



**Transport Workers Union Kenya v Atihad Airways PJSC (Cause E229 of 2022) [2023] KEELRC 1635 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1635 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE E229 OF 2022**  
**JK GAKERI, J**  
**JULY 10, 2023**

**BETWEEN**  
**TRANSPORT WORKERS UNION KENYA ..... CLAIMANT**  
**AND**  
**ATIHAD AIRWAYS PJSC ..... RESPONDENT**

**RULING**

1. Before the court for determination is a Notice of Motion by the Applicant union dated 11<sup>th</sup> April, 2022 filed under Certificate of Urgency seeking Orders That:-
  1. Spent.
  2. There be and is hereby an order directing the Ministry of Labour – CPMU division to conciliate the issues herein in dispute within a period of one (1) month.
  3. This Honourable Court do issue any other appropriate relief/Order as it may deem fit to meet the end of justice.
2. The Notice of Motion is expressed under Section 57(6) of the *Labour Relations Act*, 2007 and Sections 4 and 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and is based on the grounds set out on its face and the Affidavit sworn by Mr. Dan Mihadi on 11<sup>th</sup> April, 2022 who depones that the parties hereto have a Collective Bargaining Agreement (CBA) in force.
3. The affiant states that the applicant submitted a proposed CBA to the Respondent on 6<sup>th</sup> December, 2019 but since then the Respondent had been evasive and the terms and conditions for employment are in arrears for 53 months.



4. That the Ministry of Labour appointed a Conciliator at the instigation of the Claimant and the suit was stood over for negotiations to take place but the same reached a dead end and the parties could not agree on eight (8) issues.
5. That if the dispute persists, the employees will continue to suffer irreparably due to lack of compensation to cushion them against the Cost of Living and right to fair remuneration.
6. The affiant states that the Claimant has no other option but to refer the dispute to court under Section 73 of the *Labour Relations Act*, 2007.
7. According to the affiant, the contested issues relate to transport allowance, leave travelling allowance, sick leave, redundancy and severance pay, house allowance, leave travelling allowing, termination of employment, salary increment and effective date.

### **Response**

8. In its Replying Affidavit by Scott Neilson dated 25<sup>th</sup> May, 2022, the affiant states that he was the Senior Human Resource Business Partner-International with the Respondent based in London UK and his roles included recruitment and dealing with trade unions and negotiation of CBAs.
9. The affiant admits that after the parties signed a recognition agreement, some employees of the Respondent joined the Claimant. That contrary to the applicant's assertion that the Respondent had refused to recognize it, the Claimant filed Cause No. 1345 of 2018 before it had attained the threshold for recognition and the suit was dismissed.
10. That the Respondent had not undertaken any redundancy maliciously or without due process.
11. That the applicant's draft CBA contained excessive and prohibitive terms and only 8 out of 44 negotiable clauses were outstanding and the Respondent negotiated willingly and the contested items unreasonably exceed requirements of the law or Respondent's Counter-offers being dismissed summarily by the applicant yet they made commercial sense.
12. That the Respondent had attended all invites by the applicant to negotiate and the negotiations delayed due to a redundancy occasioned by the COVID-19 Pandemic for which neither party was to blame. That the present application is pre-mature as the dispute was yet to be referred to the mandatory conciliation process to precede the suit.
13. That although the applicant filed a dispute with the Ministry of Labour on 30<sup>th</sup> January, 2020 that the Respondent had refused to negotiate the CBA the conciliator by the name Mr. George Tsimuli did not conduct conciliation proceedings.
14. The affiant depones that the applicant had not filed a dispute with the Ministry on the contested 8 items as the same is yet to be received.
15. That the items should be placed before a Conciliator for conciliation as part of alternative dispute resolution.
16. The Respondent urges that the applicant be directed to commence the dispute in the right procedure and confirm its willingness to appear a Conciliator.
17. That the applicant has not tendered evidence to show that the Minister refused to appoint a Conciliator and any reason was given why a Conciliator was not appointed.
18. That the applicant is prematurely in court.



