



Kenya Chemical Workers Union v Agro Chemicals & Food Company Limited & another (Cause E004 of 2023) [2023] KEELRC 1674 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1674 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E004 OF 2023
CN BAARI, J
JULY 13, 2023**

BETWEEN
KENYA CHEMICAL WORKERS UNION CLAIMANT
AND
AGRO CHEMICALS & FOOD COMPANY LIMITED 1ST RESPONDENT
SALARIES AND REMUNERATION COMMISSION 2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 19th January, 2023, and which was amended vide an Amended Memorandum of Claim dated 16th March, 2023, and filed in Court on 21st March, 2023. The Claimant seeks the following reliefs: -
 - a. That this Honourable Court be pleased to award each item in favour of the Claimant as indicated in the Amended Claim dated 16th March, 2023.
 - b. That the Collective Bargaining Agreement be concluded in terms of the proposals made to the Respondent by the Claimant.
 - c. That cost of this case be met by the Respondent in favour of the Claimant.
2. The 1st Respondent entered appearance through the Federation of Kenya Employers and subsequently filed a response to the statement of claim on 31st March, 2023.
3. The 2nd Respondent equally entered appearance through one Ruth Bigambo, Advocate and proceeded to file a replying affidavit sworn by Ms. Anne R. Gitau, the Chief Executive Officer and Commission Secretary of the 2nd Respondent on 22nd February, 2023, in response to the Claimant's Amended Memorandum of Claim.



4. The claim was canvassed through written submissions and submissions were filed for all the parties.

The Claimant's Case

5. The Claimant's case is as follows: -

- i. That it submitted a proposal for the amendment of the outgoing Collective Bargaining Agreement (CBA) to cover the subsequent period of four (4) years, and which proposal was responded to by the 1st Respondent vide a counter proposal given on 20th December, 2021.
- ii. That on 10th January, 2022, the Claimant wrote to the 1st Respondent proposing a date for parties to commence Collective Bargaining negotiations, which the company responded through the Federation of Kenya Employers,
- iii. That parties agreed that the negotiations run from 2nd, 3rd and 4th of February, 2022 at the Federation of Kenya Employers offices in Nairobi.
- iv. That negotiations commenced on 2nd February, 2022, as was agreed, and after several meetings the Claimant revised its position vide a letter dated 30th August, 2022, in a bid to conclude the negotiations.
- v. That on the date negotiations started (2nd February, 2022) the 2nd Respondent issued a circular for review of rates and cluster classification for purposes of payment of daily subsistence allowance (DSA) – also known as Local Travel allowance.
- vi. That although parties agreed on other terms of the Collective Bargaining agreement, they reached a deadlocked on 5 items; namely; Housing allowance, Leave Travelling Allowance, Subsistence Allowance, Bicycle/Commuter Allowance and wage increase.
- vii. That the 2nd Respondent had already advised parties to review rates and cluster classification for purposes of payment of daily subsistence allowance, and which advisory was communicated through a circular dated 2nd February, 2022, addressed to all parastatal heads.
- viii. That despite the Claimant's efforts, the 1st Respondent still refused the Claimant's proposal forcing parties to sign a deadlock on 21st September, 2022.
- ix. That the Claimant reported the matter as a trade dispute to the Cabinet Secretary Ministry of Labour and Social Protection on 22nd September, 2022, who responded on 29th September, 2022, by appointing a Mr. Charles Gondosio of Kisumu Labour Offices conciliate the dispute.
- x. That on 21st October, 2022, the 1st Respondent wrote a letter to have a meeting scheduled for 28th October, 2020, postponed on the basis that they were awaiting guidance from the 2nd Respondent. The meeting was then rescheduled to 21st November, 2022.
- xi. On 21st November, 2022, the 1st Respondent indicated that they were yet to submit their Memorandum since they had not received guidance from the 2nd Respondent.
- xii. That the 1st Respondent on 30th November, 2022, wrote to the Conciliator requesting for more time to consult the 2nd Respondent, which was a clear indication that the 1st Respondent was not keen to have the matter concluded forcing the Conciliator to issue a Certificate of Unresolved Trade Dispute on 6th December, 2022.
- xiii. That the issuance of the certificate of unresolved dispute is the basis of the claim herein.



