Kenya Engineering Workers Union v Kenya Marine Contractors (EPZ) Ltd (CBA E107 of 2022) [2022] KEELRC 13444 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13444 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CBA E107 OF 2022

JK GAKERI, J

DECEMBER 7, 2022

BETWEEN

KENYA ENGINEERING WORKERS UNION ..... APPLICANT

AND

KENYA MARINE CONTRACTORS (EPZ) LTD ..... RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Respondent/Applicant seeking orders that;

    1. The Collective Bargaining Agreement (CBA) dated November 2020 between Kenya Engineering Workers Union and the Respondent herein be and is hereby not registered by the honourable court.

    2. Costs of this application.

2. The Notice of Motion is expressed under section 3, 12(2) of the *Employment and Labour Relations Court Act*; section 60 of the *Labour Relations Act* and Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and pursuant to the courts directions on 20th June and July 5, 2022.

3. The Notice of Motion is based on the grounds set out on its face.

4. It is the Applicant's case that the Collective Bargaining Agreement dated November 20, 2020 between Kenya Engineering Workers Union and the Respondent herein conflicts with the *Labour Relations Act* and the *Employment Act, 2007* and Radido J's judgement in Mombasa ELRC Cause No 152 of 2012 dated May 23, 2014.

5. That there has not been a simple majority of unionisable within the Respondent organization prior to the aforesaid judgement dated May 23, 2014.

6. That the Respondent organization currently has 2 employees and neither of them are members of the Kenya Engineering Workers' Union.

7. That the Application for registration of the aforesaid Collective Bargaining Agreement is grossly out of time and no prejudice will be suffered by the Union if the CBA was not registered.

8. That it was in the interest of justice that the CBA was not registered.

9. The Notice of Motion is supported by the Affidavit of Huru Hamed, the Administration Manager of the Respondent who deposes that certain provisions of the CBA are contrary to both the *Employment Act* and Radido J's Judgement dated May 23, 2014 on gratuity at paragraphs 24, 25 and 26 in respect of gratuity.

10. That paragraph 15(b) of the CBA contradicts the honourable court's judgement and the *Employment Act, 2007* under which gratuity is not statutory.

11. That paragraph 12(a) of the CBA accords women employees 2 months maternity leave contrary to section 29 of the *Employment Act* which provides for 3 months.

12. That during the pendency of ELRC Cause No 152 of 2012 and after the judgement, there was no simple majority of unionisable employees at the Respondent's and the Respondent has only 2 employees.

13. Finally, the affiant deposes that the application for registration of the CBA was grossly out of time contrary to the provisions of section 60(1) of the *Labour Relations Act, 2007*.

Respondent's Case

14. In its grounds of objection dated September 20, 2022, the Respondent urges that the Application by the Applicant does not meet the requirements of Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* as the Respondent union had not filed a suit to be referred to as a Claimant.

15. The Respondent states that the CBA in question was properly before the court for registration in consonance with the provisions of the *Labour Relations Act* and the *Employment and Labour Relations Court (Procedure) Rules, 2016* and the court had jurisdiction to cure the error in line with section 6(5)(b) of the *Labour Relations Act, 2007* since the CBA was signed consensually.

16. That the Notice of Motion Application had no Supporting Affidavit.

17. That the court should amend clause 12 of the CBA on maternity leave to read 3 months in lieu of 2 months as provided by the *Employment Act*.

18. It is urged that unions negotiate CBA's pursuant to section 54 of the *Labour Relations Act* for all unionisable employees and if a simple majority cannot be reached, the employer is at liberty to invoke section 54(5) of the *Labour Relations Act, 2007*.

19. That signing of the CBA was delayed by the long litigation history of the Applicant in Civil Appeal No 2B of 2015 and Civil Application No 28 of 2018.

20. The Respondent argues that the Applicant was using the back door to set aside the orders of the court in ELRC Cause No 152 of 2012.

21. That unionisable employees of the respondent who have since left employment were still awaiting the outcome of the CBA.

22. That the CBA was signed by one, Mr Simon Philip who was the Managing Director of the Applicant and who had not disowned it and a stranger to the CBA, one Nuru Hamed is the one who swore the Replying Affidavit yet the employer is the Applicant herein.

Applicant's Submissions

23. According to the Applicant, the singular issue for determination was whether the CBA dated November 20, 2020 between the parties should be registered.

24. The Applicant objects to the registration on the grounds that the CBA contravenes the Employment and Labour Relations laws, lacks the threshold of simple majority and was time barred.

25. On contravention of law, clause 15(b) on gratuity was cited as the offending clause. It was urged that Radido J had directed the parties to adopt the irreducible minimums as prescribed by law.

26. It was also urged that although section 29(1) of the *Employment Act* provided for 3 months maternity leave, the CBA provided for 2 months which violated the provisions of the *Employment Act*.

27. As regards simple majority of the unionisable employees, reliance was made on section 54(1) of *Labour Relations Act, 2007*.

