



University Academic Staff Union (UASU) v Garissa University; Ministry of Labour and Social Protection & another (Interested Parties) (Miscellaneous Case E088 of 2023) [2023] KEELRC 2778 (KLR) (8 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2778 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E088 OF 2023
JK GAKERI, J
NOVEMBER 8, 2023

BETWEEN

UNIVERSITY ACADEMIC STAFF UNION (UASU) APPLICANT

AND

GARISSA 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 as executed by the parties.
 2. The costs of the Application be borne by the Respondent/Employer.
2. The Notice of Motion is expressed under Articles 22(1) and (2), 23(1) and (3), 27 and 41 of the *Constitution* of Kenya and Section 12(1)(2) and (3) and 57(1) of the *Labour Relations Act, Employment and Labour Relations Court Act* and Rules 28 and 32 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.
3. The Notice of Motion is based on the grounds set forth on its face and the Supporting Affidavit sworn Dr. Constantine Wasonga on 5th April, 2023 who deposes that the parties had indepth negotiations



which culminated in the agreement within the parameters given and all items were negotiated and agreed upon and the same forwarded the same to the Ministry of Labour as practice dictates for purposes of registration vide letter dated 8th May, 2020.

4. The affiant expresses surprise that the Ministry of Labour and Social Protection had not forwarded the CBA to the court for registration despite reminders.
5. That the parties were bound by the documents they executed and it was imprudent for the Ministry of Labour and Social Protection to frustrate the process as neither of the parties have contested the CBA.
6. The affiant states that the refusal by the Ministry of Labour and Social Protection to present the CBA for registration was unreasonable and violates the Applicant Union's members constitutional rights to fair labour practices, remuneration and working conditions.
7. The affiant further deposes that the actions and omissions of the Ministry violated Section 57 of the Labour Relations Act, Article 47 of the Constitution of Kenya and Sections 4 and 5 of the Fair Administrative Action Act and urges the court to register the CBA.

Replying Affidavit

8. By its Replying Affidavit dated 5th July, 2023 sworn by Salah Farah, the Registrar Administrative and Planning of the Respondent, the affiant deposes that the Salaries and Remuneration Commission's circular to the Respondent dated 14th December, 2021 provided guidelines on the terms of the CBA since the Respondent is a public institution.
9. The affiant states that the parties that negotiated the draft CBA 2013 – 2017 on 17th March, 2020 did not follow the Guidelines prescribed by the Salaries and Remuneration Commission (SRC) and did not obtain a clearance letter to facilitate registration of the CBA.
10. That the parties did not adhere to the guidelines by the SRC which is mandated to do so by Article 230(4) of the Constitution of Kenya, 2010.
11. The affiant accuses the Applicant for having excluded the SRC from joining Misc. Application E088 (the Application herein).
12. The affiant further deposes that the Salaries and Remuneration Commission was mandated by the Constitution of Kenya, the Salaries and Remuneration Act and the Employment and Labour Relations Court Act to participate in the registration of the CBA between the parties herein.
13. The affiant states that without the input and clearance of the SRC, the CBA is illegal.
14. Worthy of note, the office of the Attorney General filed a Letter of Objection dated 5th October, 2023 from the Ministry of Labour and Social Protection. The letter objects to the registration of the instant CBA as it had not received a no objection letter from the SRC.

Applicant's submissions

15. Counsel addressed two issues;

As to whether there is a valid Collective Bargaining Agreement between the parties for the period 2013 – 2017, counsel submitted that there was as evidenced by the record and a copy had been forwarded to the Ministry of Labour and Social Protection vide letter dated 8th May, 2020 and cited the sentiments of Radido J. in Social Service League, MP Shah Hospital v KUDHEIHA (2018) eKLR to urge that a CBA was an agreement like any other binding on the parties thereto and the instant CBA was agreed upon without duress, coercion, fraud or misrepresentation.



