



Kenya Engineering Workers Union v Mabati Rolling Mills Limited (Cause E100 of 2023) [2023] KEELRC 3470 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3470 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E100 OF 2023
M MBARŪ, J
DECEMBER 7, 2023**

**BETWEEN
KENYA ENGINEERING WORKERS UNION CLAIMANT
AND
MABATI ROLLING MILLS LIMITED RESPONDENT**

RULING

1. The claimant filed application dated 11 September 2023 seeking for orders that;
 1. Spent.
 2. The court deems fit and issue an interim order against the respondent to produce the salaries of all her management staff for December 2022 and for July 2023.
 3. An interim order be issued against the respondent to produce wage bill and number of staff for the unionisable employees and that of the management staff and the salary for the lowly paid management and highly paid unionisable employee.
 4. Any other orders the court may deem fit to grant.
 5. Costs of this application be met by the respondent.
2. The application is supported by the affidavit of Wycliffe A. Nyamwata on the grounds that the issue in dispute is provided at Section 57 of the *Labour Relations Act, 2007* (the LRA). Parties have an ongoing CBA signed on 25 March 2019 but the respondent has refused to review the issues in dispute of which the effective date was 1st January 2021. In line with clause 36 of the CBA, the claimant forwarded a proposal for review to the respondent but did not give a counter proposal. There is a disagreement between the parties leading to the claimant invoking the provisions of Section 62 of the *LRA*.



3. The respondent has stood at 5% salary increase for unionisable employees during negotiations but when the dispute was ongoing, the respondent increased salary for management staff at 10% and to save on court time, this application should be allowed.
4. In response, the respondent filed the Replying Affidavit of Morara Samson Matundura the human resource manager and who aver that Section 57(5) of the LRA requires that any if there is a dispute about what information is required to be disclosed, such party in need of the same should refer the matter to the Minister for conciliation. The claimant has not referred the matter for conciliation or the issue of production of documents.
5. On 19 June 2023 the claimant referred the dispute to the Minister but this related to general wage increase but no request for documents was in issue. The current request is an afterthought. The information required is private and confidential and relating to third parties who are not members of the claimant and have not given consent to the disclosure of information relating to their salaries and employment. The respondent stands to suffer damage if the orders sought for the production of sensitive individual records are issued through a public platform such as in court where such information cannot be kept confidential and is accessible to any member of the public by simply paying court perusal fee. To produce the required information will contravene the Data Protection Act due to lack of consent of the data subjects and such disclosure will cause substantial harm to the employer-employee relationship as non-unionised employees will lose confidence in the respondent. Such exposure will cause liability on the company.
6. The production of records is not an urgent matter calling for the urgent intervention of the court in terms of Section 74 of the LRA. The claimant has referred to Section 57(6) of the LRA which is far removed from the orders sought.
7. The allegations that the respondent has effected a wage increase of 10% of management staff and is offering 5% to unionised staff is without evidence. The orders sought should not issue at this stage and the respondent should be allowed to defend the claim on the merits.
8. Parties filed written submissions and also attended court for oral highlights. These are analysed and at this stage, the only issue for consideration is whether the court should order the respondent to produce salaries of all management staff from December 2022 and July 2023 and also produce the wage bill and number of staff for the unionisable employees and that of management staff.
9. On the one hand, the orders sought as couched are on the basis that the respondent should be directed to produce the salaries of all her management staff from December 2022 and July 2023. On the other hand, the grounds supporting the application and the matters addressed in the Supporting Affidavit of Wycliffe Nyamwata relate to ongoing CBA negotiations where parties are unable to resolve the issue of wage increment. This is addressed under clause 36 of the CBA proposal.
10. The claimant has anchored the instant application under the provisions of Section 74 of the LRA which allow a trade union to move the court under a Certificate of Urgency where the dispute relates to;
... concerns—
 - (a) the recognition of a trade union in accordance with section 62; or
 - (b) a redundancy where—
 - (i) the trade union has already referred the dispute for conciliation under section 62(4); or



