



Kenya Engineering Workers Union v Rafiki Engineering Ltd (Cause E010 of 2020) [2022] KEELRC 1509 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1509 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E010 OF 2020
DN NDERITU, J
JUNE 16, 2022**

**BETWEEN
KENYA ENGINEERING WORKERS UNION CLAIMANT
AND
RAFIKI ENGINEERING LTD RESPONDENT**

JUDGMENT

1. In a memorandum of claim dated October 21, 2020 the claimant prays for:
 1. That, the honourable court do issue an Order against the respondent to either sign the drafted CBA before the honourable court and or the parties do so within the shortest time frame possible.
 2. That, if the parties are issued with time frame to sign the CBA, then the Honourable court should give a mention date for parties to confirm compliance.
 3. That, the costs of the suit be met by the respondent.
 4. That, any other Relief the honourable court may deem fit to grant.
2. Filed together with the memorandum of claim is as expected, a verifying affidavit, a list of documents, and copies of the listed documents.
3. After entering appearance dated November 4, 2020 the Respondent filed a memorandum of response dated December 23, 2020 in which it prayed that the claim be dismissed with costs for want of merits.
4. On December 1, 2021 by consent of both parties the court directed that this cause be canvassed by way of written submissions.



5. The claimant filed written submissions on December 17, 2021 and the Respondent on February 22, 2022.

II. Claimant's Case

6. As distilled from the memorandum of claim, the annexed documents, and the written submissions, the claimant's case is as hereunder.
7. The claimant and the respondent enjoy a duly signed and valid recognition agreement for the purposes of negotiation of Collective Bargaining Agreements (CBAs) under section 54 of the *Labour Relations Act*, 2007 (the Act).
8. The last CBA negotiated, agreed, and signed by and between the parties herein was entered into on 1 November 4, 2017 with an effective date of November 1, 2016.
9. Clause 39 of the said CBA provided as follows:-

“The agreement shall be effective from the 1st day of November, 2016 and shall thereafter remain in force for a period of 24 months. After the expiry date, the Agreement shall continue to be in force until it is amended by mutual consent provided that the party desiring to amend the Agreement shall give the other party at least one month's notice setting out in details the desired amendments.”
10. Upon expiry of the aforesaid CBA the Claimant started to engage the Respondent with a view of agreeing on and executing a new CBA.
11. By January 31, 2020 the parties had agreed on all the terms of the new CBA except for the date of commencement. The parties allegedly initialed (signed) on all the pages of the CBA on 4th December, 2019 and on January 31, 2020. On the later date, the date of commencement was proposed by the claimant to be November 1, 2018 and the CBA was to be in force for a period of 24 months.
12. The agreement on the above CBA was a culmination of a series of negotiation meetings.
13. Upon conclusion of the negotiations and agreement on the terms of the new CBA the claimant forwarded a copy of the new CBA to the Respondent for execution but the Respondent failed, refused, and or neglected to execute the same.
14. The claimant decided to invoke section 62 of the Act and reported the trade dispute to the Ministry of Labour whereby a Conciliator was appointed.
15. The Conciliator was not able to resolve the dispute and hence issued a certificate of unresolved dispute on July 23, 2020 under section 69 of the Act. At that juncture the claimant decided to file this dispute in court for adjudication.
16. The claimant has attached documents in support of each of the steps taken as enumerated above.
17. It is the Claimant's case that the respondent is in breach of articles 41 and 47 of the *Constitution* and rules and principles of engagement as per the law established and in line with the last CBA that was to expire on November 1, 2018.
18. It is on the basis of the foregoing that the claimant has prayed as per the memorandum of claim as set out in part I of this judgment.



III. Respondent's Case

19. The respondent's case as can be distilled from the memorandum of response to the claim, the annexures thereto, and the written submissions is as hereunder.
20. That the parties herein entered into a CBA that commenced on November 1, 2016 and was to remain in force until November 1, 2018 and thereafter the status quo was to remain until a new CBA was negotiated and agreed upon.
21. While the respondent is in agreement with most of the facts as set out in the claimant's case above, it argues that the parties disagreed on the date of commencement of the new CBA and hence agreed to maintain status quo.
22. The respondent alleges that as the process dragged on the country was hit by the Covid 19 pandemic and that the negotiations collapsed at that point.
23. The respondent alleges that the negotiated CBA cannot be executed now as the union membership among its staff has dropped below the simple majority as required under the provisions of section 54(1) of the Act. The Respondent has attached a list of its entire workforce of 19 employees out of which only 7 are purported to be union members.
24. Further, the respondent urges that on April 30, 2020 a tripartite memorandum of understanding (MOU), which allegedly binds the parties herein, was entered into which deferred and or suspended negotiations and or execution of new CBAs. A copy of the said MOU was filed with the response to the claim.
25. It is on the basis of the foregoing that the Respondent prays that this cause be dismissed with costs.