The 1st Respondent's Case

6. The 1st Respondent in its statement of response to the claim, spelt out its case to be That: -
- i. It confirms existence of a Recognition Agreement between it and the Claimant Union on the basis of which they have negotiated and concluded several Collective Bargaining Agreements (CBAs).
 - ii. The dispute herein, is as a result of negotiating yet another CBA, and that when parties were in the middle of the negotiation table the Claimant reported a trade dispute with the Cabinet Secretary for labour.
 - iii. By virtue of the 1st Respondent being a commercial state corporation, its employees fall within the definition of public officers and the financial engagements particularly on recurrent expenditure must be aligned to the guidance and recommendation of the 2nd Respondent herein.
 - iv. It is its further case that the 2nd Respondent exercising its mandate under Article 230(4) of *the Constitution* as read with the provisions of Sections 11 and 12 of the *Salaries and Remuneration Commission Act*, 2011, gave guidance on the parameters to be used in the course of the negotiations.
 - v. That based on the guidance given by the 2nd Respondent, the Claimant union and the 1st Respondent commenced negotiations of the CBA, the subject of this dispute.
 - vi. In the course of the negotiations, the 1st Respondent sought for and did receive guidance from the SRC on emerging monetary issues.
 - vii. That from inception and at all material times relevant to this dispute, the Claimant union and the 1st Respondent recognized the role of the SRC and submitted to its guidance in the course of the negotiations.
 - viii. The last of such negotiations was convened on 21st September, 2022, where parties agreed to disagree on 5 clauses as against the 12 clauses which they had hitherto agreed on.
 - ix. The five (5) clauses with financial implications, and which parties were unable to agree on, were in respect of Housing Allowance, Leave Travelling Allowance, Daily Subsistence Allowance, Bicycle allowance and wages increase.
 - x. Upon reaching the aforesaid disagreement, the Claimant union reported a Trade Dispute and the matter was referred to the Ministry of Labour for conciliation.
 - xi. The 1st Respondent submitted to conciliation, but the Claimant union maintained a hardline stand on its demand, with the result that parties were unable to agree, and which prompted the suit herein being referred to this Honourable court for adjudication.
 - xii. The financial fortunes of the 1st Respondent have been dwindling in recent times with a negative turnover the last three financial years.
 - xiii. That the parties herein, are social partners and any engagement involving terms and conditions of employees of the 1st Respondent, must of necessity take into account job security of the said employees on the one hand, and enterprise sustainability on the other. This according to the 1st Respondent, is what brings into focus the role of the 2nd Respondent in ensuring sustainability through scientific and comparative analysis based on both sectoral and national projections.



The 2nd Respondent's Case

7. The 2nd Respondent on its part, states its case as hereunder: -
- i. That its mandated is set out under Article 230(4) of *the Constitution* and Section 11 of the *Salaries and Remuneration Commission Act*, as being to set and regularly review the remuneration and benefits of all state officers, and to advise the National and County Governments on the remuneration and benefits of all other Public Officers.
 - ii. It avers that when sitting and advising on remuneration and benefits payable in the public sector, it is guided by the constitutional principles set out in Article 230(5) of *the Constitution* and Section 12 of the salaries and remuneration Act 2011, which requires it to take into consideration the fiscally sustainability of the total public compensation bill, the ability of the public service to attract and retain the skills required to execute its functions, the need to recognize productivity and performance, transparency and fairness, and equal remuneration to all persons for work of equal value (Equity).
 - iii. That vide a letter dated 4th November, 2020, Ref No. ACFC/HRM/CBA/471/2020, the 1st Respondent submitted a request for advice from the 2nd Respondent on the draft CBA between the Claimant and 1st Respondent herein, for the period 2021 – 2025.
 - iv. That the 2nd Respondent through its letter dated 4th December, 2020, Ref No. SRC/TS/ACFC/3/17/35 (44) advised the 1st Respondent on the parameters for the negotiations of the CBA, noting that there was an ongoing job evaluations exercise.
 - v. The 2nd Respondent also noted that the CBA fell within the third remuneration review cycle, and the basic salary which was an item for negotiations and should be reviewed based on the job evaluation resultant salary structures.
 - vi. The 2nd Respondent through its letter dated 1st December, 2021, Ref No. SRC/TS/ACFC/3/17/35 (44) further advised the 1st Respondent on the parameters within which to negotiate the provisional CBA with the Claimant.
 - vii. That the 1st Respondent later wrote another letter dated 7th January, 2022 Ref No. ACFC/GM/(HR & ADMIN)/082/2022 submitting another request to the 2nd Respondent for review of Leave Travelling Allowance.
 - viii. The 2nd Respondent through its letter dated 28th February, 2022 Ref No. SRC/TS/18/56(11) responded to the 1st Respondent's letter taking into consideration remuneration determination factors among them affordability, fiscal, sustainability, comparability with the Public Service and existing government policies and guidelines, upheld its earlier advice on rates applicable to Leave Travelling Allowance.
 - ix. The 1st Respondent through its letter dated 7th October, 2022, wrote another letter informing the 2nd Respondent that the Claimant had filed a trade dispute and reported the dispute to the Ministry of Labour citing the five items herein. In the letter, the 1st Respondent sought the advice of the 2nd Respondent so as to unlock the stalemate.
 - x. The 1st Respondent in addition to the five items mentioned hereinabove, also requested the 2nd Respondent to review and advise on two other items namely; shift allowance and acting allowance which though not before the Conciliator, the parties had not agreed upon.



