



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. E004 OF 2021

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

NYANZA CLUB.....RESPONDENT

JUDGMENT

1. The Claimant herein came before court vide a Notice of Motion application dated 18th January, 2021, seeking orders of summary judgment against the Respondent in the sum of Kshs. 5,484,444.00, being salary increments and house allowances accrued on account of a decree issued in ELRC Cause No. 118 of 2017.

2. The Claimant was directed to file a fresh suit for determination of the issues subject of the application of 18th January, 2021, herein above referred, culminating in the current suit.

3. The Claimant lodged a memorandum of facts on 20th January, 2021, outlining a computation of the award of the judgment rendered on 13th December, 2018, by Justice Nduma Nderi.

4. The court in the judgment, made the following orders:

“Accordingly, the court awards the Claimant union in respect of all the unionisable staff as follows:

a) General wage increase of 8.5% for the first year of the Collective Bargaining Agreement and 8.5% increment for the 2nd year of the Collective Bargaining Agreement.

b) House Allowance is awarded at 15% of the basic salary or Kshs. 5000 per month, whichever is greater for the period of the Collective Bargaining Agreement

c) The issue of effective date of Collective Bargaining Agreement will impact the bottom line of the club. We are now nearing the end of 2018, and since this is the first Collective Bargaining Agreement by the parties, the court finds that it is in the interest of justice and fair play that the effective date of the Collective Bargaining Agreement be 1st January, 2018. The Collective Bargaining Agreement shall therefore cover the period 2018/2020. Arrears salary and House Allowance is therefore effective 1st January, 2018 and the expiry date of the Collective Bargaining Agreement shall be 30th December, 2019.

d) The Collective Bargaining Agreement be concluded and filed with the court within 30 days in terms of the judgment.”

5. The Claimant has brought this suit seeking summary judgment for the amount computed as being owing and payable to its membership in accordance with the decree set out above.

6. The Respondent in a statement of response filed before court on 22nd February, 2021, avers that the Claimant filed this suit without obtaining her consent on the final computations in respect to the judgment in Kisumu ELRC Cause No. 118 of 2017. It is the Respondent's position that it intended to discuss the computation with the Claimant so as to make amendments prior to implementation.

7. The Respondent through her witness one Dave O. Arunga, asserted that it is willing to abide by the orders of the court, and that the delay in doing so, has been due to a difficult financial position, arising from the effects of Covid-19 which forced it to shut down for most of the Covid-19 period.

8. The Respondent states that it stands to suffer prejudice should the prayer for summary Judgment sought herein be granted.

Determination

9. The Claimant's claim is founded on Order 36, rule 1 of the Civil Procedure Rules. The Order provides as follows in respect of summary judgment: -

“(1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest;

where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

10. The Claimant's position, is that it has computed the amount owing and payable to its membership based on their pay slips and in accordance with the orders of the court. The Claimant further submitted that the Respondent did not dispute the computation nor lodge a counter claim as part of its statement of response to this suit.

11. The issue of computation is important in this instance, being the only way, this court can determine whether or not to enter summary judgment, as the computation if agreed upon, will be deemed as a liquidated figure for purposes of summary judgment.

12. The court is concerned that the Respondent has not demonstrated interest in the amicable conclusion of this matter, right from the original suit whose orders form the basis of the current case. If indeed the Respondent was not in a position to comply with the orders at the time they were issued, it should at the very least and as a sign of good faith, have consulted the Claimant on a mutually workable compliance time line.

13. The success or lack thereof in the implementation of a Collective Bargaining agreement, is depended on the willingness of the parties to negotiate freely.

14. A collective Bargaining agreement is a social contract between social partners. It would be in the interest of both parties to mutually agree on the most equitable manner of breathing live to the agreement, as opposed to calling on this court to police their social relationship.

15. The Claimant has given a computation of the amounts owing and payable to its membership by the Respondent on account of salary increment and house allowances per the decree of the court.

16. The Respondent has disputed the computation and further denied being consulted in the computation subject of the prayers before this court. Although the Claimant has provided names and amounts due to her members in different categories, the same has been disputed by the Respondent which then casts doubt on the amount payable.

17. The Respondent has further not demonstrated to this court its inability to comply with the orders, nor proposed either to the Claimant or the Court, a mechanism by which it intends to comply with the judgment.

18. The Respondent has indicated that its former management had experienced difficulties complying with the orders of this court and their willingness to work things out with the Claimant for a mutually beneficial relationship.

19. In the circumstances, for reason of the disputed computation laid before this court, and the fact that Collective Bargaining is a voluntary, bipartite process and which need not be adversarial, I decline to enter summary judgment as prayed, and instead, make the following orders:

a) THAT both parties jointly compute the amount due and payable to the Claimant's membership in accordance with the judgment rendered in *ELRC Cause No. 118 of 2017* on 13th December, 2018.

b) THAT the parties jointly agreed computation be filed before this court within 45 days of this judgment for adoption as a judgment of the court.

c) THAT parties file a mutually agreed payment scheduled based on the quantum agreed on in paragraph (a) above.

d) In the interest of a mutually beneficial working relationship, I make no orders as to costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. E. Ng'ame present for the Claimant

Ms. Lukasile h/b for Mr. Ngala for the Respondent

Ms. Christine Omollo-C/A