



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

C.B.A NO. E022 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA COUNTY GOVERNMENT WORKERS UNION.....UNION

VERSUS

EMBU WATER AND SEWERAGE COMPANY LIMITED.....EMPLOYER

AND

KENYA UNION OF WATER AND SEWERAGE EMPLOYEES.....OBJECTOR

RULING

1. The dispute herein arose following the objection to the registration of the CBA between Kenya County Government Workers Union, **the Union** hereinafter referred to as ECGWU and Embu Water and Sewerage Company Limited, **the Employer**. The objection was raised by the Kenya Union of Water and Sewerage Employees, **the Objector** herein after referred to as KUWASE. The CBA is for the period 1st July 2019 to 30th June 2021.
2. The CBA between KCKWU and the employer was presented to this court for registration by letter dated 18th December 2020. The same was fixed for consideration for registration on 13th January 2021 when it was deferred to 18th January 2021 as the court was on vacation.
3. On 18th January 2021 when the matter came up, an objection was raised by Mr. Nelson Othoo who appeared on behalf of the Objector on grounds that NUWASE had a recognition agreement with the employer.
4. Mr Otieno who appeared for KCGWU stated that this was the third CBA between KCGWU and the employer. That there is a valid recognition agreement and the objecting Union has never had a CBA with the employer. That the three CBA's were signed on 20th December 2011, 22nd November 2013 and 23rd June 2015 respectively.
5. The registration of the CBA was again deferred to 25th January 2021 and the Court directed the Objector to file a formal application.
6. On 25th January 2021, Mrs. Wafula who appeared for the Salaries and Remuneration Commission (SRC) also raised an objection to the registration of the CBA on grounds that its advice was not sought by the Employer. That water companies employees are public officers and the CBA must be submitted to SRC. The Ministry of Labour and the Employer raised no objection on the registration of the CBA.
7. As directed by the Court, KUWASE filed an application dated 25th January 2021 in which it seeks the following orders:

i.) *Spent*

ii.) *The Honourable Court be pleased to stay the intended Registration of the CA NO. E022 OF 2020 herein which was Scheduled for registration on 18th January 2021 pending hearing and determination of this Application, for the reasons that the county Government workers Union is a stranger Union in the water sector and is masquerading to be representing the employees in the water sector even after separation of water services from local authorities, contrary to court order both in RCA No. 34 of 2020, Civil Appeal No. 18 of 2013 National Union of Water and Sewerage Employees and 3 Others v Nairobi Water and Sewerage Employees and 3 Others and ELRC No. 755 of 2013 as consolidated with ELRC Causes 2133 of 2011, 823A of 2012 and 2504 of 2012, 2020 of 2012, 2062 of 2012, 1526 of 2013, 1007 of 2017, 977 of 2017, and 2107 of 2016..*

iii.) *THAT the Honourable court do decline to register the CBA No. E022 of 2020 between the Union and the Employer and direct the Objector to proceed and negotiate the CBA for the workers with the Employer as the Objector is the right Union in the sector.*

iv.) *THAT cost of this application be assessed by the court.*

8. The application is premised on the following grounds:

i. *THAT the Objector and the respondent have had a valid recognition agreement and CBA and the last CBA being the 2015, then the Kenya County Government Workers Union encroached our territory and caused sectorial unrest knowingly that the Employer and the Objector have been in the path.*

ii. *THAT the Union [Kenya County Government Workers Union] and the Employer deliberately colluded and purportedly involved in the negotiations of a CBA and presented the same to this Honourable court and the same was scheduled for registration on 18th January 2021 despite having knowingly that they are in the wrong sector and there are existing court orders barring them from being in the sector. UNLESS restrained, the said court orders will be rendered nugatory.*

iii. *THAT the Union and the Employer are using a hit and run game having actively participating in the above mentioned suits both in the court of Appeal and Employment and Labour Relations Court therefore abusing this court's process unless restrained.*

iv. *THAT the action and or inaction by the Union and the employer is frivolous and vexatious in nature having repeating the same mistake despite this honourable court orders and is an abuse of this court process as it is against the law of natural justice and the constitution.*

v. *THAT the Union and the Employer are demeaning the constitutional Authority of this Honourable Court unjustly without any lawful cause at all unless permanently restrained.*

vi. *THAT it is in the interest and justice that the orders sought be granted.*

vii. *THAT no prejudice shall be suffered by the Union and the employer should the orders sought be granted.*

9. In response, KCGWU filed a replying Affidavit sworn by its General Secretary, Mr Roba Duba, on 9th February 2021. The Affiant deposes that there is a valid recognition agreement between the Employer and itself signed on 7th June 2017.

