



University Academic Staff Union (UASU) v Kisii University; Ministry of Labour and Social Protection & another (Interested Parties) (Miscellaneous Case E085 of 2023) [2023] KEELRC 2904 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2904 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E085 OF 2023
JK GAKERI, J
NOVEMBER 16, 2023

BETWEEN

UNIVERSITY ACADEMIC STAFF UNION (UASU) APPLICANT

AND

KISII UNIVERSITY RESPONDENT

AND

MINISTRY OF LABOUR AND SOCIAL PROTECTION .. INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

RULING

1. Before the court for determination is the Applicant's Notice of Motion dated 5th April, 2023 seeking Orders That;
 1. The Honourable Court do register the internal Collective Bargaining Agreement between the Applicant Union and the Respondent employer for the period 2013 – 2017 dated October 2019.
 2. The costs of the Application be borne by the Respondent/Employer.
2. The Notice of Motion is expressed under various articles of the *Constitution* of Kenya, 2010 and provisions of the *Labour Relations Act*, 2007, *Employment and Labour Relations Court Act*, 2011 and the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and is based on the grounds set out on its face and supported by the Affidavit of Dr. Constantine Wasonga sworn on 5th April, 2023.



3. The affiant deposes that the applicant union and the Respondent had executed a Collective Bargaining Agreement (CBA) which was submitted to the Ministry of Labour and Social Protection vide letter dated 27th October, 2022.
4. That the CBA was executed after indepth negotiations which were conducted in accordance with the law and all items were agreed upon.
5. The affiant further disposes that the applicant union is surprised by the Ministry's failure to transmit the CBA to court for registration without any justification.
6. The affiant depones that the union and the Respondent are bound by the CBA and it is unjust for the Ministry to frustrate the process as none of the parties is disputing the execution.
7. That the unreasonable refusal by the Ministry of Labour and Social Protection to facilitate registration of the CBA is a violation of the applicant's members constitutional right to fair labour practices, fair hearing and reasonable working conditions.
8. That the delay equally violates Section 57 of the *Labour Relations Act*, 2007.
9. Finally, the affiant urges the court to register the CBA as approved by the parties to safeguard the rights of the Applicant's members.
10. The Respondent did not file a Replying Affidavit.
11. However, the Interested Parties filed a letter from the Ministry of Labour and Social Protection objecting to the registration of the CBA between the Applicant union and the Respondent on the premise that the CBA in question was not accompanied by the Salaries and Remuneration Commission clearance letter, a fact communicated to the bearer of the CBA document.
12. The letter states that "it is mandatory for all CBAs relating to public institutions to have SRC Clearance before presentation to the Ministry for analysis."
13. According to the Ministry of Labour and Social Protection, the parties to the CBA did not comply with the procedure and it could not recommend registration of the CBA.
14. To buttress its case, the Ministry of Labour and Social Protection attached copies of two letters from the Salaries and Remuneration Commission Ref No. SRC/Ts/SC/3/17 and Ref No. MLSSS/6/3 VOL 1 (25) to the Principal Secretary, Ministry of Labour and Social Protection and the Chief Registrar of the Judiciary dated 29th April, 2014 and 8th May, 2014 respectively urging the recipients of the letters to ensure that all CBAs relating to public sector employers had been analysed by the Ministry of Labour and Social Protection and had been advised on by the Salaries and Remuneration Commission to prevent public sector employers to commit the Government to CBAs that it cannot afford to implement besides distorting and promoting disparities in public sector wages.

Applicant's Submissions

15. Counsel for the Applicant Union isolated two issues namely; whether there was a valid CBA between the union and the Respondent for the period 2013 – 2017 and whether the court should register the CBA for the period 2013 – 2017.
16. Regarding the validity of the CBA, counsel submitted that parties negotiated, concluded and executed a CBA and forwarded the same to the Ministry of Labour and Social Protection for purposes of registration but the same remained unregistered even though there was no objection.



