



**Kenya Game Conservancy, Tour & Safari Workers Union v Pollmans  
Tours and Safaris Ltd; Transport Workers Union Kenya (Objector) (CBA  
E106 of 2023) [2023] KEELRC 2570 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2570 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CBA E106 OF 2023  
JK GAKERI, J  
OCTOBER 23, 2023**

**BETWEEN**

**KENYA GAME CONSERVANCY, TOUR & SAFARI WORKERS  
UNION ..... CLAIMANT**

**AND**

**POLLMANS TOURS AND SAFARIS LTD ..... RESPONDENT**

**AND**

**TRANSPORT WORKERS UNION KENYA ..... OBJECTOR**

**RULING**

1. Before the court for determination is the Objector’s Notice of Motion dated 11<sup>th</sup> May, 2023 filed under Certificate of Urgency seeking ORDERS THAT:-
  1. Spent.
  2. The Honourable Court be pleased to set aside/decline the intended registration of the CBA No. ELRCCBA E106 of 2023 between Pollmans Tours & Safaris Ltd and the Kenya Game Conservancy, Tours & Safaris Workers Union which is scheduled for registration on 17<sup>th</sup> May, 2023 pending hearing and determination of the Objectors suit under Cause No. E239/2023 which is active before this court.
  3. The Honourable Court grants any other appropriate relief/order deemed fit to meet the ends of justice.
2. The Notice of Motion is not expressed under any law but is based on the grounds set forth on its face and supported by the affidavit sworn by Mr. Dan Mihadi on 11<sup>th</sup> May, 2023 who deposes that there is an active suit under Cause No. E239 of 2023 dated 22<sup>nd</sup> March, 2022 for failure to conclude the review



of the current Collective Bargaining Agreement between the employer and the Objector union and the Respondent who applied to be joined as an interested party.

3. That the employees risk losing 24 months salary arrears and allowances from January 2021 to December 2022 because of collusion between the employer and the Respondent union.
4. That there was a Recognition Agreement and a Collective Bargaining Agreement (CBA) between the Objector and the employer which is under threat.
5. The affiant states that unionisable employees of the employer are members of the Objector union, paying monthly subscription fees and none had resigned.
6. That the CBA between the Objector and the employer remains effective until another one is agreed upon.
7. That the dispute has been reported to the Ministry of Labour.
8. The affiant states that the intended registration of the CBA dated 24<sup>th</sup> March, 2023 between the employer and the Respondent union is a malicious scheme to deprive off the unionisable employees their 24 months salary arrears and allowances.

### **Response**

9. In its response, the employer vide a Replying Affidavit sworn by Gershom Odhiambo, the Human Resource and Administration Manager of Pollmans Tours and Safaris Ltd, Mombasa deposes that the suit between the company and the Objector had nothing to do with the CBA before the court as the CBA between the Objector and the employer lapsed on 31<sup>st</sup> December, 2020 and the employer had negotiated a CBA with the Kenya Game Conservancy, Tours and Safari Workers Union which was approved by the Ministry of Labour and Social Protection vide letter dated 12<sup>th</sup> April, 2023 in accord with the provisions of the [Labour Institutions Act](#), 2007 having been signed on 24<sup>th</sup> March, 2023 and was thus binding on the parties.
10. The affiant states that the unionisable employees of the company had agreed to join the Respondent union as evidenced by the list of 116 employees annexed to the Affidavit.
11. That the list produced by the Objector dated 5<sup>th</sup> September, 2023 was not authentic as it had no signatures or membership numbers and has no reference to the Objector.
12. The affiant states that majority of the unionisable employees of the company were members of the Respondent union and the Objector union has no members or only a minority.
13. That the CBA has taken into consideration the interests of the employees and the employer as it was mutually negotiated and agreed upon.
14. The affiant states that the process of negotiating a CBA is consensual and cannot be forced on the parties.
15. That the Objector has been pestering the company to enter into a new CBA while aware that its members had decamped to the rival union.
16. The court is urged to dismiss the objection.



## Evidence

17. When the matter came on 28<sup>th</sup> September, 2023, the court directed the parties to avail specific documents to the court so as to enable the court determine the objection.
18. Specifically, the court required the Objector to provide copies of the CBA dated 2019 together with a Recognition Agreement and a list of current employees of Pollmans Tours and Safaris who were members of the Transport Workers Union, Kenya as at June 2023.
19. The Employer was to avail a list of all its unionisable employees and Mr. Nyumba for the union was to provide a List of Employees of Pollmans Tours and Safaris who were members of the union with latest deductions of June 2023.
20. On the 28<sup>th</sup> September, 2023, counsel for the Objector reported that he had filed an Affidavit with attachments.
21. Counsel for the employer confirmed compliance as well and parties were accorded 5 days to file short submissions.
22. The Objector filed a copy of the CBA dated 4<sup>th</sup> August, 2019 together with a list of 189 names, allegedly members of the Objector union in August 2023.
23. According to Mr. Gershom Odhiambo, the Human Resource and Administration Manager of Pollmans, the company and the Kenya Game Conservancy, Tours and Safari Workers Union signed a binding CBA on 24<sup>th</sup> March, 2023 and 116 employees had agreed to join the union.
24. Evidence on record reveal that as at 29<sup>th</sup> March, 2023, the Objector union had about 39 employees of Pollmans as its members.
25. The union avers that it had a Recognition Agreement with Pollmans dated 24<sup>th</sup> January, 1995 and had concluded and registered several CBAs and the Objector union had registered a CBA without terminating the Subsisting Recognition Agreement but the employees had in exercise of their right to associate joined the union.
26. Reliance was made on the provisions of Section 54(1) and 57(1) of the [Labour Relations Act](#), 2007 to urge that the union and Pollman's had concluded a CBA.
27. That the Objector ought to have lodged a complaint with the Minister for conciliation and approach the court later if the conciliation process failed.
28. The union submitted that the unionisable employees of Pollmans left the Objector in exercise of their fundamental freedom of association and had no right to interfere with the registration of the CBA.
29. It was further submitted that the objection to the registration of the CBA was unmerited.

## Objector's Submissions

30. As to whether the employer could enter into or execute a Recognition Agreement with the Respondent union, counsel submitted that since the Objector and the employer had a recognition agreement, and it had not been revoked under Section 54(5) of the [Labour Relations Act](#), 2007 as no notice had been given to the National Labour Board, it had no capacity to negotiate a CBA with the union herein.
31. The sentiments of the court in *Micato Safaris V Kenya Game, Hunting Safari Workers Union* (2017) eKLR were cited to buttress the submission.



32. According to counsel, since the Objector and the employer had a recognition agreement, no other union could enter into CBA and the purported agreement between the employer and the Respondent union was a nullity.
33. On loss of simple majority, counsel submitted that this was a question of fact and the Objector had 189 members, an allegation not backed by cogent evidence.
34. That it had not been demonstrated that the Objector had lost simple majority of the members in the company.
35. Reliance was made on the sentiments of the court in *Kenya Jockey and Betting Workers Union V Resort Kenya Ltd (2014) eKLR*.
36. It was urged that since an employee cannot be a member of two unions and they had not resigned as members of the Objector union, the alleged membership of the rival union was void.
37. It was submitted that the employer had provided a list of all its unionisable employees to demonstrate how many employees were in the two unions.
38. That the union had no Gazette Notice on deduction of dues under Section 48(1) and (2) of the *Labour Relations Act, 2007*.
39. That the Objector had demonstrated that it operated in the sector according to its Constitution, had a Legal Notice and a simple majority of all unionisable employees of Pollmans.
40. As to whether the objection should be sustained, the Objector urged that the employer and the Respondent had no valid recognition agreement and had never had a registered CBA and the 1995 agreement had been overtaken by events and the Objector had both signed as late as 4<sup>th</sup> August, 2019 and registered on 26<sup>th</sup> September, 2019 and the CBA had not lapsed as alleged but was under review.
41. Reliance was placed on the provisions of Section 59(1) and (2) of the *Labour Relations Act, 2007* on the binding effect of a CBA.
42. On taking of sides by the company, reliance was made on the sentiments of Onyango J. in *Kenya Plantations & Agricultural Workers Union V Kenya Chemical & Allied Workers Union & 2 others (2018) eKLR* to urge that the employer ought not to interfere with the affairs of a union.
43. Reliance was also made on the provisions of Section 60(6) of the *Labour Relations Act, 2007*.

