



Kenya Union of Commercial Food & Allied Workers v Machakos Water & Sewerage Co Ltd & 2 others; Central Planning & Monitoring Unit of the Ministry of Labour & 2 others (Interested Parties) (CBA E056 of 2022) [2022] KEELRC 13518 (KLR) (9 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13518 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CBA E056 OF 2022
SC RUTTO, J
DECEMBER 9, 2022

BETWEEN

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS UNION

AND

MACHAKOS WATER & SEWERAGE CO LTD EMPLOYER

AND

**KENYA UNION OF WATER & SEWERAGE EMPLOYEES
(KUWASE) 1ST OBJECTOR**

WATER SERVICES PROVIDERS ASSOCIATION (WASPA) 2ND OBJECTOR

AND

**CENTRAL PLANNING & MONITORING UNIT OF THE MINISTRY OF
LABOUR INTERESTED PARTY**

SALARIES & REMUNERATION COMMISSION INTERESTED PARTY

REGISTRAR OF TRADE UNIONS INTERESTED PARTY

RULING

1. What is before me for determination is the Notice of Motion Application dated 25th May, 2022 by the 1st Objector, the Kenya Union of Water & Sewerage Employees (KUWASE). The 1st Objector seeks through the said Application, to object to the registration of the Collective Bargaining Agreement (CBA) executed on 8th December, 2021, between Machakos Water and Sewerage Company Limited (Employer) and the Kenya Union of Commercial Food and Allied Workers (Union), which Application covers the period beginning 1st July, 2021 upto 30th June, 2023.



2. The objection was raised orally on 11th May, 2022, by Mr. Othoo when the CBA came up for registration. It was pursuant to the said oral objection that the Court directed the 1st Objector to file a formal application.
3. The orders sought in the Application as follows:
 - a. Spent
 - b. The Honourable Court be pleased to stay the intended registration of the CBA No. E056 of 2022 herein which was scheduled for registration on 18th May, 2022 pending hearing and determination of this Application;
 - c. The Honourable Court be pleased to issue orders restraining the commercial food and allied workers union from purporting to represent and or holding itself as an agent of the Machakos Water and Sewerage Company limited employees, recruiting as members or dealing with the said employees in any manner whatsoever pending hearing and determination of this Application.
 - d. The National Labour Board be directed to formally terminate any recognition Agreement fraudulently signed between Kenya union of Commercial Food and Allied Workers and Machakos water and Sewerage Company limited or any other water company within the Republic of Kenya to allow the lawful agent of water and sewerage sector being Kenya union of water and sewerage Employees.
 - e. The Registrar of Trade Unions be directed to correct the register of Commercial Food and Allied Workers Union by deregistering all water company branches registered by it in the name of Kenya Union of Commercial Food and Allied workers henceforth.
 - f. The Kenya union of Commercial Food and Allied Workers Union be ordered to delete the word water conservation and pipeline cooperation and water service Regulatory Boards from its constitution at Rule 5(viii) as presented to the Registrar of Trade Unions on 26th February 2021 and as registered on 25th May 2021, that permits it to hold its self as an Agent of the employees in the water companies within 60 days and failure to which, the Registrar of trade unions do proceed to correct the same by deleting Rule 5(viii) of the union's constitution registered on 25th May 2021 in compliance with court Orders.
 - g. The Honourable Court do decline to register the CBA No. E056 of 2022 between the Union and the Employer until rule 5(viii) of their registered constitution is delete and or amended.
 - h. The employer be restrained from deducting and remitting of union dues or other dues from its employees commercial Food and Allied Workers union.
4. The Application is is premised on the grounds appearing on its face and on the Affidavit of Mr. Elijah Awach who describes himself as the Secretary General of the 1st Objector. Briefly, he avers that:
 - a. The Union on 26th February 2021 intentionally amended its constitution with intention to grab water companies from the applicant/objector by including



element of water in its constitution at Rule 5(viii) contrary to Water Act 2002 which is a constituency of the 1st Objector.

