



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO E6465 OF 2020

**KENYA UNION OF DOMESTIC WORKERS, HOTELS EDUCATIONAL INSTITUTIONS, HOSPITAL
AND ALLIED WORKERS (KUDHEIHA).....CLAIMANT**

VERSUS

THE CABINET SECRETARY, MINISTRY OF SCIENCE AND TECHNOLOGY.....1ST RESPONDENT

MINISTRY OF SCIENCE AND TECHNOLOGY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. In its Memorandum of Claim dated 5th November 2020 and filed in court on 17th November 2020, the Claimant Union lists the following as issues in dispute in this claim:

- a. Refusal by the 1st Respondent to negotiate, conclude and sign a Collective Bargaining Agreement with the Claimant;
- b. Refusal by the 2nd Respondent to negotiate, conclude and sign a Collective Bargaining Agreement with the Claimant;
- c. Refusal by the 1st Respondent to revise the Collective Bargaining Agreement dated 18th March 1986;
- d. Refusal by the 2nd Respondent to revise the Collective Bargaining Agreement dated 18th March 1986;
- e. Refusal by the 1st and 2nd Respondents to revise the Collective Bargaining Agreement dated 18th March 1986, in breach of the relevant provisions of the Labour Relations Act.

2. The Respondents filed a joint Reply to the Memorandum of Claim.

3. The matter was prosecuted by way of written submissions.

The Claimant's Case

4. The Claimant Union states that it represents employment interests of non-teaching staff in all educational institutions managed by University Councils and Boards of Management.

5. The Claimant further states that it has a Common Bargaining Agreement with the 2nd Respondent and that it is entitled to review and/or negotiate, conclude and sign a Collective Bargaining Agreement and review the Common Bargaining Agreement dated 18th March 1986, pursuant to the Labour Relations Act.

6. The Claimant avers that Clause 6 of the Collective Bargaining Agreement (CBA) dated 18th March 1986 provides that the CBA shall

remain in force unless either party gives notice for revision.

7. The Claimant accuses the 1st and 2nd Respondents of refusal to negotiate, conclude and sign the CBA, contrary to the provisions of the CBA dated 18th March 1986 and Section 57 of the Labour Relations Act.

8. On 25th September 2018, the Claimant reported a dispute to the Cabinet Secretary, Ministry of Labour & Social Protection and by letter dated 6th November 2018, a Conciliator was appointed to settle the dispute concerning the refusal by the 1st and 2nd Respondents to negotiate, conclude and sign a Collective Bargaining Agreement with the Claimant.

9. The Claimant states that on 18th February 2019, the Cabinet Secretary, Ministry of Labour & Social Protection invited the 1st Respondent and the Claimant for a conciliation meeting on 22nd March 2019 which the 1st Respondent declined to attend.

10. The Claimant avers that other notices of conciliation meetings were issued by the Cabinet Secretary, Ministry of Labour & Social Protection on 16th August 2018, 16th January 2019, 1st February 2019 and 7th February 2019.

11. The Claimant states that on 29th March 2019, the Cabinet Secretary, Ministry of Labour & Social Protection declared the file closed and issued a certificate that the dispute had not been resolved since the 1st and 2nd Respondents had shown no interest in resolving the matter amicably.

12. The Claimant seeks the following:

a. An order directing and 1st and 2nd Respondents to negotiate, conclude and sign a Collective Bargaining Agreement with the Claimant;

b. In the event that the 1st and 2nd Respondents decline to negotiate, conclude and sign a Collective Bargaining Agreement with the Claimant within 90 days, the Collective Bargaining Agreement dated 18th March 1986 be deemed duly reviewed, adopted and binding upon the Claimant and the 1st and 2nd Respondents;

c. An order compelling the 1st and 2nd Respondents to review the Collective Bargaining Agreement dated 18th March 1986.

13. The Claimant also asks for costs of the case.

The Respondents' Case

14. In their Reply dated 4th December 2020, the Respondents deny that the 2nd Respondent was the employer of the Claimant's members.

15. The Respondents state that the Collective Bargaining Agreement dated 19th March 1986, which the Claimant seeks to compel the Respondents to review, has since lapsed as Legal Notices No 262 and 263 of 26th August 1993 altered the relationship between the Claimant and the Respondents.

16. According to the Respondents, the said Legal Notices terminated the Recognition Agreement of the parties and consequently, the Respondents' responsibility to negotiate Collective Bargaining Agreements with the Claimant, on behalf of public schools ceased.

17. The Respondents acknowledge that when the 1986 Collective Bargaining Agreement and Recognition Agreement were signed by the parties, the 2nd Respondent was the employer of non-teaching staff; however, Legal Notices No 262 and 263 changed the position and granted Boards of Governors the power to hire, discipline and dismiss non-teaching staff.

18. The Respondents maintain that the responsibility of negotiating terms and conditions of service for non-teaching staff was given to the Boards of Governors, who also have responsibility over the salaries and benefits of the non-teaching staff.

Determination

19. The first issue that emerges for determination is whether the present claim is *res judicata*. In their submissions dated 1st February 2022, the Respondents contend that the issues raised by the Claimant were conclusively determined in ***Kenya Union of Domestic, Hotels, Educational Institutions, Hospital & Allied Workers v Ministry of Education (Industrial Court Cause No 26 of 2009)***.

20. Section 7 of the Civil Procedure Act provides as follows:

7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

21. The Respondent relied on the decision in ***Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties) [2020] eKLR*** where the High Court held as follows:

“ A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, a party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

i. The suit or issue raised was directly and substantially in issue in the former suit.

ii. The former suit was between the same party or parties under whom they or any of them claim.

iii. Those parties were litigating under the same title.

iv. The issue in question was heard and finally determined in the former suit.

v. The court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”

22. I have looked at *Industrial Court Cause No 26 of 2009: KUDHEIHA v Ministry of Education* (supra) and find that the issues raised in the present case were fully ventilated and determined in that case. I further find that the parties in that case are the same as those in this case.

23. Consequently, I have arrived at the conclusion that the issues raised in the case now before me are *res judicata* by virtue of *Cause No 26 of 2009*.

In light of this, the only thing left for me to do is to strike out the Claimant’s claim, which I hereby do.

24. Each party will bear their own costs.

25. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MARCH, 2022

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JUDGE

Appearance:

Mr. Jaoko for the Claimant

Mr. Mulili for the Respondents