



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1340 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

LOAD TRAILER (EA) LIMITED.....RESPONDENT

RULING NO. 2

1. The Claimant is a trade union registered in Kenya to represent employees in motor trade and electrical trade industries. It has a Recognition Agreement with the Respondent, a company established in 1954 as a trailer manufacturing company under the name Bhachu Engineering Works but changed its name in 2012 to Load Trailer East Africa limited.

2. The Claimant and the Respondent have a recognition agreement signed on 22nd June 2015. They were in the process of negotiating the first Collective Bargaining Agreement (CBA) when they failed to agree following the Respondent's refusal to make counter proposals or to attend any meetings for the purposes of negotiating the CBA.

3. The Claimant was compelled to report a dispute to the Minister of Labour as provided under Section 62 of the Labour Relations Act. The Minister accepted the dispute and appointed a Conciliator who invited the parties for a conciliation meeting on 30th September and 9th October 2015 but the Respondent failed to submit their proposals at the first meeting and asked for more time to prepare the same but failed to attend the second meeting. The Conciliator was compelled to declare the dispute unresolved to pave the way for reference of the same to this court for adjudication.

4. Judgement in this matter was delivered on 20th April 2018. In the judgment, the Court determined the CBA for the parties. A subsequent application by the Respondent to set aside the judgment dated 8th January 2019 was dismissed by the Court. So was an application by the Claimant to adopt its tabulation of the CBA arrears. The application by the Claimant to have the Managing Director of the Respondent summoned to appear in Court was discharged following the appearance of Mr. Jagdeep Singh following issuance of a warrant of arrest by this court.

5. In the ruling delivered on 22nd November 2019, the Court observed as follows –

“The second application seeks to implement the CBA that is yet to be signed and registered. This is premature. What the claimant should be seeking is the execution of the CBA so that it can be registered before it is implemented.

For the foregoing reason, all the applications are dismissed with each party bearing its costs.

The respondent is however cautioned that its failure to sign the CBA constitutes contempt of this court's orders which is punishable in the manner provided in law. The respondent is thus directed to sign the CBA within 30 days from today's date. The case will be mentioned on 16th December 2019 to confirm compliance.”

6. The Respondent has persisted in non-implementation of the judgment of this court compelling the Claimant to file the instant application which seeks the following orders –

i. Spent.

ii. Spent

- iii. That the court to issue an order adopting the calculations off arrears and terminal dues to the grievant employees
- iv. That the court do issue an order enforcing Section 26 of the Employment Act 2007 and ILO convention 100
- v. That the court do issue an order it deems fit to address *the cause of justice*
- vi. That cost of the suit to the applicant.

7. In the grounds and affidavit of ROSE AUMA OMAMO, in support of the application, the Claimant states that following the judgment of the court, it drafted the CBA which it sent to the Respondent to sign and implement. That the Respondent declined to sign the CBA which remains unimplemented to date.

8. In the replying affidavit of JAGDEEP SINGH GURMEET BHACHU, the Managing Director of the Respondent, he states that the tabulation was done without consultation with the Respondent and is grossly exaggerated. That the Respondent's business was badly affected by COVID-19 pandemic forcing it to scale down operations which affected its liquidity.

9. Further, that the Claimant seeks to enforce the CBA in respect of employees who voluntarily left membership of the Union.

Analysis and Determination

10. I have considered the application by the Claimant, the replying affidavit and the Claimant's submissions. No submissions were filed by the Respondent.

11. The issue for determination is whether the Claimant is entitled to the orders sought.

12. Section 57 of the Labour Relations Act provides that an employer who has recognised a Union shall conclude a collective agreement with the Union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.

13. Section 60 of the Act provides for registration of a CBA. It is the duty of the employer to submit the CBA for registration within 14 days of its conclusion. However, where the employer fails to submit the CBA for registration, the Union may do so. Section 60(1), (2) and (3) of the Act provides for the registration of CBA as follows –

60. Registration of collective agreement

1. Every collective agreement shall be submitted to the Industrial Court for registration within fourteen days of its conclusion.

2. The employer or employer's organisation which is party to an agreement to be registered under this section shall submit the agreement to the Industrial Court for registration.

3. If an employer or employers' organisation fails to submit the collective agreement to the Industrial Court as specified in subsection (1), the trade union may submit it.

14. Section 59 provides for the implementation of a CBA as follows –

59. Effect of collective agreements

1. A collective agreement binds for the period of the agreement—

a. the parties to the agreement;

b. all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or

c. the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.

2. A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employers' association.

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

4. A collective agreement shall be in writing and shall be signed by—

a. the chief executive officer of any employer, the chief executive or national secretary of an employers' organisation

that is a party to the agreement or a representative designated by that person; and

b. the general secretary of any trade union that is a party to the agreement or a representative designated by the general secretary.

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.

15. The CBA herein, although awarded by the Court and signed by the parties, has not yet been presented to this Court for registration by either the Respondent whose statutory duty it is to submit it for registration, nor the Claimant/Applicant who is mandated to submit the CBA for Registration where the employer fails to do so..

16. The Court must however point out that the CBA that has been signed by the parties has an effective date and the law enacts the manner in which it is to be implemented. The tabulation by the Claimant is therefore an entitlement to the employees who were in employment on the date of judgment on 20th April 2018, and once the CBA is registered, the Court will have no hesitation in granting the same.

17. The Respondent's averment that it was not consulted before the tabulation fly in the face of reason as it was the responsibility of the Respondent to implement the CBA and the Claimant has only approached this Court because the Respondent failed to do that which it is obligated by law to do.

18. The Respondent's averment about the financial implications of COVID-19 pandemic would also not be sustainable as the award of this court was delivered on 20th April 2018, long before the world imagined that such a pandemic as COVID-19 was even possible. It is further evident from the Court record that since 2016 when this suit was filed, the Respondent has used all means at its disposal to ensure the CBA does not see the light of day. It is only after the Respondent's Managing Director was threatened with arrest, following issuance of warrants of arrest, that the Respondent signed the CBA. The Respondent can therefore not benefit from its own deliberate default.

19. The foregoing notwithstanding, it is premature for the Claimant to tabulate benefits arising for a CBA that has not yet been registered. It is for this reason only, that the application fails.

Conclusion

20. The application herein is declined on grounds that although it is valid, the Court cannot grant the orders until after the CBA that was signed by the parties is registered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF JULY 2021

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 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.

MAUREEN ONYANGO

JUDGE