Banking, Insurance and Finance Union (Kenya) v Gulf African Bank Limited (Cause E908 of 2021) [2022] KEELRC 4142 (KLR) (26 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4142 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E908 OF 2021

MA ONYANGO, J

SEPTEMBER 26, 2022

BETWEEN

BANKING, INSURANCE AND FINANCE UNION (KENYA) .... CLAIMANT

AND

GULF AFRICAN BANK LIMITED .... RESPONDENT

JUDGMENT

1. The claimant is a trade union registered under the *Labour Relations Act* to represent employees in the banking, insurance and finance sectors and has a recognition agreement with Kenya Bankers Association, an organisation that represents commercial banks from where it draws its membership. The recognition agreement covers employees of the member banks of the association.
2. The claimant and the association have negotiated several collective bargaining agreements (CBAs) on behalf of their members. The CBA relevant to this suit is the one dated August 19, 2021 and registered by this court on September 22, 2021.
3. The respondent is a commercial bank regulated under the *Central Bank of Kenya Act* and is a member of Kenya Bankers Association. It is therefore bound by the CBA dated August 19, 2021.
4. It is the claimant's case that upon registration of the CBA the Kenya Bunkers Association (KBA) directed all its member banks to compute the salary adjustments arising from the CBA and pay their unionisable employees who are covered by the CBA.
5. The claimant avers that the respondent has since September 22, 2021 failed/refused to pay its unionisable employees who were beneficiaries of the said CBA. That the CBA, once concluded, signed and registered becomes enforceable in law and any party that disobeys the terms of the registered CBA is in breach of the law.

6. The claimant states that the employees of the respondent have over the years been members of the claimant who pay monthly union dues as confirmation of their membership.

7. It is the claimant's position that by refusing/failing to pay the unionisable employees according to the terms of the CBA, it is in breach of article 41(5) of the *Constitution* of Kenya and is further unfair labour practices under article 47(1) of the *Constitution*. The claimant urges the court to step in and enforce the CBA.

8. In its memorandum of claim dated November 4, 2021 and filed on even date, the claimant seeks the following orders:

    a. The claimant would wish to humbly pray to this honourable court to order the respondent to immediately compute and pay all the unionisable employees of the bank who are covered by the CBA a 4% salary increment with effect from March 1, 2020 and a further 3% salary increment effective March 1, 2021 and another 6% increment on all the allowances which are contained in the CBA.

    b. That the payments enumerated in (1) above will be paid retrospectively in arrears with effect from March 1, 2020 and March 1, 2021 accordingly.

    c. Costs of this suit.

9. The respondent filed a very brief statement of response (one paged) dated February 24, 2022. In the defence it reiterated the averments in a replying affidavit of Lawi Sato dated February 9, 2022.

10. In the affidavit and Lawi Sato, respondent's senior legal officer who avers that the respondent implemented a 6% wage increment in March 2020. That in March 2021, the respondent was supposed to increase wages by only 1% to reach the 7% increment in the CBA. That the respondent mistakenly did not effect the increment in March 20221, but computed and paid the same with salary for January 2022 together with arrears.

11. Further, that leave allowance and house allowance were to be increased to Kshs 928.00 and Kshs 12,508.00 respectively starting from March 2021, which it adjusted in January 2021 and said arrears with January 2022 salary.

12. The respondent avers in the statement of response that the 6% wage increment in March 2021 was not a gratuitous increment as averred by the claimant, but a business decision to cushion the respondent from abrupt increment in its wage bill once the anticipated CBA was negotiated and registered.

13. It avers that should it implement the 7% CBA increment the employees would earn an increment of 13%, which would amount to unjust enrichment by the claimant's members. That it would be inequitable and unjust to punish the respondent for being cautious in its business model by increasing wages in anticipation of a concluded CBA.

14. The respondent concludes that it has implemented the salary increment envisaged in the existing CBA and any further increment must await a new CBA, if at all.

15. The parties disposed of the suit by way of written submissions. The claimant submits that it is not in dispute that the respondent is a member of KBA which is an umbrella body representing all the member banks which includes the respondent.