- b. The union took advantage of a proxy war that ever existed between the Kenya County Government Workers Union and the Applicant herein, which ended up at Court of Appeal being Civil Appeal No. 18 of 2013 where the said court of competent jurisdiction made a final determination and or final orders that the constituency of water belongs to (National union of water and sewerage employees now (Kenya Union of Water and Sewerage Employees), the same court restored and or validated the recognition agreement that existed between the then Appellant and the employer being the sole union to represent employees in the water sector and the said orders were confirmed by Justice Maureen Onyango in C.A No 34 of 2020.
- c. The encroachment by the Union is intentionally instigated to start a fresh war taking the applicant back to where it was in the year 2010-2018 before the court of competent jurisdiction pronounced itself setting aside the orders of Hon Justice Nzioki wa Makau who according to the court found to have exercised extra powers out of his jurisdiction.
- d. The Union and the Employer deliberately colluded and purportedly involved in signing a recognition agreement and negotiated a CBA and presented the same before this Honourable court and the same was scheduled for registration on 18th May 2022 despite having knowingly that they have no capacity and are in the wrong sector or constituency and there are existing court orders barring such acts and or actions from being in the sector.
- e. The union and the Employer are using a shoddy game to open up fresh war between themselves and the applicant herein which might be expensive to the applicant unless restrained.
- f. The Union and the Employer are demeaning the constitutional authority of this Honourable Court unjustly without any lawful cause at all unless permanently restrained.
- g. The amendment as registered at rule 5(iii) is conflicting its registered constitution more so at rule 3(a) unless the court shed light by resolving the same before the CBA is registered by ordering for deletion and or amendment of rule 5(viii) that permits the union to hold itself as an Agent of the employees in the water and sewerage companies and or sector, the proposed registration will usurp the right of the employees in the water and sewerage companies in all the counties across the country.
- h. The Union cannot recruit and or hold itself as representing the employees engaged in the supermarket and or Agricultural sector because employee has a right to join a union of his choice, it must be a relevant union in the sector as per the registered constitution of such trade union as interpreted in the judgment of Hon. Justice Maureen Onyango in CBA No. 34 of 2020.



5. The 2nd Objector filed grounds of opposition in which it averred that:
- a. The Water Services Providers Association (WASPA) is neither a necessary party nor a relevant party to these proceedings.
 - b. WASPA does not object and has not objected to the registration of the CBA between the union and the Employer.
 - c. The Application is bad in law, lacks merit and is an abuse of the court process.
 - d. The Application in particular offends provisions of section 54 and 60 of the [Labour Relations Act](#) and to that extent is contra law, null and void.
 - e. The Application should be dismissed with costs.
6. The Union opposed the Application through the sworn Affidavit of Jackson Kyunuve who described himself as the Assistant General Secretary. Briefly, he avers that:
- i. the [Constitution](#) and Rules of the Union authorizes it to represent unionisable employees engaged in water companies and Water Service Providers.
 - ii. the said Constitution and Rules were not amended on 26th February, 2021 and registered on 25th May, 2021 as being alleged and on the contrary, the said provisions under Rule 5 has been in existence far beyond February, 2021 and beyond 2013.
 - iii. arising from the authority of the Union's Constitution and Rules, the union recruited unionisable employees of Machakos Water & Sewerage Company Ltd.
 - iv. following the successful recruitment of unionisable employees of the employer into Union membership, the Union and the employer executed a Recognition Agreement dated 26th June, 2011.
 - v. pursuant to the said Recognition Agreement the employer and the union negotiated, concluded and signed the first Collective Bargaining Agreement dated and signed on 7th June, 2013 which came into effect on 26th June, 2011 for two years.
 - vi. other Collective Bargaining Agreements have been negotiated, concluded signed, registered and implemented.
 - vii. the Collective Bargaining Agreement due to take effect from 1st July, 2021 for two years, now attracting interference by the objectors, is the present Collective Bargaining Agreement which is before the court and is enclosed herewith.
 - viii. the 1st Objector has not shown that it has recruited simple majority of the unionisable employees of the employer and signed a Recognition Agreement with employer herein.
 - ix. in the absence of union membership and in the absence of a recognition agreement, the 1st Objector or any other objector has no room to engage with



the employer, let alone attempting to interfere with a negotiated Collective Bargaining Agreement.

