



Dock Workers Union of Kenya v Kenya Ports Authority (Petition E013 of 2022) [2023] KEELRC 1660 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1660 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E013 OF 2022
M MBARÚ, J
JUNE 29, 2023

BETWEEN
THE DOCK WORKERS UNION OF KENYA PETITIONER
AND
KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. The petitioner is seeking the following orders:
 - a. An order of declaration do issue that the making of the Human Resource policy and procedure manual of 2021 was unlawful for the reasons that it altered the terms and conditions of service as contained in the Collective bargaining Agreement for the period 2022/2023 without following the procedures as provided in the Recognition Agreement “ the Industrial Relations Machinery of 986” and unconstitutional for failing to comply with the provisions of Article 10 of the Constitution.
 - b. An order of declaration does issue that the translation and or conversation of the employees in acting positions and or those employees whose letters of promotion are still pending horizontally to the new structure, when the Order issued on 10th February, 2022 and the subject matter is still alive before the Conciliator and this court is unlawful and unconstitutional.
 - c. An order of judicial review does issue to quash the Human Resource Policy and Procedure Manual of 2021.
 - d. An order of judicial review does issue to stop the respondent from making any policy document without complying with Article 10 of the Constitution.



- e. An order of judicial review does issue to compel the respondent to confirm all employees who have acted continuously for period in excess of 6 months and no reasons was recorded why they could not be confirmed.
 - f. An order of judicial review does issue to compel the respondent to issue appointment letters to all those employees who were interviewed, evaluated and approved for promotion.
 - g. Any other relief that his court may deem fit to grant.
 - h. Costs be borne by the respondent.
2. The petitioner is a registered trade union representing unionisable employees of the respondent. the respondent is a state corporation. Parties have a Recognition Agreement and have negotiated Collective Bargaining Agreement (CBAs) regulating terms and conditions of employment.
 3. Under the Recognition Agreement, parties agreed that there should be no change of terms and conditions of service unilaterally except through a negotiated settlement. In the Human Resource Manual, 2017 (the Policy) the respondent purported to change the terms and conditions of service different from the CBA terms with an attempt to limit the number of children the employee could have under the medical cover to a minimum of 4 but the petitioner objected and such provision was deferred. The respondent has reintroduced the same under section 5(2)(1) of the Policy in disregard to Section 9 and 10 of the Recognition Agreement which requires the terms and conditions of service be negotiated pursuant to Section 30 of the CBA which has opened the medical cover to all members of the employee. The alteration of the same is in contravention of Section 59 of the [Labour Relations Act, 2007](#).
 4. The Policy as amended is intended to reduce the gains which have accrued to employees in terms of those due for promotions in the acting positions. The alteration and changes will affect the right to health of children already covered and enjoying health care benefits and facilities. The change was done unilaterally without negotiations with the petitioner contrary to Article 41 of the [Constitution](#). this is discriminatory of the children already covered and against the principles of legitimate expectations.
 5. The petition is also that in October/November, the petitioner engaged the respondent into settlement of confirming employees who had been acting in higher positions for a period longer than 6 months and there was a disagreement and a strike notice was issued on 10 November 2021. The respondent filed Cause No E099 of 2021. According to Section B.11(f) of the Policy, an employee is supposed to be deployed in the acting capacity for a period which should not exceed six months and in the event that such an employee acting in a higher position is not qualified, then the position must be advertised within 6 months. Most employees have now been acting in higher positions for a period of over 3 years and the respondent has enjoyed efficient service from then and hence should be appointed as the substantive office holders.
 6. On 17 November 2021 the court issued order in Cause No E099 of 2021 stopping the intended strike and later delivered a ruling directing that the strike notice had been issued contrary to the law and the substantive issues were referred to a conciliator. In the interim, the respondent tried to deploy all those employees who were in the acting positions to their substantial positions and to forestall such mischief, the petitioner moved to court seeking to preserve the mater now pending before the conciliator. The conciliator's report is due and pending for submissions in court.
 7. The respondent has also changed the organisation structure where the Policy, 2021 has been developed to be implemented through Special Notice No2 of 25 July and 3 August 2022 respectively. The Policy



