



Banking Insurance & Finance Union (Kenya) v Access Bank (Kenya) PLC (Employment and Labour Relations Cause E948 of 2021) [2023] KEELRC 2870 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2870 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E948 OF 2021
MA ONYANGO, J
NOVEMBER 2, 2023**

BETWEEN
BANKING INSURANCE & FINANCE UNION (KENYA) CLAIMANT
AND
ACCESS BANK (KENYA) PLC RESPONDENT

RULING

1. The Claimant is a trade union registered under the *Labour Relations Act* to represent employees in the Banking and Insurance sector as more specifically set out in the union's constitution.
2. The Claimant has a recognition agreement with the Kenya Bankers Association with whom it has negotiated several collective Bargaining Agreements (CBA)s on behalf of the staff of the Association's member banks.
3. The Respondent herein is a commercial bank registered under the *Banking Act* to carry on banking business within the Republic of Kenya and is a member of the Kenya Bankers Association and by virtue thereof, bound by the CBA between the Claimant and the Association.
4. It is the Claimant's case that it concluded the negotiations for the CBA for the period 2021/2023 on August 19, 2021 and the CBA was registered by the Court on September 22, 2021. That in line with Section 59 of the *Labour Relations Act* the CBA became enforceable upon registration.
5. According to the Claimant, unionisable employees of the Respondent were entitled to salary increment of 4% effective March 1, 2020 and a further 3% with effect from March 1, 2021 in addition to an increase of 6% on all allowances effective March 1, 2021.
6. It is the Claimants case that the Respondent did not implement the CBA resulting in the underpayment of the Claimant's members in the Respondent's employment.



7. In the memorandum of claim dated November 16, 2021 the claimant seeks the following reliefs which I reproduce verbatim: -
 - a. The Claimant would wish to humbly pray to this Honourable Court to order the Respondent to immediately compute and pay all the unionisable employees of the bank who are covered by the CBA a 4% salary increment with effect from March 1, 2020 and a further 3% salary increment effective March 1, 2021 and another 6% increment on all the allowances which are contained in the CBA.
 - b. That the payments enumerated in (1) above will be paid retrospectively in arrears with effect from March 1, 2020 and March 1, 2021 accordingly.
 - c. Costs of the suit
8. The memorandum of claim was filed together with an application by way of notice of motion in which the Claimant sought the following orders: -
 - a. That this Honourable Court be pleased to certify this instant Application as urgent and the same heard ex-parte in the 1st instant and service be dispensed with.
 - b. That this Honourable Court be pleased to issue interim ex-parte orders compelling the Respondent herein to compute and pay all the unionisable employees of the bank a 4% General Wage increment effective March 1, 2020 and a further 3% General Wage increment and a 6% review on all the allowances as indicated in the CBA with effect from March 1, 2021.
 - c. Costs of this suit.
9. The application is made under Section 59(5) and Section 60(5) of the *Labour Relations Act*, No. 14 of 2007 Article 41(5) of the *Constitution* of Kenya and all other enabling provisions of the Law.
10. In response to the Memorandum of Claim and the application, the Respondent filed grounds of opposition dated November 30, 2021, a replying affidavit of Isaac Onyango, the Respondent's Legal Officer sworn on January 20, 2022 and a Memorandum of Response dated July 18, 2022.
11. According to the Respondent, the Claimant reported a trade dispute to the Cabinet Secretary, Ministry of Labour and Social Protection by letter dated August 11, 2020. The issues in dispute were: -
 1. Violation of the parties CBA by underpaying unionisable employees of the bank.
 2. Failure/refusal to remit to the union Agency Fees from unionisable employees who are not members of the union but are covered by the Collecting Agreement as required by the parties CBA and Section 49 of the *Labour Relations Act*, No. 14 of 2007.
12. The dispute was accepted by the Cabinet Secretary and Mr. Jacob Gatimu appointed as conciliator by letter dated August 27, 2020.
13. It is the Respondent's case that the Conciliator invited the parties for a meeting on September 17, 2020 during which he encouraged them to meet and resolve the issues at their own level. That the parties met and were able to reach settlement and a consent was signed on March 16, 2021 in which the parties agreed as follows:-
 1. That the Respondent shall pay to the Claimant a sum of Kenya Shillings One Million, Seven Hundred and Seventy-One Thousand, Two Hundred Only (Kshs. 1,771,200.00) being



settlement for the arrears of agency fees for the period, January 2018 to December 2020 into the following Claimant's Bank Account:

Bank: Standard Chartered Bank

Branch: Harambee A venue

Beneficiary: Banking Insurance Finance Union (K)

