



University Academic Staff Union (UASU) v Jomo Kenyatta University of Agriculture and Technology; Ministry of Labour and Social Protection & another (Interested Parties) (Miscellaneous Case E084 of 2023) [2023] KEELRC 2791 (KLR) (7 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2791 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E084 OF 2023
JK GAKERI, J
NOVEMBER 7, 2023**

BETWEEN

UNIVERSITY ACADEMIC STAFF UNION (UASU) APPLICANT

AND

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY RESPONDENT

AND

**MINISTRY OF LABOUR AND SOCIAL PROTECTION .. INTERESTED PARTY
ATTORNEY GENERAL INTERESTED PARTY**

Conditions that a Collective Bargaining Agreement (CBA) has to meet for it to be registrable.

The applicant union sought the registration of a Collective Bargaining Agreement (CBA) that had been negotiated with the respondent university. The Ministry of Labour and Social Protection objected to the registration, citing the exclusion of the Salaries and Remuneration Commission (SRC) from the negotiation process. The court held that a CBA was only enforceable after registration by the Employment and Labour Relations Court, and the failure to involve the SRC rendered the CBA invalid. The application was dismissed, with each party bearing their own costs.

Reported by John Ribia

Labour Law – Collective Bargaining Agreements – registrability - validity – enforceability – Collective Bargaining Agreement vis-à-vis agreement – what conditions did a Collective Bargaining Agreement have to fulfill for it to become registrable - whether a Collective Bargaining Agreement became a binding contract upon attestation by the parties or upon registration by the Employment and Labour Relations Court - what was the role of the Salaries and Remuneration Commission in the formulation and registration of Collective Bargaining Agreements – Constitution of Kenya, 2010, article 230(4)(b) and (5); Labour Relations Act (Cap 233) sections 59(3), and 60; Labour Institutions Act (Cap 234) section 160(6); Salaries and Remuneration Commission Act (Cap 412D) section 11.



Labour Law – public officers – remuneration of public officers – mandate of Salaries and Remuneration Commission – classification of employees of public universities – whether employees of public universities were public officers - whether the Salaries and Remuneration Commission had a role to play in the determination of salaries and benefits payable to employees of public universities - Constitution of Kenya, 2010 article 230(4)(b) and (5); Salaries and Remuneration Commission Act (Cap 412D) section 11.

Words and Phrases – valid – definition - legally sufficient; binding, a valid contract - Black's Law Dictionary, 10th Edition.

Words and Phrases – contract – definition - an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable by law - Black's Law Dictionary, 10th Edition.

Brief facts

The applicant union and the respondent had executed a Collective Bargaining Agreement (CBA) which was submitted to the Ministry of Labour and Social Protection for registration at the Employment and Labour Relations Court. The applicant contended and the respondent entered and executed a Collective Bargaining Agreement (CBA) after in-depth negotiations.

The applicant union contended that the applicant union was surprised by the Ministry's failure to transmit the CBA to court for registration without any justification. It was further contended that the applicant union and the respondent were bound by the CBA and it was unjust for the Ministry to frustrate the process as none of the parties was disputing the execution. That the unreasonable refusal by the Ministry of Labour and Social Protection to facilitate registration of the CBA was a violation of the applicant's members constitutional right to fair labour practices, fair hearing and reasonable working conditions.

Ministry of Labour and Social Protection filed an objection contending that certain procedural steps were not complied with and that the CBA was not registrable.

Issues

- i. Whether a Collective Bargaining Agreement became a binding contract upon attestation by the parties or upon registration by the Employment and Labour Relations Court.
- ii. What conditions did a collective bargaining agreement have to fulfill for it to become registrable?
- iii. What was the role of the Salaries and Remuneration Commission in the formulation and registration of Collective Bargaining Agreements?
- iv. Whether employees of public universities were public officers.
- v. Whether the Salaries and Remuneration Commission role to play in the determination of salaries and benefits payable to employees of public universities.