- has introduced new grading system based on the employee substantive position of appointment and which then disregards the court order of 10 February 2022.
8. The new organisational structure and Policy did not form part of Cause No E099 of 2021 and hence the filing of this Petition and the orders sought should be allowed as prayed.
 9. The petition is supported by the Supporting Affidavit of Simon Kiprono Sang the General Secretary of the Petitioner.
 10. In response to the Petition, the respondent filed the Replying Affidavit of Irene Mbogho the acting Manager Human Resource and who aver that there are two suits pending before this court being ELRC Cause No E099 of 2021 and ELRC JR No 001 of 2022 which are premised on the same issues as herein and this matter is sub judice.
 11. The respondent is a state corporation established under the *Kenya Ports Authority Act* with mandate to develop, operate and manage ports in Kenya and all scheduled seaports on the Kenyan coastline and islands way ways. The respondent has a workforce of about 7,800 employees and prior to 2021, the respondent's internal governance mechanism was regulated by the Policy, 2017 approved by the State Corporations Advisory Committee (SCAC) and all relevant authorising entities.
 12. In the year 2020 the President issued a Presidential Directive directing that ferry operations at Likoni Channels which is operated by the Kenya Ferry Services Limited and the Floating Passenger Bridge were to be mutually operated by the respondent. the effect was that assets, liabilities and contract and other obligations we rot be transferred to the respondent and upon completion, the Kenya Ferry Services would be dissolved.
 13. As a result, the respondent was required to develop a new Policy. several consultative meetings were held and on 2 March 2021 a policy framework was put in place with an institutional structure, grading and staff establishment, career progression guidelines, remuneration structure and a human resource policy and procedures manual.
 14. On 3 and 4 June 2021 the respondent convened its 393 meeting and adopted the Policy which has since been approved by the SCAC and the head of public service on 19 April 2021. The Cabinet Secretary National Treasury and Planning directed the respondent to implement the Policy which approved the deployment, confirmation and appointment of senior staff members into the new organisation structure to enhance service delivery.
 15. On 28 March 2023 both parties attended court and agreed to address the petition by way of written submissions. Only the petitioner complied. There are no written submissions by the respondent.
 16. The petitioner submitted that parties are bound by the Recognition Agreement and CBA and in the case of *Said Ndege v Steel Makers Ltd* [2014] eKLR the court held that Section 59(1)(b) of the *Labour Relations Act* that terms and conditions of a CA bind and are incorporated into the contracts of all unionisable employees and an employer who has entered into a CBA with a union is required to conclude such CBA putting in place the agreed terms.
 17. Section 30 (e) of the CBA provide that all children of the employee are eligible for medical cover subject to an age limit of 22 years. the respondent should not be allowed to limit the same under the Policy, 2021.
 18. In developing the new Policy the respondent has violated the constitutional rights of the petitioner and its members contrary to Article 10 and 41 of the *Constitution*. purporting to review the medical policy through the Policy is in disregard of the CBA in place in the case of *Peter Wambugu Kariuki & 16 other v Kenya Agricultural Research Institute* [2013] eKLR the court held that fair labour practices



is a right under Article 41 of the Constitution and every employee has the right to fair remuneration, to reasonable working conditions and the right to form and join a trade union of choice. The employer has the right to determine its own administrative programmes and activities but must engage with the trade union.

19. The failure by the respondent to apply the Recognition Agreement and CBA terms has led to this petition which should be allowed.

Determination

20. The petition is seeking various declarations and orders and the core of it is whether the Policy, 2021 is unlawful and should be quashed; whether the conversion of employees into acting position is contrary to orders issued on 10 February 2022 in ELRC No 099 of 2021; and whether the respondent should be compelled to confirm all employees who have acted continuously for periods in excess of 6 months and be issued with letters of appointment.
21. The petitioner moved the court by way of a Petition. The case of whether to file a petition or not is a matter addressed by the court in many occasions and recourse should always be Rule 7 of the Employment and Labour Relations Court Procedure Rules, 2016 to frame the orders sought to include constitutional violation or orders of judicial review in a Memorandum of claim, unless, a party is seeking to raise any question of the interpretation or application of the Constitution or a finding that a statute is in conflict with the Constitution, see Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR and Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR that;

The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution.

