



Kenya Petroleum Oil Workers Union v Green Wells Energies Ltd (Cause E059 of 2023) [2023] KEELRC 3198 (KLR) (6 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3198 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E059 OF 2023
S RADIDO, J
DECEMBER 6, 2023**

**BETWEEN
KENYA PETROLEUM OIL WORKERS UNION CLAIMANT
AND
GREEN WELLS ENERGIES LTD RESPONDENT**

JUDGMENT

1. The Kenya Petroleum Oil Workers Union (the Union) sued Green Wells Energies Ltd (the Respondent) on 7 August 2023, and the Issue in dispute was stated as:

Refusal by the Management to finalise CBA negotiations.
2. The orders sought by the Union were:
 - (a) An order directing the Respondent to negotiate the collective bargaining agreement between the Claimant and the Respondent for the period 1st January 2023 to 31st December 2024.
 - (b) The Respondent be compelled to furnish the Claimant with audited financial statements, conclude and sign a collective bargaining agreement for registration (sic) the shortest time possible.
 - (c) An order directing the parties to adopt the Claimant’s revised proposals and subsequent registration of the same.
 - (d) Any other relief that the Court may deem fit and just to grant.
 - (e) Award the costs of the Claim to the Claimant as against the Respondent.
3. Filed with the Memorandum was a Motion seeking interim orders.



4. The Respondent filed a Response and Counterclaim on 4 September 2023, asserting that the recognition agreement between it and the Union stood revoked/cancelled by operation of the law because the Union's membership had fallen below the statutory threshold of a simple majority, and therefore the instant action could not be maintained.
5. The Respondent sought an order in the Counterclaim revoking/canceling the recognition agreement.
6. The parties appeared for directions on 19 September 2023. The Union indicated that it was abandoning the Motion in lieu of an expedited hearing of the Cause.
7. The Union also proposed that the Cause proceeds to determination on the basis of the record and submissions to be filed and exchanged.
8. Consequently, the Court gave directions including that it would deliver a judgment on 1 November 2023.
9. However, on 4 October 2023, the Respondent filed a Motion seeking stay of the proceedings pending resolution of the question of the existence of a valid recognition agreement and/or revocation of any such recognition agreement.
10. When the Motion came up on 12 October 2023, the Court ordered that the issues raised in the Motion be canvassed as part of the hearing on the merits.
11. The Union filed its submissions on 2 October 2023 and the Respondent filed its submissions on 27 October 2023.

Validity/existence of the recognition agreement

12. Section 54(5) of the *Labour Relations Act* has given the National Labour Board the jurisdiction at the first instance to consider the question whether a recognition agreement should be revoked. The section entitles the employer to make an application for the revocation of a recognition agreement.
13. Apart from granting first instance jurisdiction to the National Labour Board, section 54(6) of the *Act* contemplates that a trade union may report a trade dispute to the Cabinet Secretary for Labour concerning a recognition agreement.
14. If the trade dispute remains unresolved at conciliation, then the jurisdiction of the Court may be invoked by the trade union. The Union herein reported a trade dispute.
15. The Union did not doubt the validity or existence of the recognition agreement.
16. It is the Respondent that had doubts. It was open to the Respondent to raise the question relating to the existence and/or validity of the recognition agreement when the parties appeared for conciliation. The record does not indicate whether the Respondent raised the question during conciliation.
17. The Respondent herein did not attempt to utilise the alternative dispute resolution avenues available to it under section 54(5) of the *Labour Relations Act* before invoking the Court's jurisdiction and the Court, therefore, declines to assume jurisdiction over the Counterclaim or adjudicate on question on the validity or existence of the recognition agreement between the parties.

Right to organise

18. Article 41(4) and (5) of the *Constitution* guarantees the right of every employer and trade union to organise and engage in collective bargaining.



