



University Academic Staff Union (UASU) v Egerton University; Ministry of Labour and Social Protection & another (Interested Parties) (Miscellaneous Case E086 of 2023) [2023] KEELRC 2803 (KLR) (8 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2803 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E086 OF 2023
JK GAKERI, J
NOVEMBER 8, 2023**

BETWEEN

UNIVERSITY ACADEMIC STAFF UNION (UASU) APPLICANT

AND

EGERTON 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 (CBA) between the Applicant Union and the Respondent employer for the period 2013 – 2017 dated 2nd March, 2020.
 2. That 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, provisions of the *Labour Relations Act*, 2007 and the *Employment and Labour Relations Court Act*, 2011 as well as the Employment and Labour Relations Court (Procedure) Rules, 2016 and is based on the grounds set forth on its face and supported by the Affidavit of Dr. Constantine Wasonga sworn on 5th April, 2023.



3. The affiant depones 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 initially vide letter dated 6th April, 2021.
4. That the CBA was executed after indepth negotiations which were conducted in accordance with the law and all items were discussed and agreed upon.
5. The affiant expresses surprise that the Ministry of Labour and Social Protection had without justification failed to forward the CBA to the court for registration.
6. The affiant further deposes that the Applicant Union and the Respondent are bound by the CBA and it is unfair for the Ministry to frustrate the process as none of the parties is disputing the CBA.
7. The affiant states that the unreasonable refusal by the Ministry of Labour and Social Protection to facilitate a registration of the CBA is a violation of the Applicant's members constitutional rights to fair labour practice, hearing and reasonable working conditions among other rights.
8. The affiant urges the court to register the CBA as approved by the parties to safeguard the rights of the employee's represented by the Applicant union.
9. The Respondent did not file a Replying Affidavit.
10. 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 ground that the Ministry was the avenue through which CBAs are transmitted to the court for registration as they had to be analysed to ascertain that they were consistent with the relevant Wages Order Guidelines and Salary levels issued by the Cabinet Secretary from time to time and other terms and conditions of employment.
11. That guided by the SRC's letter Ref No. SRC/TS/3/17 dated 29th April, 2014, all CBA's relating to public sector employees had to be advised by the SRC before being transmitted to the Ministry for purposes of analysis and registration by the court.
12. The Ministry of Labour and Social Protection's letter is unequivocal that the parties to the CBA did not comply with the procedure and the Ministry could not recommend registration of the CBA.
13. 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 were 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 from committing the Government to CBAs that it cannot afford to implement besides exacerbating distortions and disparities in public sector wages.

Applicant's submissions

14. As to whether the parties herein had a valid CBA, counsel submitted that the Applicant union and the Respondent engaged in indepth negotiations, concluded and executed a CBA and forwarded the same to the Ministry of Labour and Social Protection vide letter dated 6th April, 2021.
15. Counsel further submitted that negotiations were conducted in accordance with the law and no objection had been raised.



16. Counsel urged that the parties had a valid CBA.
17. As to whether the 2013 – 2017 CBA ought to be registered, counsel submitted that despite forwarding the CBA to the Ministry of Labour and Social Protection and sending reminders, the CBA remains unregistered yet the registration had not been objected to. That the Ministry’s refusal to facilitate registration of the CBA violated the Applicant’s members rights under Article 41 of *the Constitution* of Kenya, 2010 and Section 57 of the *Labour Relations Act*, 2007.
18. Counsel urged that the CBA was beneficial to the Applicant’s Union members.
19. 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)* where the court registered the CBA in question.
20. Finally, counsel cited the provisions of Section 60 of the *Labour Relations Act*, 2007 to urge the court to register the CBA as it is from the SRC and the CBA was negotiated in accord with the guidelines given by the SRC.

Respondent’s submissions

21. The Federation of Kenya Employers (FKE) submitted that the Respondent was a state corporation and a public service organization within the meaning of Regulation 2 of the Salaries and Remuneration Commission (Remunerations and Benefits of State and Public Officers) Regulations.
22. It is further submitted that the Applicant union and the 1st Respondent had a valid CBA for the period 2013 – 2017 concluded in January 2019 and the 1st Respondent sought guidance.
23. The Federation of Kenya Employers invited the court to take judicial notice of the fact that the national economic performance has been low and budgetary allocation to the Respondent could be guaranteed and the court ought not to give directions that cannot be implemented and are not sustainable.
24. The Federation of Kenya Employers contended that as the applicant and the 1st Respondent are social partners, engagement on terms and conditions of employment must take into consideration the job security of employees and enterprise sustainability.
25. It is further submitted that the court should be hesitant to make unimplementable orders as it would cause friction and erode trust and peace in industrial relations.
26. The Federation of Kenya Employers urged the court to consider the holding in *BIFU V Post Bank Ltd and Kenya Chemical Workers Union V Pyrethrum Processing Company of Kenya Ltd* where the court expressed itself with finality on the role of the Salaries and Remuneration Commission.
27. Strangely, the Federation of Kenya Employers is ambivalent on whether the CBA herein ought to be registered.