22. The respondent did not file any written submissions nor raise any issues and as set out above, such shall suffice.
23. On whether the respondent's Policy, 2021 is unlawful and should be quashed, the petitioner acknowledges that there is ELRC Cause No E 099 of 2021 touching on the questions as to the medical cover of its members that has allegedly been altered, reviewed or changed by the respondent and that such matter is before conciliation pending before court. with this acknowledgement, to delve into the same matter would create chaos where the court were to issue different orders herein and then deliver different orders and directions in the other matter, earlier filed. The matter having been addressed herein as being present and pending conciliation, such other suit having been initiated first, for rule of law, such matter ought to be concluded first.
24. The petitioner well aware of such other matter in ELRC No E099 of 2021 has the advantage of filing an Amended Claim/Response or a Counter-claim/Response to ensure the issue raised herein is well addressed and covered in the suit earlier filed.
25. In the written submissions, the petitioner has not delved into the current status of the earlier suit. for purposes of this petitioner, this issue stands premature.



26. The above taken into account, the statutory function of a Recognition Agreement is single and should relate to the employer recognising the trade union which represents the majority of unionisable employees for the sole purpose of negotiating CBAs with terms and conditions of employment in terms of Section 54 of the [Labour Relations Act, 2007](#). Upon Recognition, the documents that is given life and evolves over time is the CBA.
27. The employer hence retains the prerogative to organise its structures and systems to ensure productivity and enhance efficiency. As a government agency recognised under the provisions of Kenya Port Authority Act, the respondent is a public body regulated under Article 230(4) of the [Constitution](#) which vests the responsibility upon the SRC to:
- a. set and regularly review the remuneration and benefits of all State officers; and
 - b. advise the national and county governments on the remuneration and benefits of all other public officers.
28. These provisions must be read and take into account the provisions of Article 234(2)(g) of the [Constitution](#) which empowers the Public Service Commission to review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service. see [Teachers Service Commission v. Kenya Union of Teachers \(KNUT\) & 3 Others](#) [2015] eKLR.
28. With regard to having a legitimate expectation with regard to the positions held on acting basis for over 6 months, the parties are bound by the CBA terms and conditions as required under Section 59 of the [Labour Relations Act, 2007](#). As a state corporation the respondent is also bound by various other procedures to ensure compliance within its statutory mandate.
29. The Supreme Court in addressing the question of legitimate expectation in the case of [Kenya Revenue Authority v Export Trading Company Limited](#), SC Petition 20 of 2020; [2022] KESC 31 held that;
- As can be discerned from these two definitions, legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before the decision maker or it may take the objective form that a party may legitimately expect that, before a decision that may be prejudicial is taken, one shall be afforded a hearing.
- Respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate
30. In this case, parties have a CBA covering the period of 2022/2023. Parties have a chance to negotiate and re-negotiate terms and conditions of service by taking into account changing work environments, systems and procedures that affect productivity and work environments. Save for the issue of a medical cover stated to have been reviewed to the detriment of the petitioner and its members and which is addressed in a different suit as set out above, the issue of employees whose acting roles have exceeded the 6 months allowed under the Policy are not particularised.
31. Having moved court through a petition, the court is denied a crucial element to appreciate the import of this claim. In the Supporting Affidavit of Simon Kiprono Sang, the question of the employees affected under this directive is not particularised.
32. In the Replying Affidavit of Irene Mbogho, the respondent's case is that there are about 7,800 employees and following a Presidential Directive in the year 2020, ferry operations at the Likoni



channel operated by Kenya Ferry Services and the floating passenger bridge were all placed under the respondent operations. Without a desegregation of which cadre of employees are affected under these schemes of things, to seek for a blanket order directing the respondent to confirm and issue employees on acting positions for over 6 months would remove a major element of what is regulated under the CBA for unionisable employees and the prerogative of the respondent to organise its operations to ensure efficiency and productivity.

33. This is aptly addressed by the petitioner in the written submissions in citing the case of Peter Wambugu Kariuki & 16 others, cited above, that the rights under Article 41 of the Constitution include the employer having the right to determine its own administration as part of the fair labour practices. Without a desegregation as to how the CBA has been impacted, the generalised orders sought cannot issue. This is in taking into account that, the respondent as the employer has the legal duty under Section 5(8)(c) of the Employment Act, 2007 read together with Section 6 and 12 to formulate policies and procedures with regard to workplace practices. This legal mandate cannot be negated through CBA negotiations. Whereas parties are at liberty to agree on the terms and conditions of employment, the employer retains the right to organise the workplace to ensure productivity and efficiency.
34. For this petition, the orders sought shall not issue taking into account ELRC No E099 of 2021 that is pending conciliation. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

