



Kenya Engineering Workers Union v Metal Crowns Limited (Employment and Labour Relations Cause E145 of 2022) [2023] KEELRC 2234 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2234 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E145 OF 2022**

**K OCHARO, J
SEPTEMBER 28, 2023**

BETWEEN
KENYA ENGINEERING WORKERS UNION CLAIMANT
AND
METAL CROWNS LIMITED RESPONDENT

RULING

1. Through a Notice of Motion, application dated March 4, 2022, expressed to be under the provisions of Section 12 of the *Employment and Labour Relations Court Act, 2016*, section 57 and 74 *Labour Relations Act, 2007*, the Claimant/Applicant seeks the following orders:
 - a. Spent
 - b. That interim orders be issued against the respondent to produce the audited financial statement for the past two years (August 1, 2018 to July 30, 2020) and produce wage bill and the number of staff for both unionsable and management before the submissions on the main claim.
 - c. Any other order the Honourable Court may deem fit to grant.
 - d. That the costs of this application be met by the respondent herein.
2. The application is premised on the grounds obtaining on the face of the application and those on the supporting affidavit of Wycliffe A Nyamwata sworn on the March 4, 2022.
3. The respondent opposes the application upon basis of the grounds of opposition dated September 19, 2022.
4. When the application was placed before this court on the September 20, 2022, the court directed that the same be canvassed by way of written submissions. The submissions have been filed.



The Application

5. The Claimant/Applicant asserted that the respondent and it have an outgoing CBA duly negotiated and registered by this court, CBA which was executed by the parties on the 25th day of March, 2019. The Respondent has refused to review the same.
6. The Claimant/Applicant contends that in line with Clause 30 of the Collective Bargaining Agreement it did forward a proposal for review to the Respondent herein. In reaction, the Respondent did a counter proposal.
7. A disagreement between the parties arose, prompting the Claimant to invoke the provisions of section 62 of the *Labour Relations Act 2007* by reporting a trade dispute to the Cabinet Secretary of Labour, through its letter dated February 8, 2020. The dispute was accepted as No MLSP/LD/IR/13/2/2021. The secretary appointed Ms Alice Chonga of Industrial Area Labour Office as a Conciliator.
8. The Claimant/Applicant contends that during the conciliation process, the respondent proposed that the same be handled by the Kenya Federation of Kenya Employers (FKE). This notwithstanding, the Respondent failed to produce documents or evidence from which her financial position would be ascertained. The most important document for this purpose was a financial audit statement.
9. In her report, the Conciliator recommended that the parties to resume negotiations as between themselves. She did not however direct the respondent to produce proper records (financial audit statement) to facilitate the negotiations. The Conciliator urged the Claimant/Applicant to consider the economic effects of Covid- 19, consideration which could not be possible without the financial documents being availed.
10. The Claimant summed it up by stating that being the justice of this matter require that the order sought be granted.

The Opposition

11. The Respondent puts forth the following grounds in opposition to the Application:
 - a. That the application is misconceived.
 - b. That the application is an abuse of the court process.
 - c. That the application is *ex-facie* incompetent and fatally defective.
 - d. That the application is a non-starter.
 - e. That the jurisdiction of this court has not been properly invoked.
 - f. That the application is premature.

The Claimant's/Applicant's Submissions

12. In the submission dated August 26, 2022, the Claimant/Applicant identifies two issues for determination thus:
 - i. Whether the grounds of opposition are merited.
 - ii. Whether the interim orders sought are merited.
13. The Applicant contends that the grounds forming basis of the opposition against its application herein, are wanting in merit, as they are not appreciative of the fact that; the outgoing (CBA) provides



that the same shall be effective from August 1, 2018 and shall remain in force for a period of two years and thereafter continue to be in force until amended, provided that the party wishing to terminate or amend the Agreement shall give one months' notice, setting out all the intended amendments; that It (the Applicant) followed the procedure provided for invocation of section 62 of the [Labour Relations Act](#) duly and, that the conciliator did issue a certificate of unresolved trade dispute.

14. As regards the merits of the application, the Applicant submits that the documents sought will help it make an informed decision as regards the dispute and will definitely aid the court to expeditiously determine the matter herein.
15. To buttress its submissions that its application is merited, the Applicant puts reliance on the decision in Cause No 240 of 2018, ELRC, [Kenya Engineering Workers Union vs Rift Valley Engineers Workers Ltd](#), and NBI ELRC, Cause No 45 of 2013 – [Kenya Engineering Workers Union vs Hebatullah Brothers Ltd](#).