- (ii) the employer has retrenched employees without giving notice; or
 - (c) employers and employees engaged in an essential service
- 11. However, in the grounds supporting the application, the claimant only addresses the provision of Section 57 of the LRA which relates to CBA negotiations. No matter has been addressed with regard to any question of recognition, redundancy, that the issue of the records required has been referred for conciliation and this failed or that the matters herein relates to provision of essential services.
- 12. The primacy of seeking interim orders is to allow the right holder to have the subject of the suit preserved pending hearing and determination of the main claim. Where then an applicant moves the court under the wrong provisions of the law or the orders sought are not given sufficient and correlated facts in the Supporting Affidavit or the grounds thereto, to proceed and assess the same would not achieve justice.
- 13. As correctly submitted by the respondent, the requirement to produce salaries of all her management staff has far-reaching implications. This must only be ordered in the clearest of cases and where justice demands that the production of such records would meet the ends of justice and that this is the only way toward that justice. The balance of rights then must tilt to the party who is seeking to preserve individual rights weighed against the need to produce individual records in a matter that is not clear. To this end, the balance of convenience favours the respondent.
- 14. However, Section 57(2) to (6) of the LRA requires parties negotiating a CBA to disclose information in good faith.
- 15.. The employer is required to disclose all relevant information in terms of Section 57(2) of the LRA;
 - (2) For the purpose of conducting negotiations under subsection (1), an employer shall disclose to a trade union all relevant information that will allow the trade union to effectively negotiate on behalf of employees.
- 16. On its part, the information disclosed to the trade union is to be kept confidential in terms of Section 57(3) of the LRA;
 - (3) All the information disclosed by an employer as specified in subsection (2) is confidential and shall not be disclosed by any person to a person who is not engaged in the negotiations.
- 17. The employer is protected in disclosing information that is legally privileged, to disclose would contravene the law, if disclosed would cause harm to the employer or the employee or that the information sought to be disclosed is private and personal and relating to the employee who has not given consent to the disclosure of such information.
- 18. Section 57(4) of the LRA directs that;
 - An employer is not required to disclose information that—
 - (a) is legally privileged;
 - (b) the employer cannot disclose without contravening a prohibition imposed on the employer by any law or an order of any court;
 - (c) if disclosed, may cause substantial harm to the employer or employee; or



(d) is private personal information relating to an employee, unless an employee consents to the disclosure of that information.

19. Further, where the employer fails to produce or disclose the required information, the trade union should lodge a dispute with the Minister. I take it, at this point the Minister would be able to view the shop floor and interrogate the dispute vis-a-vis the parameters of Section 57(4) of the LRA. Taking into account the provisions of Article 31 of the Constitution on the right to privacy which includes the non-disclosure of information relating to their family or private affairs unnecessarily required or revealed. The Data Act further provides for the rights of a data subject, the enforcement of rights of data subjects, the principles and obligations of personal data protection, processing of sensitive personal data, among many other aspects of personal data.
20. These provisions then must be put into account and the court must look at the overriding objectives under the law and the need to have salary records for management staff of the respondent produced without the claimant first exhausting the primary forum before which it ought to write and seek that such information be produced and the motions the Section 57(4) of the LRA gone into together with other laws particularly the Data Act read together with Article 31 of the Constitution. See Mwanzia v Rhodes (Constitutional Petition E115 of 2022) [2023].
21. Ultimately, for want of exhausting of available dispute resolution mechanism under Section 57(5) of the LRA, the orders sought shall not issue at this instance. Application dated 11 September 2023 being premature is hereby struck out. Costs shall abide the outcome of the main claim.

DELIVERED IN OPEN COURT AT MOMBASA THIS 7TH DAY OF DECEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:-

Court Assistant: Japhet Muthaine

.....and