IV. Issues For Determination

26. With the foregoing background the following issues commend themselves to this court for determination:-
 - (a) Did the respondent deliberately and blatantly fail, refuse, and or neglect to enter into a CBA with the claimant that had been negotiated and agreed upon?
 - (b) Is the claimant entitled to the prayers sought?
 - (c) Costs.

V. The CBA

27. It is not in dispute that the parties herein are in a recognition agreement which allows them to mutually engage and negotiate CBAs.
28. It is on the basis of the said recognition that the parties engaged and negotiated the CBA signed at Nakuru on November 14, 2017.
29. Under Clause 39 of the said CBA, quoted verbatim elsewhere in this judgment, the same was to remain in force for 24 months and thereafter continue being in force until the same is amended by consent and or parties negotiate, agree, and sign a new CBA. In other words, after the expiry of the 24 months from November 1, 2016 the status quo was to hold until another CBA is signed or an addendum emending the same is executed by the parties.



30. It is on the basis of the terms of the said CBA that the claimant started engaging the respondent in November, 2019 with a view of negotiating and executing a new CBA.
31. It is the view and finding of this court, from the correspondences exchanged between the parties from November, 2019 to January, 2020 that the only issue that the parties were unable to agree on in the new CBA is the effective date of commencement.
32. The claimant finally forwarded the new negotiated CBA to the respondent for execution vide a letter dated February 8, 2020 but the respondent did not act on the CBA. This prompted the claimant to refer the matter to the Ministry of Labour and Social Protection as a trade dispute.
33. The appointed Conciliator issued a certificate of unresolved trade dispute dated July 23, 2020 in accordance with section 69(a) of the Act.
34. For clarity the material part of the said certificate is reproduced verbatim:-
“RE: CERTIFICATE OF UNRESOLVED TRADE DISPUTE –
MILSP/LD/IR/13/22.2020
Issue in dispute: –Refusal by management to sign a Collective Bargaining Agreement (CBA)
Pursuant to section 69(a) of the *Labour Relations Act* 2007 Law of Kenya, I hereby issue a certificate of unresolved trade dispute to enhance the parties to move to the next level of arbitration (Employment and Labour Relations Court).

The issuance of this certificate has been occasioned by the Managing director of Rafiki Engineering Works Ltd refusal to sign the CBA after agreeing to all the clauses presented by the union initialsing/signing the same.
Efforts by the Conciliator to convince the MD of Rafiki Engineering Works Ltd has been futile.
Issued today 23rd day of July, 2020.”
35. The Conciliator is categorical that the Respondent deliberately refused to sign the CBA even after agreeing on all the clauses. The certificate is dated July 23, 2020 and the conciliator stated that the respondent’s director had initialed or signed each page of the CBA as an acknowledgment that the Respondent was in agreement with each of the clauses in the CBA.
36. However, the respondent has denied ever signing the new CBA and insists that the parties were completely unable to agree on the date of commencement.
37. The only evidence that this court has to confirm that the Respondent signed or initialed each page of the CBA comes from the certificate of unresolved trade dispute issued by the conciliator on July 23, 2020. However, the respondent did not execute the last page of the CBA and also on page 19 wherein there is clause 39 on the date of commencement which was indicted to be 1st November, 2018.
38. The Respondent has held the position that the commencement date was not agreed upon and that it failed to sign the CBA for that reason. However, the respondent has not stated or explained why it was opposed to the commencement date of November 1, 2018.
39. The respondent did not on its part make any counter- proposal on a commencement date and this informs this court in taking the view that the respondent did not approach the negotiations in good faith.