Determination

28. The issue for determination is whether the CBA before the court at the instance of the Applicant Union is a registrable.
29. While the applicant union submitted that there was a valid and registrable CBA before the court, the 1st Respondent is ambivalent about it and leaves it to the court to decide.



30. It is noteworthy that the objection by the Ministry of Labour and Social Protection was filed long after Applicant Union had filed its submissions and had not addressed the issue of external approval of CBAs relating to public sector organizations.
31. The objection is premised on non-compliance with a certain procedures.
32. The 1st issue for determination is whether there is a valid CBA before the court.
33. Black’s Law Dictionary, 10th Edition defines the term valid as “Legally sufficient; binding, a valid contract.”
34. It also defines a contract as;

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable by law.”
35. Although a Collective Bargaining Agreement (CBA) is an agreement analogous to any other, it is heavily regulated by the law and becomes enforceable after registration by the Employment and Labour Relations Court pursuant to the provisions of the *Labour Relations Act*, 2007 and the *Employment and Labour Relations Court (Procedure) Rules*, 2016.
36. Section 60 of the *Labour Relations Act* sets out the circumstances in which a Collective Bargaining Agreement may be registered by the court.
37. Section 60(1) of the *Act* is unequivocal that;

“Every Collective Agreement shall be submitted to the Employment and Labour Relations Court for registration within fourteen days of its conclusion.”
38. It is the duty of the employer or employer’s organization which is party to the CBA to submit the agreement for registration failing which the trade union may do so.
39. The court is empowered to register CBA in the form it was submitted or with amendments as agreed upon by parties.
40. Significantly, under Section 60(6) of the *Labour Relations Act*, 2007, a CBA is not registrable if it;
 - a. conflicts with the Act or any other law; or
 - b. does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister.
41. The essence of registration of a CBA is encapsulated in Section 59(5) of the *Labour Relations Act*, 2007 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.”
42. It therefore follows that the act of registration of a CBA converts the agreement between the parties into an enforceable and implementable CBA and as provided by Section 59(3) of the *Act*,

“The terms of the collective agreement shall be incorporated into the Contract of Employment of every employee covered by the collective agreement.”



43. It would appear to follow that an unregistered CBA has neither the force of law nor is it implementable.
44. Flowing from the foregoing analysis, it is evident that the CBA between the Applicant Union and the Respondent is an agreement as opposed to a contract.
45. Consequently, 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 them with the potential of maturing into a CBA on registration.
46. The other issue for determination is the propriety of the Interested Party's objection to the registration of the CBA vide the letter dated 5th October, 2023.
47. The Ministry's letter faults the CBA on two ground, namely;
 - i. The Central Planning and Project Monitoring Department (CPPMD) of the Ministry, which analyses CBAs on behalf of the Ministry to ensure compliance with guidelines on relevant Wage Orders and Guidelines and salary levels issued by the Cabinet Secretary from time to time and other terms and conditions of employment had not done so.
 - ii. That all CBAs relating to public sector employers forwarded to the Ministry of Labour and Social Protection for analysis must have been negotiated in accordance with the advice of the Salaries and Remuneration Commission and cleared for registration.
48. The 1st ground of objection by the Ministry is exemplified by the provisions of Section 60(6) of the [Labour Relations Act, 2007](#). The court cannot register a CBA if the guidelines on wages, salary levels and other conditions of employment issued by the Cabinet Secretary have not been complied with.
49. It is the duty of the Ministry of Labour and Social Protection to satisfy itself that its guidelines on wages, salary levels and other terms and conditions of employment as prescribed have been complied with.
50. In the absence of documentary evidence from the Ministry of Labour and Social Protection, the CBA before the court is not registrable by the Court.
51. Finally, as regards the role of the Salaries and Remuneration Commission (SRC), to the credit of the Respondent, documentary evidence on record reveal that as early as 1st November, 2018, the Vic-Chancellor of the Respondent wrote to the Salaries and Remuneration Commission seeking the Commission's review and concurrence to facilitate registration of CBA 2013 – 2017 between the University and the Applicant Union.
52. The letter itemised the eight (8) types of allowances the CBA sought to increase. It also proposed to increase the retirement age of Assistant Lectures, Lecturers and Senior Lectures to 70 years.
53. Although, the Respondent did not attach a response from the Commission, it submitted another letter dated 31st January, 2019 on registration of the CBA as well as the commencement of negotiations between the Respondent and kudheihia for 2013 – 2017.
54. Records reveal that SRC gave its advisory vide letter Ref No. SRC/TS/UG/ Vol. VII 48 dated 9th August, 2019 and by letter dated 2nd March, 2020, the Respondent sought the Commission's concurrence to facilitate registration of the CBA 2013 – 2017.
55. In its response to the Respondent's letter, vide letter dated 5th May, 2020, the SRC stated that a review of the CBA for 2013 – 2017 between the Respondent and the Applicant Union showed that it complied with the advisory given on all items with financial implications save for the increase in the