- xi. The 2nd Respondent vide its letter dated 21st November, 2022, Ref No. SRC/TS/18/56(14) invited the 1st Respondent to deliberate on the five items requested for review.
- xii. That on 28th November, 2022 both the 1st and 2nd Respondent held a consultative meeting and deliberated on the items under dispute and upheld its earlier advice to the 1st Respondent.
- xiii. That the 2nd Respondent's then officially communicated its advice on the five items vide its letter dated 6th December, 2022.
- xiv. That having issued the advice referred herein, the 2nd Respondent has in her view, fully discharged its constitutional mandate with respect to the issues raised in the Memorandum of Claim.

Analysis and Determination

- 8. I have considered the claim and the submissions by the parties herein. The issue for determination is whether this court should determine terms and conditions subject of the collective bargaining agreement between the parties herein, on the basis of the declaration of unresolved dispute/impasse.
- 9. The Claimant proposes that this Court adopts their proposal to the 1st Respondent on the matters subject of the impasse which are; Housing Allowance, Leave Travelling Allowance, Daily Subsistence Allowance, Bicycle allowance and wages increase.
- 10. The 1st Respondent's position is that being an agency in public service, it sought guidance from the 2nd Respondent (SRC) and premised on the said guidance, its hands are now tied and can only negotiate with the Claimant within the confines of the guidance given by the 2nd Respondent.
- 11. The 1st Respondent further argues that the decision to report a trade dispute was rushed, similar to the Conciliator's decision to declare an unresolved dispute.
- 12. Although an impasse in collective bargaining suspends the negotiations, it does not in itself terminate the obligation to bargain, and the role of this Court at this point, is to enforce this obligation.
- 13. Parties in a negotiation process have a fundamental responsibility to ensure that fair labour relations are at play, just as they are required to negotiate freely and voluntarily.
- 14. This Court notes that the 1st Respondent is an entity within the public service, and for this reason, the content of bargaining is limited premised on the fact that terms and conditions of service in the public sector are governed by policies and codes of regulation that have statutory underpinning.
- 15. A collective bargaining agreement in the public sector that is negotiated without the input of the SRC is incomplete. The advisory role of the 2nd Respondent (SRC) is both mandatory and binding. Justice Otieno Odek in Teachers Service Commission v. Kenya National Union of Teachers, Civil Appeal No. 196 of 2015, held thus: -

“ The advice given by SRC is binding because the advice is not merely an opinion that is given by a friend, it is advice that has constitutional underpinning...”
- 16. This goes to say that a collective bargaining process where employees in the public sector are involved, ceases to be a bipartite and becomes instead, a tripartite process due to the mandatory and binding nature of the advisory by the SRC. Other than for reasons of fiscal sustainability, the advisory by the SRC ensures uniformity in wages across the public service.



17. It is apparent that the 2nd Respondent rendered its advisory on the pending items vide a letter dated 1st December, 2021. In my view, the advisory by the 2nd Respondent clearly sets out the parameters within which parties should proceed to negotiate and conclude the collective bargaining agreement.
18. If this Court were to make a determination on the issues in variance between the parties herein, the outcome will in my view, cease to be a collective bargaining agreement.
19. Consequently, I order that parties go into further and more intense negotiations and conclude the CBA in line with the advisory given by the 2nd Respondent (SRC).
20. This being a matter involving social partners, I make no orders on costs.
21. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 13TH DAY OF JULY, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Mutongoi present for the Claimant

Mr. Okeche h/b for Mr. Ouma for the 1st Respondent

Mr. Murakaru h/b for Ms. Bigambo for the 2nd Respondent

Christine Omolo- C/A