10. Mr Roba deposed that KCGWU received the application a day to the hearing and as such seeks its dismissal for having been filed and served way past the strict court timelines. In addition, he deposed that the application was premised on the wrong provisions of the law and that a court of law had to be moved under the correct provisions of the law for a right or recourse to be derived from it.

11. He deposed that the allegations of collusion between the employer and itself is misleading and amounts to a serious accusation which must be strictly proved.

Objector's Submissions

12. The Objector submitted that as per the provisions of section 54(8) of the Labour Relations Act, the court is guided by the sector the employer works in and the existence of a recognition agreement. It submitted that as far as it was concerned, a valid recognition agreement existed between itself and the employer who has not proved whether the National Labour Board approved its petition to cancel or reject it.

13. KUWASE also submitted that the employer had not demonstrated whether its members had resigned and whose obligation it was to notify the Objector. It submitted that the CBA is tainted thus null and void as it was negotiated without capacity.

14. KUWASE urged this court to rely on the decision in **Kenya County Government Workers Union v National Union of Water and Sewerage Employees (2021) eKLR** where the court held:

“KCGWU must respect the unchallenged determination of this court that it is not the correct or proper Union for employees of the water sector where the Nairobi Water and Sewerage Company operates. It must also respect the unchallenged decision of this court as confirmed by the Court of Appeal and expunge employees of water and sewerage companies from the membership clause of its Constitution.”

15. It submitted that the above pronouncements have neither been set aside nor varied by any court and are in force to date. In addition, it stated that the court in the above decision clarified the sector in which an employee is supposed to join a Union and argued that KCGWU cannot purport to represent employees in the water companies given that it does not have the capacity to represent employees in the water sector. That this action by KCGWU is unfounded, unlawful and illegal.

16. KUWASE submitted that the court in the above case was emphatic that the proper trade Union to represent employees in the water sector is NUWASE now (KUWASE).

17. In conclusion, it urged the court to decline to register the CBA.

Union's Submissions

18. KCGWU submitted that the Employer identified in the Application herein does not exist and that the CBA that has been brought forth for registration is between itself and the Embu Water and Sanitation Company and not Embu Water and Sewerage Company Limited as quoted by the Objector.

19. It relied on the case of **Anderson Mole Munyaya & 3 Others v Morris Sulubu Hare (2017)** where the court of appeal quoted the **Supreme Court of Nigeria in Goodwill & Trust Investment Ltd and another v Witt & Bush Ltd. –SC 266/2005** held that where the wrong principals have been sued the court has no jurisdiction and the resulting judgement is therefore a nullity.

20. KCGWU submitted that the court is guided by Section 60(6) and (7) of the Labour Relations Act when registering a CBA and as far as it is concerned, the pending CBA does not conflict with the provisions of the said sections. That KUWASE had not proved otherwise as well.

21. KCGWU submitted that KUWASE had raised flimsy grounds in its objection which ought not to stop this court from proceeding with the registration of the CBA. It backed this argument with this court's decision in **Kenya Union of Domestic Hotels, Educational Institution, Hospitals & Allied Workers v Kenya Medical Training College (2014) eKLR**.

22. On the delay in service of the Application, KCGWU relied on the provisions of Order 51 Rule 13(3) of the Civil Procedure Rules which requires service to be effected in not less than seven days before the date of hearing. It relied on the case of **Tom Wasike Nangumba v Coconut Limited (2013) eKLR** which upheld the same. It also submitted that where there are strict timelines set by court, each party is under a duty to adhere to the directions.

23. Regarding the allegation of collusion with the employer, KCGWU relied on the case of **Scholastica Nyaguthii Muturi v Housing Finance Co. of Kenya Ltd & Another (2017) eKLR** where the court held that he who alleges fraud must prove the same to the satisfaction of the court. It submitted that the Objector has not done the same and the allegations remain as allegations which the court should disregard.