16. Counsel submitted that the SRC had not specifically objected to the registration of the CBA and its circular came after the CBA had been concluded and freely executed and it was consulted after the CBA was concluded.
17. According to counsel, the immediate past CBA was implemented in the same way and the Employer/ Respondent had not raised any concerns regarding its registration.
18. Sentiments of the court 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, were cited to urge the court to register the CBA as the court did in that case.
19. Reliance was also made on the decision in *Said Ndege v Steel Makers Ltd* (2014) eKLR to reinforce the submission.
20. Counsel urged that the employer's objection was bad in law and was intended to delay registration of the CBA.
21. As to whether the court ought to register the CBA herein, counsel submitted that it should do so as the CBA was unopposed and parties are bound by the documents they had duly executed and the Respondent's objection violated the Applicant's members rights under Article 41 of the *Constitution* of Kenya, 2010 and Section 57 of the *Labour Relations Act*, 2007.
22. Reliance was also made on the provisions of Section 60 of the *Labour Relations Act*, 2007 and the decision in *Kenya Union of Commercial Foods and Allied Workers v National Social Security Fund; Salaries and Remuneration Commission (Objector)* (2021) eKLR to urge the court to register the CBA.
23. When the matter came up on 13th July, 2023, the Respondent and the Interested Party had not complied and were accorded 14 days to do so. The Respondent was absent on 20th September, 2023. Counsel for the Interested Party sought 14 days to file a response.
24. The applicant's counsel urged the court to set a ruling date which the court did and accorded the Respondent and Interested Party 10 days to file responses and submissions. The Interested Party filed the Ministry of Labour and Social Protection Letter. The Respondent did not file submissions.

Determination

25. The singular issue for determination is whether the court should register the Collective Bargaining Agreement (CBA) 2013 – 2017 between the Applicant Union and the Respondent dated 17th March, 2020.
26. It is common ground that the CBA between the Applicant Union and the Respondent was freely negotiated and executed by the parties and consistent with the provisions of Section 59 of the *Labour Relations Act*, 2007 as elaborated by case law, a CBA is a binding agreement analogous to any other contract and may only be set aside on the principles that govern the setting aside of ordinary contracts such as duress, undue influence, misrepresentation, mistake. (See *Social Services League, M.P. Shah Hospital v KUDHEIHA* (supra) and *Nairobi City County Government v Kenya County Government Workers Union; Salaries and Remuneration Commission (Interested Party Applicant)* among others.
27. As correctly submitted by counsel for the Applicant Union, the CBA in question is to all intents and purposes an agreement between the parties thereto and on registration it would become part of the employment contract in conformity with the provisions of Section 59(3) of the *Labour Relations Act*, 2007. It becomes a binding and enforceable contract.



28. It is also not in contest that after the CBA was executed by the parties, the Applicant Union forwarded a three copies of the CBA to the Principal Secretary, Ministry of Labour and Social Protection vide letter dated 8th May, 2020.
29. The letter requested the Principal Secretary to have the CBA registered by the Employment and Labour Relations Court as by law required.
30. There is no evidence on record or allegation that the CBA in question was forwarded to the court for registration.
31. The Applicant Union faults the Ministry of Labour and Social Protection for the delay in the registration of the CBA and urges the court to register the CBA.
32. Although it is unclear as to why the Ministry of Labour and Social Protection delayed in forwarding the CBA to court for registration, the Respondent argues that though it executed the CBA, it was not negotiated in accordance with the SRC Guidelines contained in Circular No SRC/Ts/10(76) dated 14th December, 2021, more than one (1) after execution of the CBA.
33. The circular to the Vice Chancellor of the Respondent University makes reference to a previous Letter Ref No GaU/EXT/79/21 dated 7th May, 2021 and Ref No GaU/EXT/122/21 dated 7th July, 2021 by the Respondent.
34. The letter advised the Respondent to negotiate with the Applicant union on the basis of 27 items categorised as allowances and the negotiations were to cover 1st July, 2021 and 30th June, 2025.
35. The Applicant Union counters this argument by submitting that the circular came after the parties had negotiated and concluded the CBA which is the correct position. However, prudence would have dictated that a copy of the CBA be forwarded to the Salaries and Remuneration Commission for its perusal before it was forwarded to the Minister of Labour and Social Protection.
36. Had the CBA been registered then, the instant suit would not have arisen. It is discernible that the Ministry of Labour and Social Protection had concerns with the CBA and may have consulted on the way forward. However, it does not appear to have notified the Applicant Union or the Respondent that it had any concerns and the Applicant Union on the other hand tendered no evidence that it made any follow up after 8th May, 2020 till 14th December, 2021.
37. The delay in forwarding the CBA to the court for registration remains unexplained and regrettably for the Applicant Union, an unregistered CBA is an unenforceable promise by virtue of Section 59(5) of the Labour Relations Court Act, 2007 which provides that;

“ A Collective Agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.”
38. This case turns on the role of the SRC in CBA negotiations between unions and public institutions.
39. The Salaries and Remuneration Commission (SRC) is one of the Commissions established by the Constitution of Kenya, 2010 under Article 230(1) and one of its core functions is to;

“ advise the national and county government on the remuneration and benefits of all public officers”