### **Applicant's submissions**

19. The Applicant explains that prior to the CBA negotiations, the Respondent refused to recognize the applicant which had to file a suit Cause No. E1345/2018 and the same was signed on 2<sup>nd</sup> December, 2019 and CBA proposals were delivered on 6<sup>th</sup> December, 2019 but parties were yet to agree on certain issues.
20. That pursuant to court order, the CPMU issued a report on 9<sup>th</sup> February, 2023 and the same was filed.
21. Puzzlingly, the applicant itemises the prayers it was seeking in relation to transport allowance, leave travelling allowance, sick leave entitlement, termination clause, redundancy and severance pay, salary increment, house allowance and effective date which are not prayed for in its Notice of Motion.
22. The prayers are not supported by any data or analysis.

### **Respondent's submissions**

23. Counsel detailed the history of the relations between the parties and submitted on the essence of voluntary negotiations for purpose of arriving at the terms and conditions of employment as provided by the Right or Organize and Collective Bargaining Convention (1949), Convention No. 98 of the International Labour Organization (I.L.O) to urge that CBAs come into existence through consultative engagements and/or negotiations between unions and employers in exercise of their freedom of contract as underlined by the Court of Appeal in Teachers Service Commission V Kenya National Union of Teachers (KNUT) & 3 others (2015) eKLR at paragraph 159.
24. That the applicant appeared to force onto the Respondent what it called “the airline sector practice” unknown to the Respondent and sector practice’s would have negative impact on the financial position of airlines and threaten their business.
25. Counsel submitted that the contested items raised critical legal issues such as transport allowance, which is contractual and not a legal imperative and the parties had agreed on it.
26. On sick leave, counsel urged that 120 days of paid sick leave per year was unreasonable and unfair given that the law permitted only 14 days. The court was urged to adopt what the parties had agreed during reconciliation at 15 days full pay and 15 days half pay.
27. On severance pay, its proposal of 30 days per year was reasonable as the law provides a minimum of 15 days. That the Respondent cannot sustain the extra month of ex gratia severance pay.
28. That leave travelling allowance be capped at Kshs.15,000/= as it was contractual. The Applicant’s proposal at Kshs.40,000/= was too high.
29. On house allowance, counsel urged that the court considers the CPMU report and retain the same at Kshs.7,760/= being above the 15% of basic pay.
30. On service pay, the Respondent would be prepared to pay gratuity if its income was to surge over the period and employees were members of the NSSF.
31. On wage increment, counsel urged the court to adopt its offer of 2% as allowing an increase would increase the Respondent’s Wage Bill to a colossal Kshs.2.9 million.
32. That the proposal be shelved until the Respondent recovers from its present losses.
33. Finally on effective date, counsel urged that the CBA should come into operation on registration by the court as provided by Section 59(5) of the [Labour Relations Act, 2007](#).



34. Counsel submitted that the court has been consistent that it cannot determine the terms of a CBA without allowing the parties to do so exhaustively as underscored by Nzioki Wa Makau J. in *Amalgamated Union of Kenya Metal Workers V Kenya Vehicle Manufacturers Ltd* (2018) eKLR.
35. That in cases of contestation, the issues ought to be placed before a Conciliator.
36. That although the court had jurisdiction to come up with favourable terms of a CBA, the same ought to be exercised judiciously and only in instances of a deadlock as held by the Court of Appeal in *Kenya Tea Growers Association V Kenya Plantation & Agricultural Workers Union* (2018) eKLR.
37. Counsel urged that the court would be acting judiciously if it adopted the Respondent's proposal.
38. Counsel further submitted that the applicant's proposal in paragraphs 10 & 18 were unconscionable and were not the "airline sector practice" alleged to be by the applicant during negotiations and a CBA could not be compared with those of other parties.
39. Counsel finally urged that the application and/or suit as filed was not merited and granting the orders sought would obfuscate the Respondent's right to negotiate a fair CBA.

Central Project Planning & Monitoring Department (CPP&MD Report)