Held

1. Valid meant legally sufficient; binding, a valid contract. A contract was an agreement between two or more parties creating obligations that were enforceable or otherwise recognizable by law.
2. Although a Collective Bargaining Agreement (CBA) was an agreement analogous to any other, it was heavily regulated by the law and became 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. Section 60 of the Labour Relations Act, 2007 sets out the circumstances in which a Collective Bargaining Agreement may be registered. The import of section 60 was that a Collective Bargaining Agreement must be submitted to the Employment and Labour Relations Court for registration within 14 days of its conclusion and may be registered within 14 days of receiving it.
3. The Employment and Labour Relations Court had jurisdiction to register a CBA in the form it was submitted or with amendments as agreed upon by the parties. Section 160(6) of the Labour Institutions Act, 2007 identified the circumstances in which a CBA could not be registered.
4. The essence of registration of a CBA was encapsulated in section 59(5) of the Labour Relations Act, 2007 as a collective agreement that became 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.
5. The act of registration of a CBA constituted the agreement between the parties to a legally enforceable CBA. Under section 59(3) of the Labour Relations Act, the terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.
 6. Before a CBA was registered, it had no force of law. The CBA between the applicant union and the respondent was an agreement between them as opposed to a contract. There was an agreement between the parties with potential of maturing into an enforceable CBA on registration.
 7. The other issue for determination is the Interested Party's objection to the registration of the CBA as exemplified by the letter from the Ministry of Labour and Social Protection dated October 5, 2023 which prominently questions the exclusion of the Salaries and Remuneration Commission (SRC) from negotiation process.
 8. The applicant union did not avail evidence to show that the Ministry of Labour and Social Protection analysed the CBA and confirmed its compliance with the relevant guidelines on salary and other terms and conditions of employment as required by law. In the absence of such evidence, the CBA before was not registrable.
 9. It was difficult to comprehend that the applicant union and the respondent were unaware of the role of the Salaries and Remuneration Commission (SRC) with regard to CBAs affecting employers of public officers. The parties might have imagined that it was possible to circumvent the SRC's mandate in the process.
 10. The powers and functions of the SRC under article 230(4)(b) and (5) of the Constitution, and section 11 of the Salaries and Remuneration Commission Act demonstrated that the SRC had a central role to play in the determination of salaries and benefits of employees in the public service.
 11. Employees of public universities were public officers and as ordained by article 230(4)(b) of the Constitution of Kenya, 2010, the SRC had an essential role to play in the determination of salaries and benefits payable to such officers and its advice must be sought. The parties did not jointly or separately seek SRC's advice or informed it that CBA negotiations had commenced or were in progress. The refusal by the parties to engage the SRC, and the respondent in particular, vitiated the CBA negotiations and the outcome as the parties blatantly ignored a constitutional procedural step in the process.
 12. The CBA forwarded to the Principal Secretary, Ministry of Labour and Social Protection for transmission to the Employment and Labour Relations Court for purposes of registration was invalid and incapable of being registered.

Application dismissed.

Orders

Parties to bear their own costs.

Citations

Cases

Kenya

1. *Inter Public Universities Councils Consultative Forum of the Federation of Kenya Employers & 2 others v Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA); Ministry of Education, Ministry of Labour, Attorney General & Salaries and Remuneration Commission (Interested Parties) Cause 1, 2 & 3 of 2020; [2020] KEELRC 739 (KLR) - (Mentioned)*
2. *Kenya National Union of Nurses v Moi Teaching and Referral Hospital Board & 2 others Cause 1 of 2015; [2015] KEELRC 90 (KLR) - (Mentioned)*
3. *Teachers Service Commission v Kenya National Union of Teachers (KNUT) & 3 others Petition 3 of 2015; [2015] KEELRC 863 (KLR) - (Mentioned)*



4. *University Academic Staff Union (UASU) v Chuka University; Ministry of Labour and Social Protection & another (Interested Parties)* Miscellaneous Case E087 of 2023; [2023] KEELRC 2783 (KLR) - (Mentioned)

Texts

Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 1B- (Interpreted)
2. Civil Procedure Rules (cap 21 Sub Leg) order 21 rule 1- (Interpreted)
3. Constitution of Kenya articles 159(2)(d); 230(4)(b) - (Interpreted)
4. Employment and Labour Relations Court (Procedure) Rules, 2016 (cap 8E Sub Leg) In general- (Cited)
5. Employment and Labour Relations Court Act (cap 8E) section 15(6)- (Interpreted)
6. Labour Institutions Act (cap 234) section 160(6) - (Interpreted)
7. Labour Relations Act (cap 233) sections 57, 59(3); 60 - (Interpreted)
8. Salaries and Remuneration Commission Act (cap 412D) section 11- (Interpreted)

Advocates

None mentioned

RULING

1. Before the court for determination is the applicant's notice of motion dated April 5, 2023 seeking orders that;
 1. The court do register the internal Collective Bargaining Agreement (CBA) between the applicant Union and the respondent employer for the period 2017 – 2021 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 various articles of the *Constitution of Kenya, 2010* and provisions of the *Labour Relations Act*, *Employment and Labour Relations Court Act* 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 April 5, 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 October 27, 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 Applicant union and the Respondent are bound by the CBA and it was 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 April 29, 2014 and May 8, 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. 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.
16. Counsel further submitted that negotiations were conducted in accordance with the law and no objection had been raised.
17. Counsel urged that the parties had a valid CBA.
18. As to whether the 2017 – 2021 CBA ought to be registered, counsel submitted that despite forwarding the CBA to the Ministry of Labour and sending reminders, the CBA remained 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 Ac, 2007*.
19. Counsel urged that the CBA was beneficial to the applicant's members.
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)* where the court registered the CBA in question.



