REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E562 OF 2021

KENYA CHEMICAL WORKERS UNION..CLAIMANT

VERSUS

BAMBURI CEMENT LIMITED..RESPONDENT

RULING

1. This Ruling is precipitated by the Claimant's Notice of Motion seeking various reliefs against the Respondent. It is expressed to be brought under the provisions of Section 57(6) of the Labour Relations Act 2007, and any other enabling laws of the land. The motion together with the Supporting Affidavit sworn by Mr. Peter Ouko Onyango seeks the following orders:-

> 1. *Spent*.
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> 2. THAT, this Honourable Court be pleased to fix a hearing date on priority basis and prays that the matter be disposed of within 30 days to allow employees salary of the third year be adjusted to over 40 employees of the company who are members of this Union.
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> 3. THAT, pending hearing and determination of this application, this Honourable court be pleased to order or direct the Respondent to adjust the employees' salaries of the 3rd year with 7.5% as was negotiated by the parties.
>
> 4. THAT, the cost of this application be provided for.

2. The Respondent was opposed and filed a replying affidavit sworn by Ms. Waeni Ngea who is the Respondent's Head of Legal & Compliance and the Company Secretary. As an advocate of the High Court she depones that the application does not meet the legal threshold set out in the case of **Giella *v* Cassman Brown Ltd [1973] EA 358** to warrant the mandatory order sought as no *prima facie* case with a likelihood of success has been laid out. She deponed that the Application before the court is bare, it has no grounds supporting it and no documentation has been presented to support or justify the allegations or claims made therein or in the Supporting Affidavit of Mr. Peter Ouko Onyango. Further, the Supporting Affidavit only contains unsubstantiated averments alleging refusal, failure and or ignorance of the Respondent to adjust salaries as Collective Bargaining Agreement (CBA) and that the CBA was registered. The claims are denied by the Respondent and are disputed. She deponed that the Application fails to set out or present any material upon which the court can consider the disputed claims made by the Applicant to warrant the orders sought. The affiant proceeds to assert that the Respondent disputes and denies the claims made by the Applicant and states that its actions with respect to the adjustment of salaries are lawful and justified in the circumstances. She depones that the newspaper article referenced in the Certificate of Urgency is not authored by the Respondent and is also not entirely accurate or complete regarding the detailed grounds upon which the Respondent has disputed the claim for increments in May 2020. She asserts that the Court cannot rely on the reference to the article authored by a third party and without the same having been annexed and also in light of the Respondent's wider and more detailed basis for disputing the increments. She asserts that the issues in dispute are contentious and disputed and have been canvassed before various forums before escalation to the courts and the Applicant has failed to disclose this material fact on the face of its application. In the circumstances, she verily believes that the Court can only issue orders with respect to the disputed salary increment following a plenary hearing of evidence by both parties and not on the basis of an interlocutory application as sought. She deponed that the Applicant has failed to demonstrate that irreparable injury, which cannot be adequately compensated by an award of damages will be suffered in the circumstances. In this regard, the application does not set out any claim that the members represented by the Applicant will or have suffered irreparable injury which cannot be compensated by an award of damages as this is a claim for payment of salary increments. She deponed that the employees represented by the Applicant are still employed by the Respondent and continue to receive their regular salaries and other benefits save for the disputed increment. She asserts that there is no risk of irreparable injury, as should the case be successful, there is no risk that the amounts will not be paid. There is also no evidence before the Court to suggest the contrary or any risk regarding the recovery of any amounts as the Court may order. Further, the Applicant has not demonstrated that on a balance of convenience it is entitled to the orders sought. She asserts that there is no averment alleging inconvenience or prejudice suffered by the Applicant or the employees it represents. In addition, the Respondent stands to suffer inconvenience and prejudice if the disputed increments are paid out in light of the challenges the company has faced following the adverse impact of COVID-19 on its operations and finances. She depones that the Applicant has not set out any basis upon which the court should grant it prayer 3 in which the Claimant in effect seeks a mandatory injunction at this interlocutory stage. She asserts that granting prayer 3 at this stage would prejudice the hearing of the entire dispute and would in effect be a final order with reference to the substantive claims made by the Applicant in its Memorandum of Claim. She depones that the Applicant has failed to establish a basis or any reasonable basis for the mandatory order sought and no special circumstances have been claimed or pleaded and the claims made in support of the application are disputed. She thus urged the disallowance of the motion by the Claimant.