40. In its report dated 9<sup>th</sup> February, 2023, the Ministry of Labour and Social Protection (herein after Ministry of Labour), considered the contested issues.
41. The Ministry found that the Respondent's labour cost as in 2021 stood at Kshs.13,900,000/= with a total of 4 unionisable employees having declined from Kshs.29,300,000/= and 9 respectively and the office had no management staffer casuals.
42. The Respondent declined to provide its audited accounts for 2019, 2020 and 2021 arguing that the laws of the United Arab Emirates the information was confidential.
43. It was therefore impossible for CPP&MD to establish the financial status of the Respondent.
44. That the Respondent had reduced its size owing to the COVID-19 Pandemic and operated a small global business and Nairobi was no longer a passenger destination.
45. That from December 2019 to December 2022, the Consumer Price Index had risen by 21.78% which implicated the Cost of Living negative.
46. On labour productivity, the Ministry found that without audited accounts, it could not comment on adjustment of compensation and the same applied to ability to pay and sustain additional labour costs.
47. On the specific disputed items, the Ministry proceeded as follows;
48. On salary increment, the Ministry compared the impact of the proposals by both parties on the wage bill i.e 10% and 2% one-off.
49. On house allowance, the Ministry was of the opinion that since Wage Guideline 2 required 2 rise in CPI to be applied to house allowance, the same ought to be raised by 10% to Kshs.8,536/=.
50. On leave travelling allowance, the Respondent made no commitment but stated that it gave its employees an air ticket once a year.
51. The parties had agreed on 30 days severance pay for every completed year in cases of redundancy but could not agree on gratuity.
52. The Ministry acknowledged that this was a negotiated issue for parties to agree.



53. Respondent provided no information on a Pension Scheme Fund and parties could not agree on the effective date.
54. The Ministry observed that the parties demonstrated good will as they negotiated and resolved all issues but 6 which are before the court yet the parties cite 8.
55. That the Respondent's business was negatively affected by the COVID-19 Pandemic from 2019 and it discontinued passenger flights to Kenya.

### **Determination**

56. Having carefully considered the Notice of Motion, responses and submissions by counsels and the Ministry of Labour, the singular issue for determination is whether the Notice of Motion herein is merited.
57. The only specific and substantive order prayed for by the Applicant herein, is for the court to direct the Ministry of Labour –CPMU division to conciliate the issues in dispute within one (1) month.
58. The Notice of Motion itemises the issues and the proposals made by both sides and hence the stalemate as follows;

Clause

Applicant/claimant's Proposal

Respondent's Proposal

1. Transport Allowance
  - Minimum Kshs.12,000/= pm
  - Lower grade 5,000/= pm
  - Higher grade 19,200/= pm
2. Leave travelling allowance
  - Kshs.45,000/=
  - Kshs.15,000/=
3. Sick leave
  - First 30 days full pay
  - Next 30 days half pay
  - First 10 days full pay
  - Next 10 days half pay
4. Termination of Employment
  - Pension Scheme Fund or service pay at 20 days for each year of service
  - No service pay
5. Redundancy and Severance pay
  - One month notice
  - 30 days wages per year of service



One (1) extra month ex gratia

20 days gross pay for each completed year of service

One (1) month notice

6. Salary increment  
Not based on performance  
Increment of 10%  
To be considered by employer based on individual performance and not guaranteed 2% increase in basic pay for employees rated as Good/meets completion of the end of year performance review effective 1<sup>st</sup> February, 2021.
7. House Allowance  
Increase of 10% from current backdated to 2017  
Minimum monthly house allowance Kshs.16,230/=  
Lowest Grade Kshs.7,760/=  
Highest Grade Kshs.51,680/=
8. Effective date  
1<sup>st</sup> December, 2017  
1<sup>st</sup> February, 2022
59. In the court's view, none of the foregoing issues were not beyond the capacity of the parties to agree if they negotiated in good faith having regard to the interests of both parties.
60. Issues such as sick leave, service pay, severance pay and house allowance which are governed by law and where the law prescribes the minimum should have been fairly straight forward for the parties to agree as long as the legal threshold is met.
61. With regard to which transport allowance and leave traveling allowance are contractual in nature, parties should have endeavour to arrive at a consensus in the spirit of give and take.
62. It is common ground that the parties herein have a Recognition Agreement but are yet to conclude a CBA since December 2019.
63. The onset of COVID-19 must have slowed down the negotiation process.
64. The applicant's complaint that the Respondent did not want to recognize it in 2019 was found to be hollow as it had sought recognition before it had attained the threshold as the court held in Cause No. 1345 of 2018 in a judgement delivered on 8<sup>th</sup> February, 2019.
65. The court has not deciphered any circumstance on the basis of which to blame any of the parties for the absence of a CBA.
66. It is also not in contest that by letter dated 6<sup>th</sup> December, 2019, the Applicant forwarded its draft, CBA to the Respondent's legal counsel at P.O. Box 35566 Abu Dhabi United Arab Emirates, a fact the Respondent admits.
67. Similarly, by letter dated 30<sup>th</sup> January, 2020, the applicant reported a dispute to the Ministry of Labour and Social Protection that the Respondent had refused to negotiate a CBA.



