upon the re-negotiations for the next cycle of CBA.
3. Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 12TH MAY, 2023.

**BYRAM ONGAYA
PRINCIPAL JUDGE**

