



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.714 OF 2018

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

VERSUS

ASHUT ENGINEERS LIMITED (PLASTIC DIVISION)RESPONDENT

RULING

The ruling herein relates to application dated 8th December, 2020 and following directions vide ruling delivered on 18th November, 2021 and seeking for orders that;

a. ...

b. In the alternative, the respondent be and is hereby ordered to deposit Ksh.50, 000,000 ... plus 15% of the total redundancy benefits recommended for payment to the applicant's 801 members in the Central Planning and *Monitoring unit report dated 21st September 2020*; as security for the compensation which may ultimately be ordered by this court to be paid by the respondent to the applicant's 801 members.

The application is supported by the affidavit of Wycliffe A Nyamwata and on the grounds that the respondent has issued notice of intended redundancy affecting 801 employees and members of the claimant union and which is meant to avoid the financial obligation addressed in the report off the CPMU dated 21st September, 2020. The respondent has declined to review the existing CBA which took effect on 1st August, 2017 and which is the subject of these proceedings. The cited financial challenges are without evidence and the respondent has failed to produce its audited financial statements for the year 2017 and 2018 leading to the court to direct the CPMU to prepare an independent report and which was filed on 21st September, 2020 with proposals that there be an increment to the house allowance, leave travelling allowance and 85 general wage increase for the year 2017 and 2018 at 7%. Such will result in arrears of Ksh.50 million which the respondent is aboding to pay and should therefore be deposited as security.

There is a CPMU report dated 21st September, 2020 and the respondent is guided by the Minister to issue fresh contracts to affected employees on similar terms to those in their current contracts.

In reply, Mr Amit Shah filed his Replying Affidavit and avers that the two substantive orders sought by the claimant is that the respondent be ordered to deposit Ksh.50 million recommended for payment to the claimant's 801 members in the CPMU report dated 21st September, 2020 and that the respondent should not interfere with the CBA in any way pending hearing of the suit.

The claimant filed suit seeking to enhance the CBA and that there be production of audited financial statement for the period of 1st August, 2015 to 30th July, 2017 and which were produced together with the wage bill for permanent and casual employees. The respondent was also required to fill a form by the Minister for Labour prior to the preparation of the CMPU report where it cited the challenges faced including costs of energy, cost of raw materials, labour, wastage, pilferage and theft leading to cash flow problems.

The respondent was incorporated in 1980 and the plastic division was set up in 1998 and the business of furniture and fabrication is under the engineering division and plastic related products are under the plastics division. The plastic business is a very finance intensive industry and therefore not economically viable as the engineering division supported it until 2017 when it was shut down. It then became inevitable to declare the unionised employees redundant, an on-going process.

Mr Ashut also avers that despite filling the Ministry questionnaire for the CPMU report it was recommended that the CBA be enhanced without considering the ramifications to the respondent that it would result in closing the business. The court is not bound by the CPMU report as it was only meant to aid the parties and the respondent should be given an opportunity to avail its own financial reports and any

other evidence for the court to impartially examine all evidence for a just determination.

The issues raised in the CPMU report dated 21st September, 2020 should be tested at a hearing on merit since the issues surrounding the enhancement of the CBA and the CMPU report should be interrogated and putting into account the audited financial statement ending 31st December, 2016 and ending 31st December, 2017 and these be analysed with the wage bill for a determination as to whether the claimant is entitled to the remedies sought.

The issues addressed relate to economic dispute and are weighty and should only be heard through a full hearing and to require a deposit of Ksh.50 million will be to make a determination of the matter before full hearing.

Both parties attended and made oral submissions.

The claimant submitted that the orders sought should issue since the respondent has declared a redundancy likely to affect over 800 employees and based on the CMU report the redundancy dues should be secured at ksh.50 million deposits in court. The CPMU found the respondent had made profits in the subject period and is capable of compensating the claimant for the CBA. The respondent has outsourced labour and forced the claimant members to reapply for the same positions and the redundancy is not done in good faith.

The respondent responded that the claimant filed ELRC Cause No.E013 of 2022 over the redundancy and the CPMU report relates to a different matter separate from the case stated by the claimant. The application that the respondent should deposit ksh.50 million on the basis that the CBA has not been enhanced such can only be addressed at the full hearing.

The respondent has been making losses over the years and is not able to sustain the plastics division which closed down and a new company was formed and is now based in Kilifi with equipment's lying idle. There is no profitability of plastics business which has been sustained by the engineering department and the claimant members can apply for employment under the new company. The wage bill for the respondent cannot be sustained. These facts can only be addressed at a full hearing.

Determination

The claimant filed a memorandum of claim dated 15th May, 2018 and the issue in dispute was noted to be *refusal by the respondent/management to review the parties CBA on the following clauses...*

The claimant registered 12 clauses of the CBA as being in dispute.

On 18th December, 2019 the court issued orders directing the CPMU to file a report which was filed and dated 21st September, 2021.

The CPMU report has made various recommendations which are contested by the respondent on the grounds that the CPMU failed to put into account the audited financial reports, the wage bill and the questionnaire the respondent had filled for the report.

On the application before court, the claimant is seeking security deposit of ksh.50 million on the grounds that the respondent has issued an unlawful redundancy notice and has declined to review the CBA which should come into effect on 1st August, 2017 citing financial challenges but refused to produce audited financial statements.

From the issue in dispute and the directions that the CPMU to file a report, the report recommendations now contested by the respondent, this being an economic dispute, it is only fair that the parties be heard on the matter for the court to be able to address all the issues on the merits.

The issue of deposit of Ksh.50 million as security is pegged on facts that the respondent has declared a redundancy which is likely to affect 800 employees and members of the claimant. The issue in dispute is clear and separate and relates to the review of a CBA which is unrelated to redundancy which is addressed under Cause No.E013 of 2022 and which Cause is not disputed by the claimant.

Application dated 8th December, 2020 is hereby dismissed. The court shall hear the suit on the merits. Costs shall abide the outcome of the suit.

Orders accordingly.

DELIVERED AT NAIROBI IN OPEN COURT THIS 10TH DAY OF MARCH, 2022

M . MBARU

JUDGE