The Respondent's Submission

16. The respondent submitted that in her report, the conciliator gave directions on the process of negotiation. She did not direct production audited accounts but rather spelt out the parameters within which the parties were to engage. That instead of furthering the negotiations, the applicant rushed to this court to file the instant suit and application without giving negotiations a chance.
17. The Respondent further submits that audited financial statements are private and personal information. The orders sought are not in accord with the Respondent's constitutional right to privacy. The law protects it from self-incrimination.
18. It is further submitted that section 57 of the [Labour Relations Act](#) commands parties to attempt negotiations aimed at reaching an amicable collective agreement. The Claimant has not demonstrated that the negotiations were entered into post the recommendations of the Conciliator. Instead, the Claimant proceeded to file the present proceedings. The suit herein and the application are an abuse of the court process. They are ill prompted.

Analysis and Determination

19. There is no dispute that there is a registered Collective Bargaining Agreement that was entered into and executed by the parties on the March 25, 2019. The same took effect on August 1, 2018 for a period of two years. As at the time of institution of this suit, the Collective Bargaining Agreement was an "outgoing agreement".
20. Considering how the agreement was couched, no doubt it was to remain in force until amended, replaced or terminated. I am of the view that it was upon this premise that the Claimant/Applicant proceeded to make a proposal to the respondent suggesting new terms and conditions of work for its members. The Respondent made a counter proposal which apparently was not accepted by the Applicant Union. The disagreement which ensued eventually led to the conciliation process which eventually was unsuccessful, prompting the conciliator to recommend for negotiations between the parties.
21. Disclosure of relevant information is an essential element of collective bargaining. The [Labour Relations Act](#) places a duty on the employer to disclose to a trade union all relevant information that



will enable the union engage effectively in consultation and collective bargaining. Section 57 (1) to (3) provides as follows:

1. An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.
 2. For the purpose of conducting negotiations under subsection (1), an employer shall disclose to a trade union all relevant information that will allow the trade union to effectively negotiate on behalf of employees.
 3. All the information disclosed by an employer as specified in subsection (2) is confidential and shall not be disclosed by any person to a person who is not engaged in the negotiations."
22. The issue of disclosure undoubtedly can be a thorny one. On the one part, trade unions cannot bargain effectively unless they have the necessary information. Financial information for example is essential to gauge an employer's ability to meet a union demand. On the other hand, employers may regard demands for the disclosure of information as an intrusion on managerial powers which could undermine the competitiveness of the business. See *Labour Relations Law, A comprehensive guide*, 6th Edition, Darly Du Toit Etel, 2014, page 292.
23. In interrogating the extent of the duty of disclosure, the court is enjoined to balance the employer's rights and interests against those of trade unions and employers. In my view, section 57 of the *Employment Act* provides a statutory mechanism that has to be used for attainment of the balance.
24. From the wording of the section, the employer's duty to disclose is not absolute. The obligation to disclose information is confined to "relevant" information. In the collective bargaining realm this includes all information necessary to advance, defend or refute negotiating claims. As to whether or not the information sought by a trade union is relevant is for the trade union to establish and must be determined with reference to the purpose for which it is sought.
25. I have carefully considered the circumstances of the instant matter, and the information sought and find no difficulty in concluding that the disclosure will contribute immensely to the effectiveness of the Applicant in consultations and bargaining should the negotiations recommended by the Conciliator proceed or, to, a fair, equitable and just decision, if this matter proceeds to hearing and eventually the court gets called upon to render itself on it.
26. The Respondent argues that disclosure of the information sought shall be prejudicial to it as the information in the financial audit statements is private. The fact is misplaced. Section 57 of the *Labour Relations Act* commands confidentiality in the information obtained by a trade union from the employer. A breach of the command will definitely attract a sanction(s) by the court.
27. In my view the duty to disclose facilitates the right to fair labour practice under the provision of Article 41 of the *Constitution of Kenya 2010*, to an extent that if the employer refuses to provide relevant information, he or she shall be committing an unfair labour practice. I am not persuaded therefore that the disclosure sought shall be tantamount to intrusion of the Respondent's privacy.
28. By reason of the foregoing premises, I am persuaded to find and I do that the Applicant's application is meritorious. It is hereby allowed in terms of limb (2). Each party to bear its own costs.



READ, SIGNED, AND DELIVERED THIS DAY OF 28TH SEPTEMBER, 2023.

OCHARO KEBIRA

JUDGE

In the Presence of:

Mr. Araka holding brief for Mr. Makale for the Claimant

No appearance for the Respondent

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 15th March 2020 and subsequent directions of 21st 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 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.

OCHARO KEBIRA

JUDGE