28. It was urged that recognition and registration required the simple majority.

29. The decision in *Kenya Hotels and Allied Workers Union V Attorney General* (2015) eKLR was relied upon to illustrate the essence of a simple majority.

30. The Applicant relied on the current number of employees to urge that there was no union members and there was no simple majority on May 23, 2014 and thus the Applicant had no obligation to register the CBA.

31. As regards the timing, it was submitted that delay defeats equity and equity aids the vigilant. It was urged that registration of the CBA was out of time as section 60(1) of the *Labour Relations Court Act, 2007* provides for 14 days after conclusion. That in this case, the CBA was due for presentation within 14 days of November 20, 2020.

32. Finally, the Applicant relied on the definition of "Collective Agreement" to urge that it was an agreement arrived at after negotiations and all the parties must be in agreement.

33. That the CBA before the court failed in that regard and ought not to be registered.

Respondent's Submissions

34. The Respondent union submitted that the Applicant's Managing Director signed the CBA at the behest of an Application for contempt against the Managing Director.

35. The court is urged to register the CBA on the premises that;

    i. There was an incompetent application before the court to bar the registration.

    ii. The CBA in question is in compliance with the law and the judgement in ELRC Cause No 152 of 2012.

    iii. Registration of a CBA has no prescribed time line after it is forwarded to the CP&MU by the union.

iv. The issue of simple majority does not arise during CBA negotiations when parties have a recognition agreement.

v. What are remedies from the court if some clauses in the CBA are inconsistent with the law?

36. On the 1st issue, the union submitted that there was no proper application before the court as required by Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* since there was no claim to warrant the union to be referred to as Claimant and the employer Respondent and the Applicant filed a Replying Affidavit as opposed to a Supporting Affidavit.

37. It was further submitted that the only error in the CBA was clause 12(a) on the duration of maternity leave which should be 3 months not 2 months.

38. As regards gratuity, it was submitted that the service gratuity of 15 days was in conformity with section 60(5) of the *Employment Act, 2007*. However, the provision of law reproduced as section 60(5) of the Act was section 35(5) of the Act on service pay.

39. As regards registration of CBA's, it was urged that section 60(1) of the *Labour Institutions Act, 2007* gave the employer or employer's organization party to a CBA to submit it for registration within 14 days. That the provision was couched in mandatory terms and was mitigated by section 60(3) which provides that if the employer or employers' organization fail to do so, the trade union may submit the CBA for registration.

40. That since the employer failed to do so, the union acted within the law.

41. On the simple majority alleged by the Applicant, it was urged that as long as parties had a recognition agreement, as ordained by section 54 of the *Labour Relations Act, 2007*, they were at liberty to negotiate a CBA and if the number fell below the simple majority, the employer could apply to the National Labour Board for revocation of the recognition agreement.

42. It was urged that before a recognition agreement was revoked, parties were free to negotiate CBAs.

43. Reliance was made on the decision in *Kenya Union of Entertainment & Music Industry and employees V Sports Stadia Management Board* (2019) eKLR to reinforce the submission.

44. Finally, it was submitted that the only remedy available from the court was registration of the CBA with amendment of clause 12(a) as regards maternity leave, from 2 months to 3 months.

Determination

45. The issues for determination are;

i. Whether there is a competent Application before the court.

ii. Whether the CBA herein conflicts with the *Labour Relations Act, 2007* and the *Employment Act* and the judgement in ELRC Cause No 152 of 2012.

iii. Whether there was a simple majority of unionisable employees before the judgement of May 23, 2014.

iv. Whether registration of the CBA is out of time.

46. As to whether there is a competent Application for determination, the Respondent union contend that the Application does not meet the requirements of Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* as there was no claim.

47. It is unclear as to what provision of Rule 17 has not been complied with.

48. Although the Applicant did not file a Supporting Affidavit, the Replying Affidavit filed earlier in opposition to the registration of the CBA sets out the grounds of opposition.

49. Rule 17(1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* did not expressly provide for a Supporting Affidavit.

50. The court is satisfied that the Application before the court is competent for hearing and determination.

51. As to whether the CBA is in consistent with the law and the judgement of Radido J dated May 23, 2014, the court proceeds as follows;

52. First, the Applicant has not particularised the provisions of the *Labour Relations Act* with which the CBA is in conflict.

53. Section 60(1) of the *Labour Relations Act* cited in the submissions imposes a duty on the employer to submit the CBA for registration. The Applicant could not rely on it as a defence yet it failed to perform a statutory obligation imposed by section 60(2) of the *Labour Relations Act*.

54. Second, with regard to the judgement by Radido J, the Applicant cites paragraphs 24, 25 and 26 of the Judgement as regards gratuity. Strangely, the copy of the judgement availed by the Applicant has no visible paragraphs.

55. Radido J directed that;

> " Until the parties agree, the irreducible minimums set out in various statutes will apply."

