



**Kenya Union of Commercial, Food & Allied Workers v Text Book Centre Limited
(Cause E354 of 2022) [2023] KEELRC 1773 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1773 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E354 OF 2022**

**AN MWAURE, J
JULY 14, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL, FOOD & ALLIED
WORKERS CLAIMANT**

AND

TEXT BOOK CENTRE LIMITED RESPONDENT

JUDGMENT

1. The claimant union filed the claim before Court by the memorandum of claim dated the 25th May 2022. The claimant says that they are parties with the Respondent to a valid recognition agreement and negotiating procedure which is still in force. They say that pursuant to the said Recognition Agreement the claimant/Applicant and the Respondent have negotiated several collective agreements the last one being CBA for the period 2019-2021.
2. They further say that on the June 10, 2021, the Respondent replied to the claimant/Applicant's letter and stated they were not in a position to accommodate additional staff expenses. On the June 15, 2021, the claimant wrote to the Respondent proposing for a meeting for commencement of collective bargaining negotiations. On the June 17, 2021 the Respondent wrote to the claimant/Applicant and proposed another date for negotiations and they further stated that their counter proposal was to retain all clauses.
3. The claimant avers that on the June 24, 2021, the parties met and began negotiations which failed due to the rigidity of the Respondent position. On the June 25, 2021, the claimant reported a trade dispute to the Cabinet Secretary, Ministry of Labour and Social Protection which was accepted and one Mr. Dennis Murithi was appointed to act as a conciliator. On the August 19, 2021 the parties held another meeting and continued with the collective bargaining negotiations.



4. On the September 8, 2021, the conciliator invited parties for a joint conciliation meeting on the September 21, 2021. On the September 22, 2021, the claimant and the Respondent met to continue with the negotiations in light of the Respondents' counter proposals. Parties agreed on some clauses and left others in abeyance. The Respondent's Managing director was to consult further with the board of directors. On the October 13, 2021, the Respondent wrote to the claimant stating that they had consulted the board of directors and their positions had not changed on the clauses left in abeyance. Hence on the October 27, 2021 the conciliator invited parties for another joint conciliation meeting scheduled for November 2, 2021. On the 29th October and November 3, 2021, the Respondent wrote to the conciliator and the claimant requesting for conciliation meeting to be rescheduled.
5. The claimant says that on the January 11, 2022, the conciliator invited parties for another conciliation meetings scheduled for May 19, 2022 and a final conciliation meeting was held on February 9, 2022. On the 16th and March 23, 2022, the claimant and the Respondent respectively wrote to the conciliator requesting him to issue his report and recommendations.
6. The claimant says that under the terms of the recognition agreement, the collective bargaining agreement, the wages guideline and the law, the parties have a duty to regularly review the terms and conditions of service for the Respondent's unionisable employees as the only means to cushion unionisable employees from the vicissitude's effects of inflation and ravages of the ever-rising cost of the living.
7. The Claimant prays for the following remedies;
 - a. That the Court adopt and uphold the clauses already negotiated and agreed between the parties as placed under paragraph 22 herein
 - b. The honourable court adopt the claimant's proposals as placed herein under paragraphs 23 on the clauses not agreed upon and declare the proposals as fair and reasonable
 - c. Upon granting of order b above, the Honourable court order the Respondent to sign the 2021-2023 collective bargaining agreement within 30 days from the date of judgment.
 - d. This honourable court grant any other relief it deems fit.
 - e. Costs of the suit be borne by the Respondent
8. The Respondent filed the Memorandum of Appearance on the June 7, 2022 and a memorandum of response dated the January 17, 2023.
9. The Respondent states that the claimant indeed forwarded a proposal to the Respondent for review. However, the terms set out could not be maintained by the Respondent due to the harsh economic times and due to the changes in the schooling patterns. The Respondent avers that its revenue is based majorly on sales and school calendar and it is yet to recover from the losses it made during the period of 2020 to 2022.
10. He says that the claimant took a hard stance during the negotiations despite the Respondent offering a counter proposal that would cater for the claimant's members' needs.
11. The Respondent states that he has consistently increased its labour force from 2017 and the Respondent has always increased the claimant member's needs and wages despite incurring losses as a result of the changes in the school calendar.