- x. the right to engage with an employer stems from trade union membership without which any other ambitious trade union remains a bystander and a far-end observer until it has followed the law appropriately to give room for their recognition.
- xi. whereas the 1st Objector is not an employer, group of employers or employees association, there is no evidence that they have applied to the National Labour Board to revoke the existing Recognition Agreement between the employer herein and the union.
- xii. there is no evidence that the 1st Objector has referred the cancellation of a Recognition Agreement between the union and the employer herein to the Ministry of Labour for conciliation under part viii of the [Labour Relations Act, 2007](#) thus grossly violating section 54(6) of the [Labour Relations Act, 2007](#) as reproduced above.
- xiii. there is no evidence placed before the Court that a dispute for Recognition Agreement between the employer and the union has been referred to this court under section 54 (7) of the [Labour Relations Act, 2007](#).
- xiv. the relevance of the union herein and the 1st Objector to represent employees in water sector is not a matter now before this Court for hearing and determination and that such a heavy, grave and weighty issue cannot be decided in an application for registration of Collective Bargaining Agreement.
- xv. the matter before the Court is not a demarcation dispute which would decide on the area of representation between two unions with similar constitutional provisions.
- xvi. the remedy for the 1st Objector does not lie in objecting to the registration of the present Collective Bargaining Agreement, on the contrary, they can only bring up their grievances under section 54 (6 & 7) of the [Labour Relations Act, 2007](#).
- xvii. the unionisable employees of the employer expect the implementation of their Collective Bargaining Agreement effective 1st July, 2021 for two years and that any union which objects to the registration of their Collective Bargaining Agreement does not make their life any better.
- xviii. the Objectors and the interested parties in the application, save for the Central Planning and Monitoring Unit of the Ministry of Labour, are not parties to the said Collective Bargaining Agreement so that their disgraceful intrusion is only meant to serve one interest, to interfere with the Union herein and to deny its members their right to enjoy the benefits in a negotiated Collective Bargaining Agreement.
- xix. as provided for under section 60 (7) (a) & (b) of the [Labour Relations Act, 2007](#) and rules 36 (3) of the [Rules](#) of this Court, it is only a party to the Collective Bargaining Agreement or the Cabinet Secretary, Ministry of Labour which can



raise any objection to the registration of a Collective Bargaining Agreement and not strangers such as the Objectors.

- xx. none of the Objectors or the Interested Parties are a party to this Collective Bargaining Agreement so that their involvement is indeed that of strangers. It is only the involvement of the Central Planning and Monitoring Unit of the Ministry of Labour which is understood within section 60 (7) (a) & (b) of the [Labour Relations Act](#), 2007 and under rule 36 (3) of the [Rules](#) of this court.

7. The Employer and the Interested Parties did not respond to the Application.

Submissions

- 8. The Application was canvassed by of written submissions. Save for the Union, all parties, including the 1st Objector, did not file submissions.
- 9. The Union submitted that it has proved by way of its Constitution and Rules, that it has a mandate to recruit and offer trade union representation for unionisable employees. That the union signed a Recognition Agreement with the National Water Conservation and Pipeline Corporation way back in April, 2003 when there were no water companies and water regulatory boards. That therefore, the history and involvement of the Union in the water sector dates back to April, 2003 and not February, 2021 as alleged by the 1st Objector. That the CBA before the Court is not the first one between the Union and the Employer.
- 10. That under section 60 of the [Labour Relations Act](#) (Act), and Rule 36 of the [Rules](#) of this Court, the impending registration is to give the CBA the force of law to pave way for its implementation.
- 11. The Union further contended that there is no evidence that the 1st Objector has recruited any of the employees of the Employer, or that it has a Recognition Agreement with the Employer or that there are employees of the Employer paying them union dues or that it is negotiating or attempting to negotiate terms of service for the employees of the Employer.
- 12. It was further submitted that the 1st Objector is not any of the parties envisaged under the Rules of this Court for purpose of registration of the CBA.
- 13. That further, an order cannot issue restraining the Union from representing, recruiting members and engaging with the Employer as there is no evidence that the unionisable employees of the Employer are members of another union other than itself.
- 14. With regards to the order seeking revocation of the recognition agreement, the Union argued that the 1st Objector is a stranger to the said recognition agreement.