21. 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.
22. 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 cannot be guaranteed.
23. That the court ought not to give directions that cannot be implemented and not sustainable.
24. 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 Remunerations Commission.
27. Strangely, the Federation of Kenya Employers is ambivalent on whether the CBA herein ought to be registered or not.
28. Intriguingly, the applicant's written submissions dated on July 20, 2023 and duly filed make reference to the CBA for the period 2013 – 2017 dated 2nd March, 2020 yet the Notice of Motion dated April 5, 2023 seeks the registration of the CBA for the period 2017 – 2021 as executed by the parties dated March 17, 2020.
29. The supporting affidavit sworn by Dr. Constantine Wasonga does not make things better as it is reticent on the CBA in respect of which it was sworn.

Respondent's Submissions

30. On May 9, 2023 when the applicant union's notice of motion dated April 5, 2023 came up for hearing, the applicant Union was represented. The court directed counsel to reserve the notice of motion and deferred the hearing to 13th July, 2023 when counsel for the interested party prayed for 14 days to file and serve a response and submissions.
31. Parties were accorded 14 days a piece to file their submissions and hearing was scheduled for 26th September, 2023 when counsel for the interested party confirmed that her submissions in this matter were identical to those filed under Misc. E087 of 2023 *Universities Academic Staff Union v Chuka University Ministry of Labour & Social Protection (Interested Party)* and prayed for 7 days to file and serve but did not. Puzzlingly, no submissions had been filed in respect of Misc. E087 of 2023 *University Academic Staff Union v Chuka University*.
32. In the end, no submissions were filed.

Determination

33. The singular issue for determination is whether there is a registrable CBA before the court.
34. 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.



35. Noteworthy, the Ministry of Labour and Social Protections objection was filed after the Applicant union had filed and served submissions and regrettably did not address the issue.
36. 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.
37. *Black’s Law Dictionary*, 10th Edition defines the term valid to mean “Legally sufficient; binding, a valid contract.”
38. It also defines a contract as;
- “An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable by law.”
39. 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*.
40. Section 60 of the *Labour Relations Act, 2007* sets out the circumstances in which a collective agreement may be registered.
41. The import of section 60 of the *Labour Relations Act, 2007* is that a Collective Bargaining Agreement must be submitted to the Employment and Labour Relations Court for registration within 14 days of its conclusion and may be registered within 14 days of receiving it.
42. The court has jurisdiction to register a CBA in the form it was submitted or with amendments as agreed upon by the parties.
43. Section 160(6) of the *Labour Institutions Act, 2007* identifies the circumstances in which a CBA cannot be registered.
44. The essence of registration of a CBA is encapsulated in section 59(5) of the *Labour Relations Act, 2007* as follows;
- “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.”
45. 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.”
46. It would appear to follow that before a CBA is registered, it has no force of law.
47. Evidently, the CBA herein between the Applicant Union and the Respondent is an agreement between them as opposed to a contract.
48. 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.



49. The other issue for determination is the interested party's objection to the registration of the CBA as exemplified by the Letter from the Ministry of Labour and Social Protection dated October 5, 2023 which prominently questions the exclusion of the Salaries and Remuneration Commission (SRC) from negotiation process.
50. Although, Dr. Constantine Wasonga, the Secretary General of the Applicant union is unambiguous that the Applicant 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 March 17, 2020 and forwarded the same to the Ministry of Labour and Social Protection for analysis. More significantly, the Applicant Union did not avail evidence to show that the Ministry of Labour and Social Protection analysed the CBA and confirmed its compliance with the relevant guidelines on salary and other terms and conditions of employment as required by law.
51. In the absence of such evidence, the CBA before the court is not registrable.
52. More significantly, 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.
53. 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.
54. Perhaps, the parties imagined that it was possible to circumvent the SRC's mandate in the process.
55. 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.
56. The foregoing is fortified by the 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 determination of salaries and benefits of public officers and the binding nature of its advice.
57. 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 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.”
58. 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](#).
59. Mwilu J.A (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 . . .”

60. 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.”

61. 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 where the learned judge relied on the Court of Appeal decision above, and stated 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 . . .”

62. 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.

63. 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.

64. The refusal by the parties to engage the SRC, and the respondent in particular, vitiated the CBA negotiations and the outcome as the parties blatantly ignored a constitutional procedural step in the process.

65. 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.

66. From the foregoing analysis, it is evident that the CBA forwarded to the Principal Secretary, Ministry of Labour and Social Protection for transmission to the Employment and Labour Relations Court for purposes of registration was invalid and thus incapable of being registered.

67. In the upshot, the applicant Union's notice of motion dated April 5, 2023 is unmerited and is accordingly dismissed.

68. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH 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 March 15, 2020 and subsequent directions of April 21, 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

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