68. The applicant tendered no evidence of its faulted attempts to initiate negotiations after the letter dated 6<sup>th</sup> December, 2019 was dispatched to the Respondent.
69. The Ministry responded by letter dated 19<sup>th</sup> February, 2020 and appointed Mr. George Tsimuli of Nyayo House Labour Office as Conciliator.
70. The court file has no record on what transpired during the conciliation process and the outcome until the matter was filed in court and directions on conciliation given as a consequence of which the Ministry of Labour appointed Hellen Manono as a Conciliator by letter dated 8<sup>th</sup> September, 2022 to conciliate on the contested 8 clauses of the CBA who forwarded the report to the Deputy Registrar, Employment and Labour Relations Court by letter dated 8<sup>th</sup> September, 2022.
71. The report attached is undated though filed on 3<sup>rd</sup> October, 2022.
72. The report higlighted the final position of each of the 8 contentious clauses.
73. The report which neither party contested reveals that the parties were in agreement in relation to transport allowance, sick leave, redundancy and severance pay but could not agree on the ex gratia one (1) month salary.
74. Conversely, parties could not agree on leave travelling allowance, house allowance, gratuity, salary increment and effective date.
75. On the contentious issues, the Conciliator recommended as follows;
- i. Redundancy and Severance pay  
The union accepts the management’s offer of thirty (30) days for each year of service without the additional one (1) month’s pay as ex gratia. The Conciliator reasoned rightly so, in the courts that the Employment Act had a minimum of 15 days for each completed year of service and made no provision for ex gratia payment.
  - ii. On leave travelling allowance, the Conciliator recommended that the deadlock be cured by an amount of Kshs.20,000/= as the parties were deadlocked at Kshs.30,000/= and Kshs.15,000/=
  - iii. On house allowance, the Conciliator recommended that management accepts the unions proposal of Kshs.16,230/= for the lowest cadre and retain the current rate for the higher cadre.
  - iv. On termination, the Conciliator reasoned that since Section 35(5) of the Employment Act recognized pension schemes and payment of gratuity and since the NSSF contribution were too nominal, the employer could establish a contributory pension scheme for its employees or negotiate a gratuity clause.
  - v. That the CPP&MU to advice on the percentage of salary increment based on the consumer index.
  - vi. That parties adopt January 2022 as the effective date of the CBA.
76. The Conciliator urged the parties to accept the recommendations for purposes of future negotiations.
77. Intriguingly, in its instant application, the applicant makes no mention that the parties had agreed on transport allowance and sick leave and redundancy other than the ex gratia salary. It disingenuously ignored the Conciliator’s report including the recommendations yet it did not deny having been party to the negotiations.



78. On the other hand, the Respondent embraced several recommendations of the Conciliator including transport allowance, sick leave, severance pay in redundancy.
79. As the Respondent correctly submitted, and as held by case law, it is not the business of courts to negotiate or incorporate clauses in CBAs.
80. These are instruments provided by the law to enable employers and trade unions agree on terms and conditions of employees. That is why it is referred to as a collective agreement and the court is not part of that agreement. Its mandate is to register and enforce the agreement.
81. The sentiments of Nzioki Wa Makau J. in *Amalgamated Union of Kenya Metal Workers V Kenya Vehicles Manufactures Ltd (Supra)* are spot on that;
- “The court cannot descend to the arena of negotiations of terms of employment at the work place. This court guided by the Court of Appeal decision in *Teachers Service Commission V Kenya National Union of Teachers and 3 others (Supra)* has no business settling terms of the CBA.”
82. In *Teachers Service Commission V Kenya National Union of Teachers & 3 others (Supra)*, the Court of Appeal stated;
- “The very essence of a collective agreement is that the terms and conditions therein contained are voluntarily agreed upon between the employer and the union . . .
- If the Labour Court fixes basic salary in a collective agreement as the Labour court did in this case, the collective agreement ceases to be a collective agreement as envisaged by the law.”
83. Similarly, in the words of Otieno Odek J.A
- “It is my considered view that collective bargaining is neither compulsory nor automatic. It is the source of voluntarily negotiated terms and conditions of service for employees. Collective bargaining is a platform upon which trade unions can build to provide more advantageous terms and conditions of service to their members . . .
- The right is founded on the concept of social dialogue, freedom of contract and autonomy of parties in collective bargaining . . .
- The Article emphasizes the ability of the employer and trade unions to operate as partners not adversaries. The constitutional recognition of the right to collective bargaining is not a right to blackmail a party in collective bargaining.”
84. The court is in agreement with these sentiments.
85. The question of the role of the Employment and Labour Relations Court when parties cannot agree on the terms of the CBA was considered by the Court of Appeal in *Kenya Tea Growers Association V Kenya Plantation & Agricultural Workers Union (Supra)* cited by the Respondent’s counsel.
86. Under Section 73(1) of the *Labour Relations Act* provides that if a dispute is not resolved through conciliation, either party may refer the dispute to the court for determination.
87. Similarly, Section 26(2) of the *Employment Act* provides that;
- Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed



- by any judgement award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part or Part VI, then such favourable terms and conditions of service shall apply.
88. This provisions confer upon the court’s jurisdiction to decree terms that are more favourable to those prescribed by the *Employment Act*, 2007.
89. In *Kenya Chemical and Allied Workers Union V Leather Life EPZ Ltd* (2014) eKLR, Rika J. stated as follows;
- “Traditionally, the Government has set the wage floor annually . . . In seeking to move beyond the benchmark regulated by the Government, employers and employees examine compensable factors within the work place and are guided by economic factors. The court, whenever called upon to intervene in economic disputes is similarly guided by the relevant compensable factors and economic indicators.”
90. The role of the Employment and Labour Relations Court in the resolution of economic disputes and in particular where parties have not agreed on the terms of the CBA was considered by the Court of Appeal in *Kenya Tea Growers Association V Kenya Plantation and Agricultural Workers Union* (Supra) cited by the Respondent’s counsel.
91. Although the court acknowledged that this court may intervene when the parties cannot reach an agreement, it was emphatic that;
- “ . . . the power to do by the Employment and Labour Relations Court ought to be exercised judiciously and on a case by case basis where parties are unable to agree on the terms of a CBA. The court should ensure it does not substitute its preference with that of the parties’ freedom to agree on the terms of employment. The court ought to be guided by the Wage Guidelines issued by the Government.
- . . . 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.”
92. In *Kenya Ferry Services Ltd V Dock Workers Union (Ferry Branch )* (2015) eKLR stated as follows;
- “The CPL for the period 2011 to 2013 shows an average annual inflation of 5%. Whereas the employees should be compensated for the loss of money value, it is important such compensation does not result in an unsustainable wage bill.”
93. Abuodha J. expressed similar sentiments in *Kenya Game Hunting & Safaris Workers Union V Micato Safaris* (2016) eKLR.
94. The Court of Appeal in the *Kenya Tea Growers Association Case* (Supra) held that;
- “Consequently, a court faced with a question of wage increment ought to take into account productivity, Cost of Living and the ability to pay by the employer.”
95. In the instant case, the Ministry of Labour and Social Protection (Central Project Planning & Monitoring Department (CPP&MD) prepared and filed a Report on Annual Labour Costs 2019 and 2021, cost of living, labour productivity and ability of Respondent to pay and sustain additional labour costs.



96. The report is however incomplete as the Respondent did not avail its financial statement/audited accounts critical to the analysis of the Respondent's financial position and its ability or inability to meet and sustain additional wage bill which reduces the overall persuasiveness of the report.
97. Neither of the parties furnished evidence of an expert on the matters at hand.
98. Significantly, although the dispute was referred to a Conciliator who prepared a report and made specific recommendations on certain contested issues, and the next phase ought to have been to seek the court's intervention substantially as opposed to a Notice of Motion which seeks orders other than the court's intervention to determine the contested issues.
99. The applicant seeks an order to compel the Ministry of Labour (CPMU division) to conciliate the contested issues within one (1) month.
100. Since the dispute has already been subjected to conciliation and a conciliators report is on record, the court is not persuaded that further conciliation was likely to change the positions of the parties on the contested issues.
101. The suit should proceed to hearing and final determination.
102. In the upshot, the Notice of Motion dated 11<sup>th</sup> April, 2022 is unmerited and is accordingly dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF JULY 2023**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 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 *Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