56. Instructively, the parties have a concluded CBA. The Applicant is intriguingly contesting an agreement it signed and has not disowned its Managing Director's signature or argued that the agreement was characterised by a vitiating element.

57. The parties agreed on the gratuity payable under paragraph 15(b) of the CBA. The irreducible minimums cannot apply if the parties have a better agreement and at any rate gratuity is not a legal requirement. It is a consensual payment.

58. The issue was closed consensually and no evidence has been adduced by the Applicant to justify its re-negotiation at this stage.

59. As regards maternity leave, the Respondent contends that it was an error and the Applicant was in agreement that clause 12(9) of the CBA was inconsistent with section 29(1) of the *Employment Act, 2007* which is unambiguous that a female employee shall be entitled to three months maternity leave with full pay.

60. The parties are in agreement that it should be three months and the modification is made in accord with the provisions of section 60(5)(b) of the *Labour Relations Act*.

61. On simple majority, the Applicant makes general statements that during the pendency of ELRC Cause No 152 of 2012, and after, there was no simple majority of unionisable employees within the Respondent.

62. Curiously, the Applicant does not provide a breakdown of its employees in 2012 and the purported drop in the simple majority.

63. Section 54(1) of the *Labour Relations Act* provides that

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

64. The recognition under section 54(1) is by a written agreement between the parties.

65. From the documents on record, it is unclear how many unionisable employees the Applicant had on May 6, 2011 when the Recognition Agreement was signed.

66. However, by December 2011, the Respondent Union had a membership of 59 members and by January 2012, the number had fallen to 56. Of the 99 employees whose names are provided by the Applicant, no employee left after the Recognition Agreement in 2011.

67. Most employees exited in 2013, 2014, 2015 and 2017.

68. In its judgement in ELRC Cause No 152 of 2012, the court held that the effective date of the CBA as August 1, 2012 reflected on Clause 28 of the CBA.

69. The Applicant has not adduced evidence to establish that the Respondent union had no simple majority of the unionisable employees of the Applicant.

70. Puzzlingly, if the number had fallen below a simple majority, which has not been demonstrated, there is no evidence that the Applicant took any steps to have the Recognition Agreement revoked.

71. The Applicant signed the CBA while aware of the prevailing circumstances and cannot now contend that the circumstances were different. At any rate, the effective date is August 1, 2012 for 2 years initially and thereafter indefinitely until terminated by either party through a three (3) month written notice. Nothing turns on this issue.

72. As regards the last issue, while the Applicant urges that registration of CBA was grossly out of time, the Respondent Union urges that there is no prescribed duration especially after the employer fails to act in accordance with section 60(1) of the *Labour Relations Act* as was the case here.

73. That litigation by the Applicant was also to blame for the delay.

74. After judgement was rendered in ELRC Cause No 152 of 2012 in May 2014, both parties have been in and out of the court until April 22, 2021 when the court disallowed the last application by the Respondent Union seeking implementation of the judgement delivered in May 2014. By 2017, the Court of Appeal had noticed that the Applicant was using every corner to delay the cause of justice. The Court stated as follows;

> " The court has been moved to exercise its inherent jurisdiction. However, we cannot turn a blind eye to a litigant who comes to court determined to obstruct and delay the cause of justice at every corner while expecting reprieve from the same court. We have no doubt at all in our minds and as correctly observed by the Respondent that the Applicant's conduct throughout the proceedings leading to the instant application has been to delay by whatever means the finalization of the dispute. There is no good faith at all in the Applicant's conduct

and this court should not be seen to aid the Applicant in its intransigence by allowing the application."

75. Section 60(1) of the *Labour Relations Act*, provides that the employer who is a party to the CBA must submit the agreement for registration within 14 days failing which the trade union may submit it for registration.

76. The law does not prescribe the duration within which the trade union is required to act though reasonable time may be the optimal standard which is dependent on the facts of the case.

77. Having failed, neglected or refused to submit the CBA for registration within the 14 days as bylaw prescribed, the applicant cannot turn round and blame the Respondent for the delay or contend as it has done, that the registration of the CBA is out of time.

78. The Respondent has not explained methodically whose inaction is to blame as well as when the duration for registration of the CBA run out.

79. The court is guided by the sentiments of Radido J in ELRC Cause No 152 of 2012 as follows;

> " The court in the performance of its functions notes that many a times collective bargaining agreements take time beyond the expiry dates (when the normal two years) comes to an end and therefore back dating of the effective date has been the practice/norm . . .
>
> In the circumstances of this case, an effective date of August 1, 2012 would be in order . . ."

80. For the above stated reasons, the court is satisfied that registration of the CBA is not out of time.

81. In conclusion, it is the finding of the court that the Applicant has not provided any sustainable justification for the court to decline registration of the CBA dated November 20, 2020.

82. The Respondent Union is awarded Kshs 10,000/= as costs incurred in defending the instant application.

83. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2022

DR. JACOB GAKERI

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 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 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.

DR. JACOB GAKERI

JUDGE