retirement age for Assistant Lecturers, Lecturers and Senior Lecturers and the Respondent was advised accordingly.

56. Finally, the SRC notified the Respondent that;

“ . . . Once the CBA is reviewed within the parameters advised, Egerton University to forward a signed copy of the concluded CBA to the Commission, for issuance of a ‘Clearance Letter’ to facilitate registration at the Employment and Labour Relations Court.”

57. Strangely, the Applicant Union submitted copies of the CBA to the Principal Secretary, Ministry of Labour and Social Protection for registration vide letter dated 24th July, 2020. The letter indicated that the CBA was concluded and signed on 2nd March, 2020, the date on which the Respondent forwarded a copy of the CBA for its approval and subsequent registration.

58. For unexplained reasons, the Applicant Union and the Respondent’s action appear to contradict each other.

59. Puzzlingly, the Applicant Union submitted the CBA to the Principal Secretary, Ministry of Labour and Social Protection for a second time vide letter dated 6th April, 2021 citing part of the SRC’s advisory dated 5th May, 2020 with copies of the Chairperson SRC, Vice Chancellor Egerton University and the Secretary General, Trade Union Congress of Kenya (TUC-Ke).

60. According to the Applicant Union, the CBA was compliant.

61. There is no evidence on record to show that the SRC gave the clearance for the CBA herein to be registered.

62. It requires no gainsaying that Article 230(4)(b) 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.

63. The foregoing is fortified by the Court of Appeal decision in *Teachers Service Commission (TSC) V Kenya National Union of Teachers (KNUT) & 3 others* (2015) eKLR where the learned judges underlined the role of the Salaries and Remuneration Commission in determination of salaries and benefits of public officers and the binding nature of its advise.

64. According to Githinji JA, the presiding judges;

“Having regard to the mischief that the institutionalization of the SRC under *the Constitution* was intended to cure the principles of the 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.”

65. The court was unanimous that while employers of public officers are 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.

66. Mwilu JA (as she then was) stated 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 . . .”

67. 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.”

68. The court is bound by the decision of the Court of Appeal.

69. In *Kenya National Union of Nurses V Moi Teaching and Referral Hospital; SRC & Ministry of Labour (Interested Parties)* (2015) eKLR, Radido J. stated as follows;

“The above citations leave no doubt that the advice by the Salaries and Remuneration Commission is binding not only to the Teachers Service Commission but other public body employers . . .”

70. 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.

71. Although there is evidence on record to show that the Respondent sought SRC's advise and it was given, the Applicant Union forwarded the CBA 2013 – 2017 to the Ministry of Labour and Social Protection before the SRC had given a clearance letter as intimated in its letter dated 5th May, 2020.

72. In the court's view, the failure to obtain SRC's clearance vitiated the CBA between the Applicant Union and the Respondent.

73. From the foregoing analysis, it is evident that the CBA forwarded by the Applicant Union to the Principal Secretary, Ministry of Labour and Social Protection vide letter dated 6th April, 2021 for transmission to the Employment and Labour Relations Court is not registrable.

74. In the upshot, the Applicant Union's Notice of Motion dated 5th April, 2023 is unmerited and it is accordingly dismissed.

75. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH 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

