



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 68 OF 2020

KENYA UNION OF SUGAR PLANTATION &

ALLIED WORKERS.....CLAIMANT

v

KIBOS SUGAR & ALLIED INDUSTRIES LTD...RESPONDENT

RULING

1. For determination is a Motion dated 16 September 2020 by the Kenya Union of Sugar Plantation & Allied Workers (the Union) against Kibos Sugar & Allied Industries Ltd (the Respondent) seeking orders

1. ...

2. **THAT** pending the hearing and determination of the present Cause, the Respondent be compelled to conclude, sign and ratify/enforce the final draft produced by the Chairman of the negotiating team FKE Regional Manager Western Region.

3. **THAT** pending the hearing and determination of the present application, the Respondent be compelled to spread and implement the 16% agreed by both parties for the period of (2) years beginning 1st August 2018 – 31st July 2020.

4.

5. **THAT** the costs be provided for.

2. The Motion was certified urgent on 17 September 2020 and the parties directed to file and exchange affidavits and submissions within set timelines.

3. As a consequence the following were filed

(a) The Respondent's Human Resource Manager's replying affidavit on 2 October 2020.

(b) The Union's submissions and General Secretary's supplementary affidavit on 9 October 2020.

(c) The Respondent's submissions on 13 November 2020.

4. The Court has considered the Motion, affidavits and submissions.

5. The Union and the Respondent have a recognition agreement. They entered into a collective bargaining agreement. When the agreement lapsed, the parties commenced negotiations for an agreement to cover 2018 to 2020. The negotiations started in October 2018 and went on until around 8 November 2019. The meetings were mostly under the leadership of the Federation of Kenya Employers.

6. By this time, the primary item of disagreement was *percentage general wage increment* and how to spread it.

7. The Respondent had insisted on 16% wage increase spread over 3 years while the Union had insisted on 20% spread over 3 years.

8. However, on 17 December 2019, the Union wrote to the Respondent. It conceded to the proposal by the Respondent on 16% wage increment spread over 3 years.

9. The Respondent did not reply and on 29 January 2020, the Union issued a 14-day strike notice.

10. On 30 January 2020, the parties signed a Memorandum of Disagreement on one Issue: General Wage Increment and on 10 February 2020, the Chief Industrial Relations Officer notified the parties that he had accepted the report of a trade dispute and would endeavour to conciliate.

11. However, during conciliation, the Respondent brought up a new issue (that most members of the Union had withdrawn membership) but the Union declined to agree to a ballot. The Conciliator then recommended that the parties move to Court.

12. In the replying affidavit of its Human Resources Manager, the Respondent deposed that the instant proceedings were *sub judice* or an abuse of the court process because the Union had already commenced litigation over similar facts in Kisumu Cause No. 34 of 2020, *Kenya National Union of Sugar Plantation & Allied Workers v Kibos Sugar & Allied Industries Ltd.*

13. The Respondent also raised the issue of material non-disclosure on the ground that the Union had failed to disclose the existence of Kisumu Cause No. 34 of 2020, *Kenya National Union of Sugar Plantation & Allied Workers v Kibos Sugar & Allied Industries Ltd* which was pending before another judge of this Court.

14. On what had stalled the negotiations, the Respondent blamed the Union for shifting goalposts leading to the negotiations being caught up by the *Memorandum of Understanding between the Tripartite Social Partners – Ministry of Labour and Social Protection, Central Organisation of Trade Unions and the Federation of Kenya Employers* on 30 April 2020 which suspended the conclusion and/or implementation of new collective agreements during the COVID19 public health pandemic.

15. Still opposing the application, the Respondent contended that members of the Union had withdrawn their membership but the Union had declined to concede to a ballot to determine the level of membership. As a result of the withdrawal of the membership, the Respondent moved to have the recognition agreement revoked.

16. On allegations of harassment and victimisation of union officials, the Respondent contended that it took lawful disciplinary action to deal with misconduct in the workplace.

Sub judice

17. Although contending that the subject matter of the Cause herein were under consideration in Kisumu Cause No. 34 of 2020, *Kenya National Union of Sugar Plantation & Allied Workers v Kibos Sugar & Allied Industries Ltd* the Respondent did not exhibit copies of the pleadings therein. What was exhibited was a copy of the Motion now under consideration.

18. The Court is therefore unable to determine the objection.

Material non-disclosure

19. Since the pleadings in Kisumu Cause No. 34 of 2020, *Kenya National Union of Sugar Plantation & Allied Workers v Kibos Sugar & Allied Industries Ltd* were not disclosed or produced, the Court is unable to find that the Union was guilty of material non-disclosure disentitling it from equitable relief from this Court.

Withdrawal of membership

20. The parties herein have a recognition agreement which has not yet been revoked by the statutory body given that mandate, the National Labour Board.

21. Until revoked by the National Labour Board, the Respondent cannot lawfully decline to enter into negotiations and/or decline to conclude a collective bargaining agreement with the Union on the ground that the Union has lost its (majority) membership.

General wage increase

22. Industrial relations demands utmost good faith on the part of capital and labour. Without labour, capital would just be that, capital. It is only through the toil and sweat of labour that capital can earn profits. Social justice expects capital to share some of that profit with labour in form of fair wages.

23. The lack of good faith breeds industrial disharmony which negatively affects both the employer and the worker. It is therefore for the good of both to have a harmonious relationship.

24. It is correct that the tripartite social partners agreed a pause in regard to new collective bargaining agreements but the record here suggest that the Union and the Respondent had more or less reached an agreement when the Union through its letter dated 17 December 2019 climbed down from its proposal of 20% general wage increment to 16% general wage increment as proposed by the Respondent.

25. It is therefore not the Union which can be faulted for stalling the process. The Union had already done a climb down from its position.

26. In these circumstances, while the dispute the Union has presented before the Court amounts to an economic dispute which would ordinarily require the Court to call in the aid of the Central Planning and Monitoring Unit to prepare an appropriate report, the parties should

in utmost good faith reach agreement.

Conclusion and Orders

27. From the foregoing, the Court declines to grant the orders sought by the Union and in lieu thereof it orders

(a) The parties to meet under the leadership of the Federation of Kenya Employers with a view to reaching amicable settlement within 45 days.

(b) In default of agreement within 45 days, the Central Planning and Monitoring Unit to prepare a report on the financial implication of a 16% and/or 20% general wage increment backdated to 2018 on the Respondent and file a report on or before 30 April 2021.

(c) Mention for further directions on the hearing and determination of the main Cause on the merits on a date to be scheduled hereinafter.

28. Due to social partnership between the parties, costs in the cause.

Delivered through Microsoft teams, dated and signed in Kisumu on this 3rd February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Union Mr. Gombe, Branch Secretary

For Respondent Onsongo & Co. Advocates

Court Assistant Chrispo Aura