Analysis and determination

- 15. The singular issue for determination is whether the Court should decline to register the CBA executed on 8th December, 2021 between the Union and the Employer.
- 16. As stated herein, the dispute arose at the time of registration of the CBA in issue. It therefore follows that by then, the Union had gone through the prerequisite steps to allow it secure a CBA with the Employer. Ordinarily, parties do not just wake up and execute a CBA. There are steps and stages leading up to the execution of the CBA, which are well captured under the Act. I will proceed to highlight the same briefly.
- 17. The starting point is the registration of a trade union under section 18 of the Act. This is subject to the said union meeting the requirements under the Act. It is instructive to note that registration



may be refused where there is another trade union sufficiently representing the whole or a substantial proportion of the interests in respect of which the union seeks registration. This is as per the section 14 (1) (d) of the Act.

18. Following a successful registration, a union embarks on membership recruitment. It is the union membership that allows the union achieve the requisite threshold for purposes of being recognized by an employer. The threshold is provided for under section 54(1) of the Act as follows:

“An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.”

19. Under subsection (3), such recognition is reduced into writing hence a “Recognition Agreement.”

20. In a nutshell, recognition of a trade union is achieved out of union membership.

21. Under subsection (5), the recognition agreement may be revoked or terminated following an application to the National Labour Board by an employer or group of employers.

22. It is worth mentioning that it is the recognition of a trade union that gives it the mandate to negotiate and collectively bargain with the employer. In this regard, section 57 (1) of the Act, provides as follows:

“(1) An employer, group of employers or an employers’ organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.”

23. Having laid the background leading to the culmination of a CBA between the employer and a trade union, it is evident that at this point in time, so much water has gone under the bridge in the instant case. As stated, registration and recognition of a trade union is a prerequisite to entering into a CBA. Therefore, this precedes collective bargaining.

24. In this regard, the Court has not been shown an objection to the recognition agreement between the Union and the Employer. I must add that a matter objecting to the recognition of a trade union is a matter can only be determined through a substantive suit. As it is, this dispute is not for demarcation of union membership; or for recognition of a trade union; or for the correction of the register; or related to deduction and remittance of union dues. As it is, this dispute is solely in respect of registration of a CBA. Therefore, the 1st Objector’s Application is not for this cause and cannot be entertained at this stage.

25. Further, it is instructive to note that the grounds under which the Court may refuse registration of a CBA are provided under section 60 (6) and (7) of the Act. Such grounds include instances where the CBA conflicts with the Act or any other law or does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister. Registration may also be refused under subsection (7) (b) unless all parties to the agreement have had an opportunity to make oral representations to the Court.

26. Notably, the grounds raised by the 1st Objector in support of his application, do not fall under the aforementioned grounds recognized under the Act.



27. Besides, I have noted that the 1st Objector has not exhibited a recognition agreement with the Employer or evidence of membership of employees drawn from the Employer. Therefore, I am unable to comprehend its objection at this juncture.
28. In the circumstances, the 1st Objector needs to retrace its steps and start from the point of recognition of the Union or better still, from the point the Union obtained mandate to represent unionisable employees belonging to the Employer. That said, nothing has stopped the 1st Objector from recruiting members constituting unionisable employees from the Employer. Thereafter, it can obtain recognition and subsequently, may secure a CBA.
29. As I have stated, by the time a CBA is being registered, so much water has gone under the bridge and I cannot help but ask myself where the 1st Objector was, when the Union was undertaking all the prerequisite steps culminating in the execution of the CBA in issue. In addition, the Union has stated that this is not the first CBA it has entered into with the Employer, hence where was the 1st Objector all this while?
30. Over and above, it is not in doubt that the CBA is aimed at benefiting members of the Union. Is it therefore right and prudent to deny the employees this benefit that has accrued to them? I don't think so. If anything, a refusal to register the CBA will be prejudicial to the said employees.
31. The total sum of my consideration is that the Application dated 25th May, 2022 is declined.

Order

32. In the final analysis, the application is dismissed with costs. The parties are hereby directed to take a date for registration of the CBA.

DATED, SIGNED and DELIVERED at NAIROBI this 9th day of December, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Nyumba for the Union

Mr. Mwangi for the Employer

Mr. Okeyo for the 2nd Objector

Mr. Othoo for the 1st Objector

No appearance for the Interested Parties

Court Assistant Abdimalik Hussein

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 15th March 2020 and subsequent directions of 21st April 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 had 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.

STELLA RUTTO

JUDGE

8

