



Kenya Union of Commercial, Food and Allied Workers Union v National Social Security Fund (Cause E172 of 2022) [2022] KEELRC 12726 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 12726 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E172 OF 2022
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN
**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS
UNION CLAIMANT**
AND
NATIONAL SOCIAL SECURITY FUND RESPONDENT

RULING

1. The claimant union and the respondent state corporation have a recognition agreement and a collective bargaining agreement.
2. The respondent reviewed its human resource policy and procedure manual, detailing organization structure and career progression guidelines, which the claimant holds, was done without the involvement of the claimant, and therefore outside the collective bargaining structures governing the parties.
3. Through an application dated March 18, 2022, the claimant prays the court to restrain the respondent from implementation of the new human resource policy and procedure manual, new organization structure and career progression guidelines.
4. The application is founded on the affidavit of claimant's Chief Shop Steward [CSS] Isaiah Cheraisi, sworn on March 18, 2022.
5. In a nutshell the CSS states that the parties have a recognition agreement which came into force on August 16, 1991. It governs parties' negotiating procedure. Under that procedure, parties have concluded and registered several collective bargaining agreements.
6. The claimant raised complaints with the respondent, on April 2, 2019 and August 8, 2019, on job evaluation exercise carried out by the respondent. The claimant was aggrieved that the exercise did not



include the claimant. The exercise gave rise to the new human resource policy and procedure manual, new organization structure, and career progression guidelines. These instruments were approved by the State Corporations Advisory Committee. The claimant holds that implementation of the new instruments will adversely affect its members.

7. Cherai states that parties were involved in a dispute in this court over job grades 5 and 6, which resulted in an Appeal No 63 of 2020, which is pending before the Court of Appeal. Implementation of the new instruments would render any favourable judgment made by the Court of Appeal unenforceable. Implementation should be stayed, until parties agree on employee experience and service, among other issues.
8. Carolyn Okul, respondent's human resource manager filed a replying affidavit sworn on May 27, 2022. Her position is that the CBA executed by the parties expired on June 30, 2021, and there is no valid CBA currently.
9. The respondent resolved in its meeting of December 5, 2017 to carry out an organization review. On November 23, 2018, the respondent notified the respondent of its intention to carry out a job evaluation exercise. An evaluation committee was constituted, with the claimant's CSS, Bernard Munywoki, being part of that committee. The claimant requested on November 29, 2018, that Munywoki and his deputy Wilfred Onchiri, be made permanent members of the committee, and Isaiah Cherai an alternate member. The request was granted.
10. The claimants' aforesaid representative were involved in the committee meetings which started on November 23, 2018, until later on, when they absconded. The claimant thereafter wrote to the respondent, raising concerns about the exercise. The respondent wrote back addressing the concerns. The claimant wrote again, raising concerns with the consultant, KPMG, who had been engaged by the respondent in the exercise. KPMG scheduled a meeting with the claimant for September 13, 2019, where the concerns directed at KPMG by the claimant were addressed.
11. It is the position of the respondent, that the claimant was fully involved in the exercise. The new policy does not prejudice the CBA. It does not prejudice the outcome of Civil Appeal No 63 of 2020, relating to job grades 5 and 6. These grades are well-outlined in the new policy. The Court of Appeal has not issued any stay orders. The new policy has by and large been implemented, and has been accepted by all staff. As late as March 16, 2022, the respondent wrote to the claimant, expressing its desire for further consultations. The respondent has not shut its door for further consultation on implementation. The new policy has been approved by the State Corporations Advisory Committee. The respondent states that in any case, this court held in Cause No 1796 of 2011 between the parties herein, that consultation is not necessarily concurrence.
12. Parties agreed on June 8, 2022 to have the application considered on the strength of their affidavits and submissions. They confirmed filing of submissions at the last mention before the court, on July 19, 2022. The submissions underscore the pleadings of the parties, as summarized above.

The Court Finds: -

13. The parties have a recognition agreement and have concluded several CBAs.
14. The affidavit of Carolyn Okul, which states that the CBA was for 2 years which have lapsed, and that there is presently no CBA in force, is misconceived. CBAs are normally in perpetuity, until they are modified by the parties, or terminated by the parties. The lapse of 2 years did not terminate the CBA. It would still remain in force, until a new CBA is executed.



15. There is evidence that the claimant was involved in the formulation of the new human resource policy and procedure manual, new organization structure, and career guidelines right from the inception.
16. Its shop stewards Bernard Munywoki, Wilfred Onchiri and Isaiah Cheraisi were members of the Evaluation Committee. They participated in the committee meetings as shown in the minutes held on November 27, 2018 and attendance register of April 24, 2019.
17. They raised concerns to the respondent and the consultants on the exercise and were honoured with timely responses. The concerns on job evaluation were also raised in a meeting of the Parties' Joint Industrial Council held on June 16, 2021. The claimant was advised on the documents which had been forwarded to the State Corporations Advisory Committee, and parties agreed that the new instruments would be availed to the claimant.
18. On February 15, 2022, the claimant wrote to the respondent acknowledging receipt of the new human resource policy and procedure manual and career progression guidelines. The claimant called for the new salary structure and was advised on February 21, 2022, that new salary structure only affected management staff, and that salary structure for claimant's members was contained in the CBA.
19. There was consultation from the inception of the new policy up to its implementation as shown in the meetings between the parties and correspondences exchanged between them. These consultations involved the project management team on job evaluation, the joint industrial council, the claimant, the respondent, and the consultant KPMG. There was full blown social dialogue.
20. Implementation is underway, and there is no evidence that the staff are opposed to implementation. Stay of implementation would affect management staff, who are not represented by the claimant. Resources have been put in place, including in the engagement of the consultant. The process has been going on for the past 5 years. There is no evidence that the new instruments have been crafted and implemented without the involvement of the claimant, outside the collective bargaining structures. It has not been shown that the instruments breached any of the existing clauses in the CBA.
21. The prayer relating to Court of Appeal Civil Appeal No 63 of 2020, appears to be in the nature of an order for stay of execution. The claim herein is not subject of Appeal No 63 of 2020. Judgment subject of that appeal has not been availed to this court. It is not known in what way that judgment relates to the claim herein. Implementation of the new policy has not been shown to be under consideration, before the Court of Appeal.
22. Lastly, the court agrees with the respondent that consultation does not denote concurrence between the parties. The concerns of the claimant can in any event, be addressed in pending negotiations on the incoming CBA. The new policy is not cast in bronze, and can as far as it affects claimant's members, be subjected to further review through collective bargaining and the joint industrial council. But as the parties engage in further consultations, the court would wish to bring to their attention judgment of this court in *Anthony v Communications Authority of Kenya & 3 others* [Petition E161 of 2021] [2022] KEELRC 117 [KLR] [January 25, 2022] [judgment], and the Advisory of the Public Service Commission which followed this decision.

It is Ordered: -

- a. The application filed by the claimant dated March 18, 2022 is declined.
- b. Costs in the cause.



DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI,
UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 29TH
DAY OF SEPTEMBER 2022.

James Rika

Judge