24. In conclusion, KCFWU submitted that the application lacks merit and urged the court to dismiss it and proceed with the registration of the CBA. It prayed for costs to be granted on the higher scale the Objector having delayed the registration of the CBA and for dragging innocent litigants into unnecessary litigation.

25. The Employer, the Ministry of Labour and the SRC did not file any submissions.

Determination

26. I have considered the grounds in support of the notice of motion as well as the supporting affidavit of Elijah Otieno Awach. I have further considered the replying affidavit of Roba Duba and the submissions on record. The issue for determination is whether CBA No. E022 of 2020 between Kenya County Government Workers Union and Embu Water and Sanitation Company Limited signed on 30th November 2020 should be registered.

27. It is not disputed that there is a recognition agreement between KUWASE and the Employer. It is also not in dispute that by letter dated 24th May 2017 the Managing Director of Embu Water and Sanitation Company Limited, the Employer herein, addressed a letter to the National Labour Board to facilitate the cancellation of the recognition agreement between the Employer and National Union of Water and Sewerage Employees (NUWASE) now KUWASE. The letter is reproduced below –

“EWASCO/LBD/2017

24th May, 2017

The National Labour Board of Kenya

P. O Box 40326 -00100

NAIROBI

Dear Sir,

RE: CANCELLATION OF RECOGNITION AGREEMENT BETWEEN EWASCO AND NUWASE

The above subject refers.

The management of Embu Water and Sanitation Company Limited (EWASCO) would like to inform your office that, our staff members withdrew from National Union of Water and Sewerage Employees (NUWASE) in November 2016, and then the same was communicated to the aforementioned Union on the 15th December 2016.

As a result, the union has the minority members in our company.

This is therefore to request you to facilitate the cancellation of the Recognition Agreement between the company and the union.

Our employees have joined the Kenya County Government Workers Union and a Recognition Agreement negotiation process is currently ongoing.

Yours Sincerely

SIGNED

Eng. H. M. Karugendo

MANAGING DIRECTOR”

28. As deposed in the affidavit of Elijah Otieno Awach, the National Labour Board has never sanctioned the revocation of the CBA. This is not contested by the Employer or by KCGWU.

29. Mr. Awach has further attached a copy of a CBA between KUWASE and the Employer.

30. As deposed in the replying affidavit of Roba Duba, the recognition agreement between the Employer and the Union was signed on 7th June 2017. This was obviously during the subsistence of the recognition agreement between the Objector and the Employer which from the evidence on record has never been terminated. An Employer who has a valid and subsisting recognition agreement has no capacity to enter into another recognition agreement with a difference Union over the same employees. Section 54(5), (6), (7) and (8) of the Labour Relations Act provides that –

(5) An employer, group of employers or employers’ association may apply to the Board to terminate or revoke a recognition agreement.

(6) If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.

(7) If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.

(8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.

31. This Court and the Court of Appeal have previously held that KUWASE is the appropriate in for water companies. Refer to decision of the Court of Appeal in **National Union of Water and Sewerage Employees & 3 Others v Nairobi Water and Sewerage Company Limited (2018) eKLR**, and this Court’s decision in **Kenya County Government Workers Union v Nairobi Water and Sewerage Company Limited and National Union of Water and Sewerage Employees**.

32. It is for these reasons that I find that for as long as the recognition agreement between KUWASE and the Employer herein subsists, and for as long as the decision in Court of Appeal, Civil Appeal No. 18 of 2015, being a decision in the Appeal against the decision in Cause No. 823 of 2012 remains in force, KCGWU and the Employer herein do not have capacity to either enter into a recognition agreement or negotiate any CBA.

33. The foregoing notwithstanding, the CBA herein would still not have been registered for reasons that the approval of the Salaries Remuneration Commission was not obtained by the Employer before forwarding the CBA for registration. Section 15(6) of the Employment and Labour Relations Act requires this Court to make reference to the guidelines published by SRC from time to time to the extent to which they are relevant to the dispute. Refer to the decision in **Civil Appeal No. 196, 195 and 203 of 2015 (consolidated) between The TSC v KNUT & 23 Others** on the binding nature of SRC advice under Article 230(4)(b).

34. The Employer herein is by law required to seek SRC advice before entering into CBA negotiations with a Union.

35. It is for these reasons that I decline to register the **CBA No. E022 of 2020** between **KCGWU and Embu Water and Sewerage Company Limited**.

36. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF AUGUST 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