- having regard to the parameters set out in Article 230(5) of the Constitution of Kenya, 2010 such as sustainability of public wage bill, attraction and retention of skills, productivity and performance as well as transparency and fairness.
40. As acknowledged by Abuodha J. in National Hospital Insurance Fund v Kenya Union of Commercial Food and Allied Workers & 2 others (2016) eKLR, in order to fall within the mandate of the SRC, the body or organization concerned must of essence be a public body employing or appointing either state officer or public officers.
41. Article 260 of the Constitution defines a public officer as “any state officer or any other than a state officer who holds a public office . . .”
42. Under Section 11 of the Salaries and Remuneration Commission Act, 2011, in addition to the powers and functions of the Commission under Article 230(4) of the Constitution of Kenya, 2010, the Commission shall;
- a. inquire into and advise on the salaries and remuneration to be paid out of public funds.
 - b. keep under review all matters relating to the salaries and remuneration of public officers.
 - c. . . .
 - d. . . .
 - e. determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation.
43. Similarly, Section 15(6) of the Employment and Labour Relations Court Act, 2011 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.
44. In addition to the constitutional and statutory framework on the powers and functions of the SRC, its role in the negotiation and conclusion of CBAs between unions and public institutions was pronounced by the Court of Appeal in Teachers Service Commission (TSC) v Kenya National Union of Teachers (KNUT) & 2 others (2015) eKLR where, according to Githinji JA;
- “Having regard to the mischief that the institutionalization of 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.”
45. The five justices of appeal were unanimous that whereas employers in the public service were at liberty to negotiate salary and other benefits with trade unions, SRCs advice had to be sought and be obtained.
46. Mwilu JA (as she then was) was emphatic that;
- “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 advice has to be sought and once obtained, it is binding . . .”

47. According to Koome JA (as she then was);

“ . . . SRCs advice is fundamental in the conclusion of a CBA which deals with terms and conditions of Public Officers.”

48. Finally, in the words of Odek JA;

“I hereby come to the conclusion and finding that the advice given by SRC is binding. The advice is binding because to hold otherwise would render the functions of SRC under Article 230(5) idle, it would make SRC ineffective and irrelevant.

. . . Seeking SRC's advice is a constitutional procedural step; the content of the advice given is substantive as it affects the remuneration rights and entitlements of public officers . . . the binding nature of the advice given by SRC is a matter involving interpretation of the following provisions of law . . . the binding nature of SRC advice is a constitutional matter dependent on the governance structure established by the *Constitution* . . . SRC advice is not advice in persona, it is advice in rem as it limits and determines remuneration rights and entitlements of public officers. Being advice in rem, SRC advice binds all persons, state organs and independent commissions and the judge came to the conclusion and finding that the advice by SRC is binding . . .

A literal reading of Article 230(4)(b) of the *Constitution* shows that SRC is not one of the envisaged external forces against whom the shield of independence can be waved. the *Constitution* vide Article 230(4)(b) and (5) has integrated SRC in the determination of all matters relating to remuneration and benefits of public officers.

The practical consequences is that SRC has an integrated, over-arching centripetal force in the determination of remuneration and benefits payable to public officers which includes teachers. Using company law analogy, the advice given by SRC is like a floating charge hovering over all public service and when it descends it attaches, crystallizes and binds anything and everything that it lands upon . . . SRC has teeth and can, bite and must bite and shall bite. 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.”

49. The court is bound by the foregoing sentiments, findings and holding of the Court of Appeal.

50. In *Kenya National Union of Nurses v Moi Teaching and Referral Hospital; SRC & Ministry of Labour (Interested Parties)* (2015) eKLR, the learned judge relied on the Court of Appeal decision above, holding that;

“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 not only in terms of Article 259(2) but as well as in terms of Article 230(4)(b) of the *Constitution*.”

51. The learned judge proceeded to state that the person with power to fix the remuneration of public officers (other than state officers) is the national and county governments as well as such other legal entities created by law to whom advice is given.



52. This would include public universities and the Respondent is one of them.
53. Being an employer of public officers, the Respondent was constitutionally obligated to seek SRCs advice before it executed the CBA in question but did not.
54. Having found that the Applicant Union and the respondent negotiated and concluded the 2013 – 2017 CBA without involvement of the Salaries and Remuneration Commission, the CBA presented to the court for registration is not registrable as it relates to the remuneration and/or benefits of public officers.
55. The requisite advise ought to have been sought before the negotiations commenced to ensure that the negotiations proceed in accordance with the guidelines provided by the SRC.
56. The absence of the SRC in the process vitiated the CBA rendering the CBA herein not registrable.
57. In the upshot, the Application dated 5th April, 2023 is unmerited and it is accordingly dismissed with no orders as to 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