40. Had the respondent negotiated in good faith it would have made a counter-proposal on the commencement date if it was opposed to the November 1, 2018 as the commencement date. It should have responded to the letter forwarding the CBA for execution and stated its position. Instead of demonstrating utmost good faith the Respondent failed, refused, and or neglected to act on the CBA. This is clearly unfair labour practice contrary to article 41 of the Constitution.
41. The former CBA could only fill the gap between its expiry on November 1, 2018 pending negotiations and execution of a new CBA. The status quo was not meant to hold indefinitely and that is not the spirit of Clause 39 of that CBA as quoted verbatim elsewhere in this judgment.
42. The other reason advanced by the respondent for its failure to execute the CBA is that Covid 19 pandemic paralysed the negotiations and that due to the pandemic the respondent's economic and financial situation took a turn for the worse. However, the Respondent has not demonstrated how the pandemic affected its financial performance by way of annexing its audited accounts or otherwise for the subject period.
43. The demand for rent arrears dated October 31, 2020 annexed to the respondent's written submission indicates that the alleged rent arrears were accrued from August, 2017. That is long before the Covid 19 pandemic hit Kenya and the world at large. This cannot therefore be a good indicator of how the Respondent was doing financially at the material time of the negotiations for the new CBA.
44. The other reason advanced by the respondent for not executing the new CBA is that there was a tripartite agreement (MOU) signed between the Ministry of Labour, Central Organisation of Trade Unions (COTU), and the Federation of Kenya Employers (FKE) deferring negotiations and or execution of new CBAs.
45. However, the respondent has not explained the legal status of the said MOU which cannot supercede the law applicable. An MOU is a gentlemen's agreement that is not legally binding in case one party decides to pull out of the same. This is the position that was taken by Rika J in Kenya Engineering Workers Union v East African Foundry Works Limited – Nairobi ELRC No. 155 of 2020 and this court is in agreement with that position.
46. In any event, the alleged MOU was executed on April 30, 2020 long after the negotiations between the parties had stalled due to the Respondent's failure and or refusal to execute the CBA.
47. This court finds and holds that the alleged MOU did not contribute to the Respondent's refusal and failure to execute the CBA and the Respondent is simply searching for a reason to hold on to disguise its bad faith in the negotiations. This alleged reason holds no water.
48. The other reason given by the Respondent for not executing the MOU is that the number of its employees who are members of the claimant has fallen below the simple majority. The Respondent has given a list of alleged head-count of the employees.
49. However, it is important to note that this was not an issue during the negotiations from November, 2019 to February, 2020. The necessary implication is that if the union membership has declined as alleged by the Respondent, it must have happened after the negotiations had ended and or during the pendency of this cause in court.
50. This court finds and holds that the reason based on the number of employees who are union members did not arise at all material times to the negotiations which is the material period in the matter before this court.



51. In regard to issue (a) for determination this court returns that the Respondent for no good cause or reason failed, refused, and or neglected to enter into a duly negotiated CBA contrary to fair labour practices as expressed in article 41 of the Constitution and other laws.

VI. Remedies/reliefs

52. Having found that the Respondent had no reasonable cause in refusing to execute the negotiated CBA this court shall now consider the remedies sought for by the Claimant.

53. Before dealing with the reliefs this court has to deal with the issue of the commencement date.

54. This court is mandated by article 159 of the Constitution and section 3(1) and (2) of the Employment and Labour Relations Court Act to render substantial justice to all who come before it. There is no wrong without a remedy in law.

55. As at July 23, 2020 when the Conciliator issued a certificate of unresolved trade dispute the parties had agreed on all the terms of the CBA except for the date of commencement. The Conciliator indicated that the respondent had refused to execute the CBA notwithstanding that all the terms had been agreed on. However, the conciliator did not comment on the date of commencement of the new CBA.

56. That date of July 23, 2020 is the one that signals that the respondent, without any reasonable or just cause had failed, refused, and or neglected to execute the CBA.

57. This court takes the view that July 23, 2020 is the last date on which the new CBA ought to have become effective. Equity treats as done that which ought to have been done.

58. The respondent had ample time, from November, 2019 to July 23, 2020 to execute the CBA but it adamantly refused to do so in the guise of not agreeing on the date of commencement. Since then the respondent has developed other theories as to why it did not and would not execute the CBA but all of them have been found to hold no water in the preceding parts of this judgment.

59. In prayer 4.1 the Claimant prays that the respondent be ordered to execute the CBA before the court or within a specific period.

60. This court has already found that the respondent had no reason or cause at all in refusing to sign the CBA.

61. This court has no difficulty in ordering the respondent and the claimant to execute the CBA within 30 days of this judgment. The CBA should be executed/signed before the Regional Manager of the Federation of Kenya Employers (FKE) or such other suitable person(s) as the parties may agree.

62. As stated elsewhere in this judgment the last effective date of commencement of the CBA is July 23, 2020 or such other earlier date as the parties may agree within the time-frame stated above (30 days of this judgment).

63. For the period prior to July 23, 2020 the terms of the prior CBA shall apply.

64. Of course, as this had already been agreed upon the new CBA shall be in force for a period of 24 months as per Clause 39 thereof.

65. The claimant was justified in bringing this cause to court after the respondent adamantly and for no reasonable or just cause failed and or refused to sign the CBA and hence the Claimant is awarded costs of this cause as per prayer 4.3 in the memorandum of claim.



VII. Disposal

66. In final disposal of this cause it is ordered as hereunder:-

- (a) A declaration be and is hereby issued that the Respondent's refusal to execute the negotiated CBA is unfair, unlawful, in bad faith, and in contravention of fair labour practices.
- (b) The parties herein are ordered and directed to sign and execute the said CBA within 30 days of this judgment in presence of a suitable witness.
- (c) The commencement date of the said CBA shall be July 23, 2020 or such other earlier date as the parties may agree within the 30 days stated above.
- (d) The claimant is awarded costs of this cause.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF JUNE, 2022.

.....

DAVID NDERITU

JUDGE