### **Determination**

44. The issues for determination are;
  - i. Whether the Objector had lost the simple majority to the rival union.
  - ii. Whether the Objector's objection is sustainable in the circumstances of this case.
45. As to whether the Objector had lost the requisite simple majority, counsel for the Objector maintained that it had not as no evidence to that effect had been provided by the employer.
46. The employer on the other hand relied on the Collective Agreement on record dated 24<sup>th</sup> March, 2023 whose registration is objected to.
47. Section 54 of the *Labour Relations Act, 2007* provides that;



1. An employer, including an employer in the public sector shall recognise a trade union for purposes of Collective Bargaining if that trade union represents the simple majority of unionisable employees.
48. Under Section 54(2) of the Act, a similar principle is applicable where a group of employers or an employer's organization is involved and the Minister may after consultations with the National Labour Board publicize a model recognition agreement.
49. Section 54(5) of the Act is explicit that;

An employer or group of employers or employer's association may apply to the Board to terminate or revoke a recognition agreement.
50. It is common ground that the Objector has not only a recognition agreement with the employer but also a Collective Bargaining Agreement dated 4<sup>th</sup> August, 2019 effective 1<sup>st</sup> May, 2019 to 31<sup>st</sup> December, 2020 and neither party gave a written notice of its wish to terminate, amend or modify the agreement.
51. Finally, Clause 45.2 of the CBA provides inter alia;

“... Notwithstanding anything to the contrary contained in this clause, this Agreement shall continue to be in force until another one is finally agreed upon between the two parties to this agreement.”
52. Similarly, Section 59(1) of the *Labour Relations Act*, 2007 provides;
  1. A Collective Agreement binds for the period of the agreement –
    - a. the parties to the agreement.
    - b. all unionisable employees employed by the employer, group of employers or members of the employer's organization party to the agreement.
  2. A Collective agreement shall continue to be binding on an employer or employee who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer association.
53. Thus, contrary to the employer's submission that the CBA had expired, it had not by virtue of Clause 45.2 and would appear to explain the exchange of letters between the parties on negotiations.
54. Records reveal that the Objector had already made an offer sometime in 2022 and the employer had by email dated 14<sup>th</sup> November, 2022 acknowledged that the management was working on a counter proposal and would revert as soon as it was finalized.
55. The Objector's letter to the employer dated 28<sup>th</sup> November, 2022 underlines the urgency with which it wanted the CBA for the year 2022/2023 negotiated and concluded.
56. Regrettably, no counter proposal had been made by 15<sup>th</sup> December, 2022 and by 2<sup>nd</sup> February, 2023, the employer was still consulting.
57. By email dated 13<sup>th</sup> February, 2023, the management of the employer requested for 10 days to compare notes with its board.
58. The Objector reported a Labour Dispute to the Cabinet Secretary, Ministry of Labour and Social Protection on 20<sup>th</sup> February, 2023 and the Ministry appointed a Conciliator on 23<sup>rd</sup> February, 2023 who invited the parties for a meeting scheduled for 8<sup>th</sup> March, 2023 at 10.00 an.