3. Mr. Gwako appeared for the Union and argued that the matter was to be concluded by the parties but the Respondent is stubborn. He stated that the 3rd year of CBA is yet to be implemented as the agreement is for past not future years. He argued that the Respondent cannot argue that the Covid 19 pandemic is the cause for the failure to implement. He stated that the 40 employees who are members of the Claimant have not been given the increment agreed on in the 2018-2019 CBA. He submitted that when the CBA was being registered, the

Court asked if there was any objection to its registration and none of the parties complained, the CBA was duly registered and a certificate issued. He argued that later on, Respondent came to complain on implementation of the 3rd year. Mr. Gwako urged the Court to take judicial notice that the Chief Executive Officer of the Respondent had confirmed to the world the company made tremendous profit as confirmed by the financial report of 2020. He argued that the Respondent was now trying to deny workers their rights. He stated that the parties had gone up to conciliation process and Mr. Kimeu of the Labour Office called meeting and the parties attended and the Respondent tried to bring complications. He stated that Mr. Kimeu informed the parties that he had only 30 days to give the determination in the dispute and because the dispute was undetermined after 30 days, the Conciliator gave his report. He submitted further that the Conciliator recommended payment of arrears and in conclusion, submitted that arising from the performance it is unreasonable to deny them the increment.

4. Mrs. Wetende for the Respondent submitted that she thought that there is confusion on the part of the Union as the hearing of the motion is not the hearing of the substantive claim. She stated that it is for hearing of the Motion of 30th June 2021 as the Respondent was even yet to respond to the suit. She stated that the Respondent in opposition to the motion had filed the affidavit of Ms. Waeni Ngea. She argued that the Motion is fatally and incurable defective as it does not meet the basic requirements. She stated that no grounds exist on the Motion contrary to Rule 17(8) of the Court (Procedure) Rules. She stated that no document is annexed and as such there is no affidavit evidence. Counsel argued that the Motion stands alone and that, she submits does not meet the *prima facie* requirement. She submitted that the Claimant had served the Respondent with a response to the replying affidavit in an attempt to canvass the issues raised. She submitted that too was defective. She argued that there is no affidavit before Court and that affidavit evidence should meet the requirements of Section 16. She submitted that there are no documents before the Court, there is no deponent and that the motion is defective. She submitted that the affidavit of Waeni Ngea gets out in great detail the factors surrounding the suspension of the CBA but hastened to add that these matters are for plenary hearing. She argued that the Claimant relies on a newspaper advert and further that the Claimant did not report it as a dispute. She submitted that the material non-disclosure disentitles the Claimant to the discretionary order. She argued that the Claimant seeks a mandatory order but has not proved *prima facie* case with probability of success. She argued that there was no proof of irreparable damage and also no proof the Claimant met the threshold for grant of the orders sought. She stated that the Grievants are still employees of the Respondent. The Respondent's Counsel cited case of **Vivo Energy Kenya Limited *v* Maloba Petrol Station Limited & 3 Others [2015] eKLR** and submitted that the Court should not be drawn to making a decision that will determine the entire claim at interlocutory stage. She relied on the case of **Stephen Kipkebut t/a Riverside Lodge and Rooms *v* Naftali Ogola [2009] eKLR**. The Respondent submitted that the Court should discern there are no special circumstance to warrant a mandatory injunction. The Respondent argued that the Claimant/Applicant also seeks urgent hearing within 30 days and that nothing warrants jumping the queue.

5. In a brief reply Mr. Gwako argued that the Respondent did not seem to understand the issue which is refusal to implement the salary increments to cover the staff who are 30 in number. He argued that the Respondent has given condition that it will not increase the salary by 7.5% which was agreed and that the Respondent now says only 1% increment is possible. He stated that the MOU does not stop negotiation and implementation of CBA and the Respondent should not dwell on the MOU. He submitted that the Union has negotiated the CBAs with other employers and even Bamburi itself has negotiated. He conceded that the Grievants are still employees but asserts that they should however not be denied their rights and after 12 months we cannot speak of MOU.

6. The Court has considered the rival positions taken, the submissions and arguments of parties at the oral hearing of the Application in coming to this decision. The motion herein is in respect of the implementation of the CBA. From all accounts, the issue in the present motion is the failure by the Respondent to pay the 3rd year in terms of the CBA. There is a set mechanism for resolution of the dispute failing which this Court may intervene in terms of Section 57(6) of the Labour Relations Act. The Respondent has indicated that the grant of the orders sought would be tantamount to having the matter resolved at interlocutory stage. The Court agrees with this assessment. Moreover, the application is defective in one respect which is that the affidavit does not annex any evidence and is bare, pure and simple for not indicating the grounds upon which the motion is premised.

7. Further, Part VIII of the Labour Relations Act makes provision in relation to the resolution of the trade disputes arising under the Act. There is no provision for summary determination and as such the assertions by the Claimant Union and the rival contentions by the Respondent Employer must be heard on the merits and a decision made thereafter. Motion is denied and the Court having agonised on the appropriate order for costs in respect of the notice of motion holds that the Claimant ought not have filed the motion. Despite the dispute being one between social partners in the labour sphere the appropriate order for the premature and improper attempt shall be costs of this application be borne by the Claimant. Since the matter is not yet ripe for a full hearing parties are directed to complete the pre-trial procedures and revert within 21 days of this Ruling for directions as to hearing of the suit on the merits.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021

NZIOKI WA MAKAU

JUDGE