12. The claim was to proceed by way of written submissions and pleadings on the file.
13. The court considered the claimant's submissions dated February 15, 2023. The Respondent relied on the Court of Appeal case in *Kenya Tea Growers Association v Kenya Plantation and Agricultural Workers Union* 2018 eKLR that:

“Under the guidelines, the prime elements of determining wages are listed as realized productivity gains, the ability of the economy and employers to sustain increased labour costs and the cost of living... Consequently, a court faced with a question of wage increment ought to take into account productivity, and the ability to pay by the employer.”
14. The Respondent submits that in light of the decision in Kenya Tea Growers Association this court being faced with competing requests must now balance between the Respondent's financial difficulties and the claimant's interests.
15. The respondent submitted that while being faced with a similar situation as the instant case, the ELRC in *Kenya Petroleum Oil Workers Union v National Oil Corporation of Kenya* 2021 eKLR held as follows:

“Having considered the report by the CPMU and the advice by the SRC, and in view of the foregoing observations, I decline to award any salary increment to the claimant as prayed or at all. The risk of granting a salary increase in the circumstances of this case is worse than declining because it may lead to the collapse of the company or result in redundancy of the same workers who get the wage increment”
16. The Respondent also relied on *Kenya Game Hunting and Safari Workers Union versus Micato Safaris* 2016 eKLR where it was held that:

“The purpose of wage increment is to cushion the worker from inflation by enhancing the purchasing power, however, this can only be effectively achieved against the background of improved performance and sustainability of the wage bill. A wage increase whose effect would be to trigger the journey to collapse of an organization is harmful to the self-same worker it was intended to benefit.”
17. The Respondent urged the court to find that granting of the salary increase as prayed by the claimant is worse than declining not to give as the Respondent is an entity struggling financially due to the harsh economic times.

Determination

18. The Respondent contends that granting the salary increase as prayed by the claimant is worse than declining not to give as the Respondent is an entity struggling financially. There are no rival submissions from the claimant on the issue as the submissions were not filed and the claim does not address the issue of financial difficulties at all. There are equally no witness statements attached for the claimant. The court therefore accepts the Respondent's view that it has been facing financial difficulties which has made it unable to sustain the claimed salary increment.
19. The court considered the report by the ministry of Labour of 1 November 4, 2022. The director clarified he consulted all the respective parties and considered their submissions before preparing the report.



20. In his conclusion he stated that the respondent had consistently increased its labour force and wages despite their challenges and losses made between 2017 to 2021. He concluded that the respondent did make financial concessions to the claimant's demand despite difficult financial background.
21. Being guided by the holding of case ELRC *Petroleum Oil Workers Union v National Oil Corporation of Kenya* [2021] eKLR where he court held the granting a salary increase in the circumstances of this case is worse than declining because it may lead to the collapse of the company or result in redundancy of the same workers who get the salary increment. The court finds it unrealistic to increase the wage bill.
22. The respondent has pointed out that they have faced challenges of declining school calendar and the general economic environment and so are running at a loss and are not able to increase the wage bill as demanded by the claimant.
23. The court finds the submissions by the respondent are worthy noting. In any case the director of the Ministry of Labour point to the same matters in his report.
24. Under the circumstances the court has declined to grant the prayer by the claimant as set out in paragraphs 22 of their claim.
25. Instead the respondent under the circumstances were willing to give a counter proposal as per annexure M 10 and so the court orders the parties to adopt the same forthwith and implement right away.
26. The court also orders the parties to come up with a current bargaining agreement going forward so that there is no gap for a long time. This they should be able to come up with agreed CBA within 90 days and mention to court by October 11, 2023.
27. Each party will meet their respective costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14TH DAY OF JULY, 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the *Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