17. Counsel submitted that there was a valid CBA between the parties.
18. As to whether the court should register the CBA, counsel submitted registration was the next step as there was no opposition to the registration and parties are bound by the documents they execute.
19. Counsel urged that the Ministry's refusal to facilitate registration of the CBA was a violation of the Constitution of Kenya, 2010, Labour Relations Act, 2007 and Section 4 and 5 of the Fair Administrative Action Act, 2015.
20. Reliance was made on the decision in Inter Public Universities Councils Consultative Forum of the Federation of Kenya Employers & 2 others V KUDHEIHA; Ministry of Education & 3 others (Interested Parties) CBA No. 1 of 2020 where the court allowed registration of the CBA in accordance with the provisions of Section 60 of the Labour Relations Act, 2007.
21. Counsel urged the court to register the CBA as executed and approved by parties.
22. On 11th October, 2023, the Interested Party was accorded 4 days within which to file its Replying Affidavit and submissions but had not filed by the time the court retired to prepare this ruling.

Determination

23. The singular issue for determination is whether there is a registrable CBA before the court.
24. The applicant union's counsel submitted that there was a valid CBA ready for registration by the court as it had been negotiated, agreed upon and duly executed by the parties and the next logical step was registration.
25. Noteworthy, the Ministry of Labour and Social Protection's objection was filed after the Applicant union had filed and served its submissions and regrettably did not address the issue.
26. The Ministry of Labour and Social Protection's objection is based on the ground that certain procedural steps were not complied with and the CBA was therefore not registrable.
27. Black's Law Dictionary, 10th Edition defines the term valid to mean "Legally sufficient; binding, a valid contract."
28. It also defines a contract as;

"An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable by law."
29. Although a Collective Bargaining Agreement (CBA) is an agreement analogous to any other, it is heavily regulated by the law and becomes a binding contract only after registration by the Employment and Labour Relations Court, in accordance with the provisions of the Labour Relations Act, 2007 and the Employment and Labour Relations Court (Procedure) Rules, 2016.
30. Section 60 of the Labour Relations Act, 2007 sets out the circumstances in which a collective agreement may be registered.
31. The import of Section 60 of the Labour Relations Act, 2007 is that a Collective Bargaining Agreement ought to be submitted to the Employment and Labour Relations Court for registration within 14 days of its conclusion and registered within 14 days of receiving it.
32. The court has jurisdiction to register a CBA in the form in which it is submitted or with amendments as agreed upon by the parties.



33. Section 60(6) identifies the circumstances in which a CBA cannot be registered.
34. The essence of registration of a CBA is encapsulated in Section 59(5) of the *Labour Relations Act*, 2007 which provides that;

“A collective agreement becomes enforceable and shall be implemented upon registration by the Employment and Labour Relations Court and shall be effective from the date agreed upon by the parties.”
35. Undoubtedly, the act of registration of a CBA constitutes the agreement between the parties a legally enforceable CBA and as exemplified by Section 59(3) of the *Labour Relations Act*, 2007

“The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.”
36. It would appear to follow that before a CBA is registered, it has no force of law.
37. Evidently, the CBA between the Applicant Union and the Respondent herein is an agreement between them as opposed to a contract.
38. To the issue whether there is a valid CBA between the Applicant Union and the Respondent, the court returns that there is an agreement between the parties with potential of maturing into an enforceable CBA on registration.
39. The other issue for determination is the Interested Parties objection to the registration of the CBA by its Letter from the Ministry of Labour and Social Protection dated 5th October, 2023 which prominently questions the exclusion of the Salaries and Remuneration Commission (SRC) from negotiation process.
40. Although, Dr. Constantine Wasonga, the Secretary General of the Applicant Union is unambiguous that the union and the Respondent held indepth negotiations on every item and did so in accordance with the law and concluded the instant CBA, which the parties executed on 6th November, 2019, the parties did not present the CBA to the Ministry of Labour and Social Protection for analysis until 27th October, 2022, almost one year later. More significantly, the Applicant Union did not avail evidence to show that the Ministry of Labour and Social Protection analysed the CBA and confirmed compliance with the relevant guidelines on salary and other terms and conditions of employment as required by law.
41. In the absence of such evidence, the CBA before the court is not registrable.
42. The affiant makes no reference to the engagement, consultation or advise from the Salaries and Remuneration Commission whose advise on remuneration and benefits of all public officers is a constitutional imperative.
43. The court finds it exceedingly difficult to comprehend that the Applicant Union and the Respondent were unaware of the role of the SRC with regard to CBAs affecting employers of public officers.
44. Perhaps, the parties imagined that it was possible to circumvent the SRC’s scrutiny in the process.
45. The powers and functions of the SRC under Article 230(4)(b) and 5 of the *Constitution* of Kenya, 2010 and Section 11 of the *Salaries and Remuneration Commission Act* demonstrate beyond peradventure that the SRC has a central role to play in the determination of salaries and benefits of employees in the public service.



46. The foregoing is fortified by a 5 Judge Bench Court of Appeal decision in *Teachers Service Commission (TSC) v Kenya National Union of Teachers (KNUT) & 3 others* (2015) eKLR where the learned judges underscored the role of the Salaries and Remuneration Commission in the determination of salaries and benefits of public officers and the binding nature of its advice.
47. According to Githinji JA, the presiding judge;
- “Having regard to the mischief that the institutionalization of the SRC under the *Constitution* was intended to cure, the principles of public finance and fiscal responsibility, the budgetary process and the complexity of salaries and benefits determination for public officer, I hold that the advice of SRC under Article 230(4)(b) on remuneration and benefits of all public officers is binding on the national and county governments and any power or function exercised without the advice is invalid.”
48. The court was unanimous that while employers of public officers were at liberty to negotiate CBAs with trade unions, SRC’s advice had to be sought and obtained as demanded by the *Constitution* of Kenya, 2010.
49. Mwilu JA (as she then was) put it as follows;
- “No valid salary and/or benefit of a state or public officer, as appropriate shall ensue from a process that ignores the roles of SRC as I have reproduced them above . . . there can be no doubt that SRC has to be involved in its advisory role in negotiations on the conclusion of a CBA involving public officers. The manner and style of how that is to be done is not primary, what is of paramount importance, to my mind is that SRC’s advise has to be sought and once obtained, it is binding . . .”
50. Finally, J.O. Odek JA stated;
- “I hereby come to the conclusion and finding that the advise given by SRC is binding . . .
- Seeking SRC’s advise is a constitutional procedural step, the content of the advise given is substantive as it affects the remuneration rights and entitlements of public officers . . .
- The practical consequence is that SRC has an integrated over-arching centripetal force in the determination of remuneration and benefits payable to public officers which includes teachers . . .
- SRC is the forum for determining fiscal sustainability of the remuneration and benefits of all public officers. One ignores SRC at his/her own peril.”
51. The court is bound by the decision of the Court of Appeal and enlists the sentiments of Radido J. in *Kenya National Union of Nurses v Moi Teaching and Referral Hospital; SRC & Ministry of Labour Interested Parties* (2015) eKLR as follows;
- “The above citations leave no doubt that the advise by the Salaries and Remuneration Commission is binding not only to the Teachers Service Commission but other public body employers . . .”
52. No doubt employees of public universities are public officers and as ordained by Article 230(4)(b) of the *Constitution* of Kenya, 2010, the SRC has an essential role to play in the determination of salaries and benefits payable to such officers and its advise must be sought.



53. There is no scintilla of evidence on record to show that the parties jointly or separately sought SRC's advice or informed it that CBA negotiations had commenced or were in progress.
54. The refusal by the parties and the Respondent in particular, to engage the SRC vitiated the CBA negotiations and the outcome as the parties blatantly ignored a constitutional procedural step in the process.
55. The foregoing is also consistent with the provisions of Section 15(6) of the *Employment and Labour Relations Court Act*, 2011 which provides that;
- Nothing in this Section shall preclude the court from making reference to the guidelines as may be published from time to time by the Salaries and Remuneration Commission to the extent to which they may be relevant to the dispute.
56. From the foregoing analysis, it is evident that the CBA forwarded to the Principal Secretary, Ministry of Labour and Social Protection vide letter dated 27th October, 2022 for transmission to the Employment and Labour Relations Court for registration was invalid and thus incapable of being registered.
57. In the upshot, the Applicant Union's Notice of Motion dated 5th April, 2023 is unmerited and is accordingly dismissed.
58. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF NOVEMBER 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 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 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