19. The parties herein engaged in negotiations with a view to entering into a new collective bargaining agreement after the then agreement in place lapsed on 31 December 2022.
20. The parties reportedly reached agreement on the non-monetary items, but hit a stalemate on the monetary items.
21. The Union reported a trade dispute to the Cabinet Secretary for Labour. A Conciliator was appointed but no consensus was reached leading the Union moving to Court.
22. The Court of Appeal addressed its mind to the jurisdiction of this Court in economic disputes in *Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union* (2018) eKLR thus:

A careful reading of the TSC case reveals that this Court did not hold that the ELRC had no jurisdiction at all to determine economic disputes revolving around CBAs. The full bench appreciated that the ELRC had no jurisdiction to deal with the economic dispute therein because the compulsory jurisdictional procedure on dispute resolution as set out under Part VIII of the LRA had not been followed. The dispute was required to first go through conciliation and in the event it was not resolved thereunder the same could be referred to the ELRC. The long and short of it is that the ELRC can only assume jurisdiction to adjudicate on an economic dispute after the compulsory dispute resolution procedure under Part VIII of the LRA had been followed. In the TSC case Odek, J.A succinctly put it:

“Subject to statutory exceptions, the correct jurisdictional procedure is as followed in Tailors and Textile Workers Union vs. Ashton Apparels (EPZ) Ltd. Mombasa Industrial Cause No. 340 of 2014 where the parties did not resolve the dispute at their own level and the claimant reported the existence of the dispute to the Labour Minister; the parties were not able to agree upon conciliation and the Conciliator issued a Certificate of Disagreement paving way for referral of the dispute to the Employment and Labour Relations Court.”

Having expressed ourselves as herein above what is the extent of the ELRC’s role in resolving the dispute pertaining to the terms of the CBA in question? Is it as suggested by the appellant that the court is restricted to implementing the minimum standards set out under the EA or wages orders published by the government under the Labour Institutions Act?

46. Section 26(2) of the EA provides that-

.....

We find that the above provision not only allows parties to a CBA to agree on terms that are more favourable than the minimum terms and conditions of employment set out by the EA and Wages Order but also empowers the ELRC to issue such favourable terms. To that extent we adopt with approval the sentiments of Rika, J. in *Kenya Chemical and Allied Workers Union vs. Leather Life EPZ Limited* [2014] eKLR that

“The Wage Orders fix the wage floors. Collective Bargaining between Employers and the Workers? Representatives on wage increment aims at fixing the cost of labour above the market benchmark, this benchmark being the minimum wage fixed under the Wage Orders. Traditionally, the Government has set the wage floor annually... In seeking to move beyond the benchmark regulated by the Government, Employers and Employees examine the compensable factors within the workplace, and are guided by economic indicators. The Court, whenever called upon to intervene in economic disputes is similarly guided by the relevant compensable factors, and economic indicators.”



However, the power to do so by the ELRC ought to be exercised judiciously and on a case by case basis where parties are unable to agree on the terms of a CBA..... The court ought to be guided by the Wage Guidelines issued by the government. In this case the applicable guidelines were the revised guidelines which came into force on 1st November, 2005. We note that those guidelines were brought to the attention of the ELRC then known as the Industrial Court by the Ministry of finance vide a letter dated 23rd November, 2005.

23. In this Court, the Union seeks an order compelling the Respondent to continue with the negotiations.
24. The Union also sought an order adopting its proposals which had been rejected by the Respondent.
25. Despite and in spite of calling upon this Court to adopt its proposals, the Union did not put before this Court any evidence of the relevant factors outlined in the Court of Appeal judgment nor did it seek the assistance of the Court to get an expert report or opinion from the Central Planning and Monitoring Unit of the Ministry of Labour.
26. The other substantive order prayed for by the Union was an order directing the Respondent to furnish it with copies of its financial statements.
27. Section 57(2) of the *Labour Relations Act* entitles a trade union to such information from the employer that will allow it to effectively negotiate on behalf of its members.
28. The parties reached a stalemate after the Respondent indicated that it did not have the financial wherewithal to implement or accept the proposals from the Union.
29. If the position taken by the Respondent was bona fides, it should have disclosed the financial statements sought by the Union.

Conclusion and Orders

30. The Union did not establish a case for the grant of the orders sought.
31. The Respondent invoked the Court's jurisdiction prematurely on the Counterclaim.
32. The orders prayed for in both the Cause and Counterclaim are declined with liberty given to the parties to return to the negotiating table.
33. Each party to bear own costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 6TH DAY OF DECEMBER 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Union Mr Okoth, General Secretary

For Respondent Owiti, Otieno & Ragot Advocates

Court Assistant Chrispo Aura