59. Regrettably, the Conciliator's report was that no agreement had been reached and ELRC Cause No. E239 of 2023 was filed on 24<sup>th</sup> March, 2023 seeking various interim orders which the court declined to grant.
60. Strangely, the Objector filed a substantive suit to prevent the registration of CBA and a similar objection before the court seized of the matter thus seeking similar orders before different judges.
61. There is no substantive suit before this court other than the objection to the registration of the CBA.
62. In a strange twist, by letter dated 22<sup>nd</sup> February, 2023, the General Secretary of the Kenya Game, Conservancy Tour & Safari Workers Union (the Respondent union) notified the Secretary of the Objector union that the employer's workers had approached and re-joined the union.
63. Contrary to the Objector's submission that it had a membership of 189 employees of the employer herein, no verifiable evidence was provided.
64. There is no cogent evidence to show that the 189 names identified are indeed employees of Pollmans and are infact members of the Objector union and if indeed the 189 were members of the Objector union, their acknowledgment of membership forms and payroll code attached account for about 56 employees only leaving out 133 employees.
65. The employer on the other hand provided records which would, on the face of it appear to confirm that the Respondent union had recruited about 106 employees into its membership.
66. From the documents availed by the parties, it is clear that employees of the company are shared by the two rival unions and whether or not the company has recognition agreement or CBA with the Objector or not, the employees are exercising their right to join or participate in the activities and programmes of a trade union as ordained by Article 41(2)(c) of *the Constitution* of Kenya, 2010.
67. As the company did not avail a list of its unionisable employees so as to ascertain how many had joined the two unions, and the evidence provided by the Objector lacks verifiability, it is difficult to determine which of the two rival unions enjoys a simple majority, the CBA herein notwithstanding.
68. Stripped off, its legal technicalities and other side issues, the dispute between the Objector union and the Respondent union is competition for membership.
69. There is no dispute that a large number of members of the Objector union have decamped to the rival union and the Objector hopes that the court will assist it regain its membership, an issue outside the jurisdiction of this court.
70. However, from the correspondence on record, it is clear that the company herein kept the Objector union waiting for a deal that it was keen to bring to fruition. This would perhaps explain why it took long to make a counter proposal and had to be reminded by the General Secretary of the Objector union.
71. The inference to be drawn from the happenings from November 2022 to 23<sup>rd</sup> November, 2023 is that the employer created the impression that it was committed to negotiating a CBA with the Objector union while it had another agenda. It was not negotiating in good faith and may have played a key role in enlisting the Respondent union.



72. The court is in agreement with the sentiments of Maureen Onyango J. in *Kenya Plantations & Agricultural Workers Union V Kenya Chemical & Allied Workers Union & 2 others (Supra)* that it was wrong for an employer to take sides in a dispute between unions or interfere with their membership.
- “ . . . This is wrong. The law is clear that an employer is not supposed to interfere in membership of employees’ trade union. The second respondent should not be seen to be siding with one trade union the complaining that it is in a quagmire as two unions are competing over the membership of its employees. It should not be seen to be recommending a ballot to establish which union has more members . . . ”
73. This is the situation the employer herein finds itself by having negotiated with the Objector union half-heartedly while concomitantly negotiating with the Respondent union and concluded a CBA with it to the chargin of the Objector union.
74. It requires no gainsaying that trade unionism is firmly rooted in Kenya’s industrial relations and is an integral part of the work place and space and cannot be wished away.
75. Trade unions play an essential role in nurturing and sustaining industrial harmony in agitating for the rights of workers without serious disruptions of industrial harmony.
76. No doubt the Employment and Labour Relations Court is an essential component of the matrix.
77. Having found that neither the Respondent union nor the Objector union has established that it has the requisite simple majority, I will now proceed to determine whether the Objectors objection is merited.
78. As correctly submitted by the Objector’s counsel, Section 60 of the *Labour Relations Act, 2007* prescribes the circumstances in which the court may register a collective agreement.
79. Under Section 60;
1. Every collective agreement shall be submitted to the Industrial Court for registration within 14 days of its conclusion.
  2. . . .
  3. . . .
  4. . . .
  5. The Industrial Court may register an agreement –
    - a. in the form it was submitted by the parties; or
    - b. with any amendment or modification agreed to by the parties.
  6. The Industrial Court shall not register a collective agreement that –
    - a. conflicts with this Act or any other law; or
    - b. does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issue by the Minister.
  7. The Industrial Court –
    - a. may register a collective agreement within fourteen days of receiving it.



- b. may refuse to register a collective agreement unless all parties to the agreement have had an opportunity to make oral representations to the Industrial Court; and
  - c. shall give reasons for refusing to register any collective agreement.
80. It is common ground that the company herein and the Respondent union have a Collective Bargaining Agreement which the relevant Ministry has forwarded to the court for registration.
81. It is trite law that a collective agreement is an agreement as ordained by Section 59(1) of the [Labour Relations Act](#) and becomes enforceable and implementable only after it is registered.
82. In Kenya National Private Security Workers Union V Wells Fargo Ltd (2020) eKLR, the court cited the sentiments of the court in Nairobi City County Government V Kenya County Government Workers Union; Salaries and Remuneration Commission (Interested Party/Applicant) (2019) eKLR as follows;
- “ . . . A CBA generally is a binding contract between the parties whose effect is provided under Section 59 of the [Labour Relations Act](#) and whose implementation takes effect after its registration in court.
- Consequently, a CBA just as a contract may be set aside on the same principles that would apply in setting aside a contract. In Social Service League M.P. Shah Hospital V KUDHEIHA (2018) eKLR (the court held)
- A collective agreement is a contractual agreement like any other left to party autonomy, save that it is underpinned by specific statutory provisions which if breached would render it or the offending clauses illegal.
- A part from the illegality, the normal legal principles in setting aside a contract would apply, and these include establishment that there was fraud or misrepresentation.”
83. The gravamen of the Objectors case is that the employer and the Respondent union could not enter into a recognition agreement as the employer had already recognized the Objector union and concluded a CBA and the parties were negotiating a review of the CBA.
84. It is unclear to the court as to what the situation was prior to the CBA concluded in 2019 as the Respondent union laments that the relationship between the Objector and the employer was short-lived.
85. Equally, the Respondent union accuses the Objector of interfering with its activities and entered into an unlawful engagement with the employer.
86. In the court’s view, if the union had a subsisting recognition agreement with the employer prior to 2019 which appears to have been the case, and the Objector union and the employer entered into a recognition agreement and negotiated a CBA, the scenario is analogous to the present situation, where the Respondent union has concluded a CBA with the employer in the presence of a recognition agreement and CBA with Objector union.
87. Needless to emphasize, it is clear that the Objector union has no exclusive right to represent employees in this category.
88. The dispute between the Objector union, the employer and the Respondent union is not beneficial to the employees, who regrettably are now pawns in this unnecessary contestation.
89. More significantly, the court has been notified that there is a pending case between the Objector union and the employer regarding the issue of registration of the instant CBA and documents reveal that



the suit was filed on 24<sup>th</sup> March, 2023, almost three weeks before the instance CBA was presented for registration.

90. Since the Objector union's suit was filed under Certificate of Urgency, service was directed by the court and effected on the parties.
91. Evidently, all the parties to CBA herein were aware of the Objector union's case before the CBA was presented for registration which would suggest, and for purposes of orderliness that the other suit ought to be determined before the CBA is registered as it involves two of the parties.
92. In the court's view, it would be injudicious to register the CBA herein while aware that there is a pending suit between the Objector union and the employer herein.
93. It is trite that a party must be accorded its day in court to ventilate its case.
94. For the foregoing reasons, registration of CBA dated 24<sup>th</sup> March, 2023 shall be held in abeyance pending the hearing and determination of ELRCC No. E239 of 2023.
95. There shall be no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF OCTOBER 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**