16. The claimant further submits that the only parties who can review the terms and conditions of the CBA on behalf of unionisable employees of banks are the claimant and the KBA.

17. That in the year 2020 with effect from March 1, 2020 a wage re-opener salary review was due for negotiations but due to the effects of covid-19 pandemic no negotiations took place for the entire period after the two parties agreed to suspend the negotiations.

18. That the two parties only commenced negotiations on or around May 2021 covering the period March 1, 2020 to February 28, 2021 together with the full CBA review effective March 1, 2021 to February 28, 2023. The said CBA was concluded and signed on August 19, 2021 and registered by this court on September 22, 2021.

19. The claimant submits that a CBA becomes binding and enforceable only after its registration. That there is therefore no way the respondent could implement the same before negations and registration of the CBA.

20. The claimant submits that as deponed in the claimant's further affidavit sworn on February 10, 2022, the respondent did not implement the CBA signed on August 16, 2017 and registered by the court on September 14, 2017, which was effective from March 1, 2017.

21. Further, that the parties again negotiated another CBA effective March 1, 2019 to February 28, 2020 (a wage re-opener clause) which was signed on September 10, 2019 and registered on September 29, 2019. That both CBAs were never implemented by the respondent as is evident for a letter dated November 13, 2017 reporting trade dispute to the cabinet secretary in charge of Labour and Social Protection (refer to annexure App F3) of the further affidavit of Tom O Odero.

22. It is the claimant's submission that the 6% wage increment implemented by the respondent is in respect of the two earlier CBAs.

23. It is further the submission of the claimant that by March 2020 when the respondent alleges to have implemented the CBA, the said CBA for the period March 1, 2020 to February 28, 2022 was registered on September 22, 2021 and could not have been implemented by the respondent before its negotiation and registration.

24. It is further the submission of the claimant that the respondent has not adduced any proof that 6% increment of 2020 was awarded to unionisable staff only and not all the staff of the respondent including management employees.

25. It is further the claimant's submission that there is no evidence before the court to prove that the 6% increment by the respondent in March 2020 was in anticipation of the CBA negotiations of 2021. Further, that the respondent has not adduced any evidence of involvement of the claimant in the arbitrary wage increment and the claimant cannot be bound by the same.

26. For emphasis, the claimant has relied on the decision in *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers v Kenya Medical Training College* [2014] eKLR and the decision in *Kenya Union of Commercial Food and Allied Workers v Kenya National Library Service* [2016] eKLR.

27. The respondent submits that its position should be preferred over the claimant's for the following reasons.

28. First, the claimant does not present evidence of banks giving unionisable employees, wage increments over and above those stated in the CBA. If the claimant wanted the court to believe that that is so, it was its duty to prove that such a practice exists.

29. Second, there was no law or precedent, and the claimant cites none, that precludes a party from giving consideration for a contract, which is yet to be signed. If anything, case law is replete with instances of money paid in anticipation of a contract as was held in the case of *Sedena Agencies Ltd v Presbyterian Foundation* [2017] eKLR.

30. Third, and most importantly, to ignore the 6% would lead to unjust enrichment of the claimant's members. That those members are, by contract, entitled to receive an increment of 7% for the period between 2020 and 2022. They received an increment of 6% in March 2020 but are now asking for a further 7%. If they succeed in that, then, instead of receiving the 7% they are contractually entitled to, they will receive a 13% increment.

31. That if the respondent ignores the 6%, which was paid in anticipation of the CBA, we would be forcing the respondent to pay 6% which it never meant to pay and which the claimant's members had no right to receive. In *Sedena Agencies Ltd* (supra), the court held that:

> "...legal disputes must be resolved with a broader need to meet fairness and evenness between the parties. A court must always shun the prospects of a party before it leaving the court unjustly enriched at the expense of its opponent. The doctrine of unjust enrichment is not new to our jurisdiction."

32. The doctrine was ably captured by the Court of Appeal in *Chase International Investment Corporation and Another v Laxman Keshra and 3 others* [1978] eKLR cited in *Samuel Kamau Macharia v Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited* [2003] eKLR, where the court held that:

> "The principle of unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit."