Account No.: 01XXX144800

Swift Code: SCBKENXXXX

2. That the Respondent shall commencing the month of March, 2021 deduct and remit Agency fees for all the unionisable employees in their employment to the Claimant.
3. That the Respondent shall endeavor to harmonize the salaries of all unionisable employees to the minimum basic salary entry points as per the Collective Bargaining Agreement dated 1st September, 2019 within a period of Twenty-Four (24) months from the date hereof.
4. That in a bid to harmonize the pay as stipulated in paragraph 3 hereinabove, the Respondent shall endeavor to effect salary increments with respect to the differential pay in three (3) instalments on or about the following set dates:
 - i. March 1, 2021
 - ii. March 1, 2022
 - iii. February 28, 2023
5. That this Consent be and is hereby adopted as the full agreement and/or settlement of the parties with respect to the claim(s) and is binding on the Claimant and its members on one part, and the Respondent and its representatives on the other part.
6. That this Consent be and is hereby adopted as the outcome of the Conciliation proceedings herein.
14. The Respondent avers that the consent was adopted as the full agreement and/or settlement and according to the terms of agreement, the three increments were to be implemented by 2023.
15. According to the Respondent the consent provided that harmonization of the salaries of all unionisable employees with the minimum basic salary entry points as per CBA dated 1st September, 2019 would be implemented between March 1, 2021 and February 28, 2023.
16. It is further the Respondent's position that both the consent dated March 16, 2021 and the CBA dated August 19, 2021 are set to run within the same period being March 1, 2021 to February 28, 2023.
17. The Respondent submits that the CBA registered on September 22, 2021 does not set aside nor vary the items of the consent which allowed the Respondent to harmonize the wages of its unionisable employees during the period between March 1, 2021 and 28th February, 2023.
18. The Respondent submits the terms of the consent signed on March 16, 2021 can only be set aside on grounds of fraud, collusion, for misrepresentation or misapprehension of material facts, if it is contrary to policy or for grounds upon which the court can set aside an agreement. For emphasis the Claimant relies on the decisions in *Flora N. Wasike v Destimo Wamboko* (1982-88) IKAR 625; *Teachers Service Commission v Kenya National Union of Teachers (KNUT) & 3 Others* [2015] eKLR; *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* [2015] eKRL; *Kuwindia Rurinja Co. Limited v*



Andkuwinda Holdings Limited & 13 Others [2019] eKLR and *Purcell v F.C. Trigell Ltd* [1970] 2 All ER 671.

19. It is the Respondent's position that it is not under obligation to abide by the terms of the CBA entered into between KBA and BIFU until after 2023 as to do so would amount to unjust enrichment of the Claimant and its members. On this point the Respondent relied on the decision in *Samuel Kamu Macharia v Kenya Commercial Bank, Kenya Commercial Finance Company Limited* [2003] eKLR.
20. The Respondent prayed that the Claim be dismissed with costs relying on the decision in *Peter Munila Ngure v Equity Bank* [2018] eKLR which applied section 27 of the *Civil Procedure Act* that costs follow the event unless the court for other good reasons orders otherwise.

Analysis and Determination

21. Having considered the pleadings and submissions, the issue for determination is whether or not the Respondent is bound to implement the CBA dated August 19, 2021 and registered by the court on September 22, 2021 in addition to the consent dated 16th March, 2021.
22. It is not in doubt that the Respondent is a member of the Kenya Bankers Association and is therefore bound to implement the CBA negotiated between the Claimant herein and Kenya Bankers Associating by virtue of Appendix "A" to the CBA which is a list of member Banks. Access Bank is No. 1 on the list which lists the member banks in alphabetical order.
23. The preamble to the CBA dated August 19, 2021 reads.

"An agreement made this 19th day of August, 2021, between members of Kenya Bankers Associating as listed in Appendix "A" hereof (hereinafter referred to as the Employers, which expression shall where the context so admits include all the each of such members, together with any further members who may be by mutual agreement be included hereinafter in this agreement) and Banking Insurance & Finance Union (Kenya) (hereinafter referred to as the Union) where it is agreed as follows:

24. It is also evident that the Claimant has members among employees of the Respondent as is evident from page 36 to 44 of the Claimants bundle of documents being proof of remittance of union dues by the Respondent to the Claimant including names of employees in respect of whom the remittances were made.

25. Clause A1 of the CBA dated August 19, 2021 reads-

- a. This Agreement shall apply to all Section Heads (Supervisors), Check Clerks, Clerical Staff, Copy Typists, all Technical Staff and all Subordinate Staff, Head Messengers, Drivers, Chauffeurs, employed by the Employer and covered by the terms of whatever Recognition Agreement is in force between the Association and the Union.

The provisions of the *Labour Relations Act*, 2007 which provides for payment of Agency Fees for non-union members shall apply.

26. Clause A2 of the said CBA provides for minimum entry points as follows: -

Minimum entry points for staff

Minimum basic salary entry points for staff entering the banking industry on registration of the CBA shall be as follows::



Grade	Ksh.
Clerical and Copy Typist	67,157
Technical staff (Painter, Carpenter etc.)	69,260
Technical staff (Printing Machine Operator)	63,839
Head Messenger	65,082
Subordinates	
Drivers	68,716
Chauffeurs	80,428
Office Messengers	56,375

Upon completion of one (1) year service in a bank, the employee's salary will be as provided for in the salary scale for each category in the sliding scales subject to the provisions of Clause AB12 of the CBA.

The new engagement minimum basic salary shall be effective on registration of the CBA.

The above minim basic salary entry points shall be subject to negotiations during the full CBA reviews only.

27. It is evident from the pleadings and submissions on record that by letter dated August 11, 2020 the Claimant reported a dispute against the Respondent on violation of the CBA by underpaying unionisable employees of the Bank and failure/refusal to remit Agency Fees to the union from unionisable employees who are not members of the union but are covered by the CBA.
28. The dispute was resolved by the consent dated March 16, 2021. The terms of the settlement are set out at paragraph 13 herein above.
29. As is evident from paragraph 4 of the consent, the Respondent was to effect salary increment on March 1, 2021, March 1, 2022 and February 28, 2023 in order to harmonize the same with the CBA then in place being the CBA dated September 1, 2019.
30. Again as is evident from paragraph 3 of the said consent, the CBA in respect of which the consent was signed was the one dated 10th September, 2019 and covered the period of 24 months. A copy thereof is annexed as exhibit "10- 1" to the Replying Affidavit of Isaac Onyango sworn on January 20, 2022.
31. The subsequent CBA was signed by the parties on August 19, 2021. It was to cover the period of 24 months from March 1, 2021 to February 28, 2023.
32. As submitted by the Respondent, the period covered by the consent and the period covered by the CBA dated August 19, 2021 overlap. This overlap is the cause of the dispute herein. However, the consent was in respect of the benefits under the CBA for the period covered by the CBA dated September 10, 2019. On the contrary, the instant suit is in respect of the CBA dated August 19, 2021.



33. It is therefore evident that in addition to the consent entered into between the parties on March 16, 2021, which was in respect of the period March 1, 2019 to February 28, 2021 with a wage reopener from March 1, 2020 to February 28, 2021, the Respondent is obligated to implement the subsequent CBA dated 19th August 2021 which was for the period from 1st March, 2021 to February 28, 2023.
34. From the Respondent's averments in its replying affidavit, response to Memorandum of Claim, Grounds of Opposition and written submissions, it is evident that what the Respondent implemented pursuant to the consent is for the period covered by the CBA dated September 10, 2019. The Claim herein is on the other hand, for implementation of the subsequent CBA dated August 19, 2021 which was not in existence at the time the consent was entered into by the parties is therefore not covered by the consent.
35. The two CBAs have different entry points as demonstrated below: -

CBA date	19/09/2019	19/08/2021
Grade	Ksh.	Ksh.
Clerical and Copy Typist	67,157	69,172
Technical staff (Painter, Carpenter etc.)	69,260	71338
Technical staff (Printing Machine Operator)	63,839	65,754
Head Messenger	65,082	67,034
Subordinates Drivers	68,716	70,777
Chauffeurs	80,428	82,841
Office Messengers	56,375	58,066

36. The sliding scales in the two CBAs are also different with the later CBA having enhanced rates as shown in the scales in the two CBAs.
37. It may be worth emphasizing the provisions of section 59 of the *Labour Relations Act* which provides-
59. Effect of collective agreements.
- (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 employers' organisation party to the agreement; or
 - (c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.



- (2) A collective agreement shall continue to be binding on an employer or employees 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.
- (3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.
- (4) A collective agreement shall be in writing and shall be signed by—
 - (a) the chief executive officer of any employer, the chief executive or national secretary of an employers' organisation that is a party to the agreement or a representative designated by that person; and
 - (b) the general secretary of any trade union that is a party to the agreement or a representative designated by the general secretary.
- (5) 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. Registration of collective agreement.

38. For the forgoing reasons I find merit in the Claim dated November 16, 2021. I accordingly make orders as follows: -

- a. The Respondent be and is hereby directed to immediately compute and pay all the unionisable employees of the bank who are covered by the CBA a 4% salary increment with effect from March 1, 2020 and a further 3% salary increment effective 1st March, 2021 together with ensuing arrears.
- b. The Respondent is directed to immediately compute and pay all unionisable employees covered by the CBA 6% increment on all the allowances as contained in the CBA from 1st March 2020 together with ensuing arrears.
- c. The above payments will be in addition to the payments due and payable under the consent between the parties signed on March 16, 2021.
- d. Each Party shall bear its costs of this suit.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 2ND DAY OF NOVEMBER, 2023.

M. ONYANGO

JUDGE