33. The respondent submits that it made the 6% wage increment in anticipation of the CBA increment. For emphasis it relies on the decision in *Samuel Kamau Macharia* (supra) where the court stated that:

> "...the plaintiff seeking restitution one finds his judgement, in parting with the enrichment to the defendant, vitiated by either not known that the defendant was being enriched at his (plaintiff's) expense, or by being disabled by a mistake or pressure or inequality, to prevent the enrichment of the defendant; and, as it were, his transfer was non-voluntary, in that when surrendering the benefit to the defendant he did not form an unimpaired intent to give up what he gave up at his expense or to his detriment."

34. The respondent further submits that like in the case of *Mumias Sugar Co Ltd v Joel A Makokha* [2018] eKLR, the court should refuse to confer a benefit to the claimant twice as this would lead to unjust enrichment.

35. The respondent concludes that the claim is without merit and should be dismissed with costs.

Analysis and Determination

36. I have considered the pleadings and submissions filed by the parties hereto. The question arising for determination is whether or not the respondent has implemented the CBA for the period March 1, 2020 to February 28, 2023.

37. The CBA of the period March 1, 2020 to February 28, 2023 is dated August 31, 2021 and was registered by the court on September 22, 2021.

38. Section 59(3) and (5) of the *Labour Relations Act* provide as follows:

    (3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.

    (5) A collective agreement becomes enforceable and shall be implemented upon registration by the industrial court and shall be effective from the date agreed upon by the parties.

39. From the said provisions, it is clear that a CBA can only be implemented after it has been registered by the court.

40. An employer cannot unilaterally decide to implement an unregistered CBA without consultations with the union, the employees or the employer's organisation which negotiates the CBA on its behalf.

41. In the instant case the respondent has not produced any evidence to prove that at the time it alleges to have increased the salaries of its employees it informed them that the same would be offset from the next CBA wage increases.

42. The respondent has further not rebutted the averments by the claimant that the parties negotiated and agreed on a wage re-opener of 6.0% for the year 2018 and a further 6.0% for the year 2019 which the respondent declined to implement following which the claimant reported a trade dispute on November 8, 2019.

43. The respondent has at paragraphs 5, 6 and 10 of the replying affidavit as follows

    5. In March 2021, the respondent was supposed to increase the wages by 1% only, to reach the 7% increment agreed in the CBA.

    6. The respondent, mistakenly, did not effect the increment in March 2021. It has however computed the arrears from March 2021 and paid it with the salary for January 2022.

    10. It is true the respondent did not implement the 6% increment in leave and house allowances effective March 2021. The variance of Kshs 53.00 and Kshs 708.00 respectively per month, over a ten (10) months period, has since been paid together with the January 2022 salary.

44. These in my view, are admissions by the respondent that it failed to implement the CBA that is in contention.

45. It is inconceivable that an employer can "mistakenly" not effect wage increase for its employees.

46. The respondent has not adduced any evidence to prove that it has implemented the CBA after it was registered. What it has submitted to court is not evidence of implementation of the CBA.

47. It is my finding from the evidence on record that the respondent has not implemented the CBA for the period March 1, 2020 to February 28, 2023 that was registered on September 22, 2021. It is further my finding that the increments the respondent effected were for earlier CBAs which awarded wage increases of 6% for the year 2018 and a further 6% for the year 2019, which the respondent failed to implement until March 2020.

48. The respondent is accordingly directed to immediately compute and pay all its unionisable employees covered by the CBA 4% salary increment with effect from March 1, 2020 and a further 3% salary increment with effect from March 1, 2021.

49. The respondent is further directed to implement the 6% increment on all allowances in accordance with the CBA for the period March 1, 2020 to February 28, 2023.

50. The respondent is further directed to pay all arrears arising from both wage increases and increase in allowances within 30 days from the date of this judgment.

51. The respondent shall pay Kshs 100,000/- as costs to the claimant.

52. The suit shall be mentioned on November 7, 2022 to confirm full compliance.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF SEPTEMBER 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by article 159(2) (d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of *the Constitution* and the provisions of section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE