



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 502 OF 2018

BETWEEN

DOCK WORKERS UNION.....CLAIMANT

VERSUS

- 1. KENYA FERRY SERVICES LIMITED**
- 2. MINISTRY OF TRANSPORT, INFRASTRUCTURE,
HOUSING, URBAN DEVELOPMENT AND PUBLIC WORKS**
- 3. THE ATTORNEY-GENERAL.....RESPONDENTS**

AND

SALARIES AND REMUNERATION COMMISSION.....INTERESTED PARTY

Rika J

Court Assistant: Benjamin Kombe

Leonard Rufus Ochieng' Executive Officer, for the Claimant

Elija Kitur, Advocate for the 1st Respondent

Winnie Namahya Waswa, State Counsel for the 2nd and 3rd Respondents

No representation for Interested Party

JUDGMENT

1. In its Statement of Claim filed on 19th November 2018, the Claimant Union, representing Unionisable Employees of the 1st Respondent, prays for Judgment against the Respondents as follows:-

- a. A declaration that there is a Recognition Agreement between the Parties which defines the procedure of negotiations, and unless the same is amended, it binds the Parties to it, and the Court cannot re-write a contract between the Parties.
- b. A declaration that by its own commitment and conduct, the 2nd Respondent has a responsibility to ensure and facilitate the 1st Respondent in a level corresponding and commensurate with the tasks of responsibility it has attached to the 1st Respondent.
- c. A declaration that in event that the 2nd Respondent fails to release grants which are commensurate with the services, the 1st Respondent renders to the human traffic, then the 1st Respondent should proceed to charge all services across its facilities to enable it

meet its budgetary responsibilities.

d. Mandatory injunction to compel the 1st Respondent to pay the Members of the Claimant, all accrued and withheld annual increments from 1st June 2015 to-date at 2.5% compound interest.

e. Mandatory injunction do issue to compel the 1st Respondent to sign the proposed CBA with the Claimant and register the same with this Court forthwith.

f. Mandatory injunction against the 2nd Respondent to release the grants as contained in its memorandum signed for the year 1st July 2013 to 30th June 2014 and continue to do so.

g. In the alternative to [f], an order of mandatory injunction issues, directing that the 1st Respondent may collect revenues from all its services, as in the case of other Countries.

h. Any other relief the Court may find it fit to grant.

i. Cost of the Claim be borne by the Respondents.

2. The 1st Respondent is a State Corporation, the 2nd Respondent its parent Ministry. The 3rd Respondent is the Principal Legal Advisor to the Government of Kenya. The Interested Party is an Independent Commission established under Article 230 of the Constitution of Kenya, mandated *inter alia*, with advising National Government and the County Governments on remuneration, salaries and wages of Public Service Employees.

3. The Claimant and the 1st Respondent have a Recognition Agreement and have been involved in Collective Bargaining. The Recognition Agreement requires terms and conditions of service of 1st Respondent's Unionisable Employees, are reviewed after every 2 years.

4. The last CBA, which issued through a Judgment of the Industrial Court in Cause Number 338 of 2014 between the Claimant and the 1st Respondent, lapsed on 30th June 2015.

5. The Claimant sent proposals to the Respondent, on amendment of CBA, to cover the subsequent period of 4 years, as currently regulated by the Interested Party, to cover the period 1st July 2015 to 30th June 2019.

6. The Claimant and the 1st Respondent convened several meetings under their Joint Industrial Council [JIC]. They agreed on other collective bargaining subjects but were deadlocked on 5 subjects: basic salary; house allowance; commuter/ transport allowance; leave traveling allowance; and luggage allowance upon retirement.

7. The 1st Respondent filed its Statement of Response on 18th December 2018. It agrees to the description of the Parties. It is agreed that the first 2 Parties have a Recognition Agreement and were involved in CBA negotiations as outlined in the Statement of Claim. It is the 1st Respondent's position that the Co-Respondents and the Interested Party, are improperly joined to the Claim, as they have no labour contract of any form with the Claimant Union.

8. The interested Party published Guidelines in 2013, altering collective bargaining cycles from the previous 2, to 4 year cycles. It is agreed that the Claimant forwarded proposals for amendment of various clauses in the CBA, through a letter dated 21st November 2016. There were proposals and counter-proposals, and several meetings between the first 2 Parties, under the aegis of the JIC. The 1st Respondent sought and obtained the advice of the Interested Party. It is agreed that Parties reached deadlock on 5 subjects.

9. The 1st Respondent does not admit that the Court has jurisdiction in setting or reviewing of remuneration and other benefits due to Public Officers. The jurisdiction is reserved to the Interested Party. Once the advice of the Interested Party issues, it must be followed as ruled by the Court of Appeal in ***Teachers Service Commission v. Kenya National Union of Teachers [KNUT] & 3 Others [2015] e-KLR.***

10. The 3rd Respondent did not file a Statement of Response. Instead, on record are Grounds of Opposition. The Employment and Labour Relations Court [Procedure] Rules 2016, do not state that a Statement of Claim, is to be answered through Grounds of Opposition; the Rules require there is a Statement of Response, filed within a specified period. The Court shall proceed on the basis that there is no Statement of Response, filed by the 3rd Respondent.

11. The Interested Party similarly, did not file a Statement of Interest, but satisfied its participatory obligation in the dispute, by filing a Report on 30th May 2019 highlighting its mandate and advice issued to the Employer, the 1st Respondent herein, on the collective bargaining subjects.

12. On 19th July 2019, Parties recorded a consent order to have the Claim disposed through Submissions, Pleadings, and Documents on record, under Rule 21 of this Court's Procedure Rules.

13. The issues as understood by the Court are as follows:-

- Whether the Court has jurisdiction in the matter.
- Whether 2nd and 3rd Respondents, and the Interested Party, are properly joined to the Claim.
- Whether the declaratory orders and orders of mandatory injunction sought should be granted.
- Whether the Court should intervene and impose a solution on the deadlocked issues.
- Who bears the cost of the Claim?

The Court Finds:-

14. **Jurisdiction:** The Court has jurisdiction in adjudication of employment and labour relations disputes, pursuant to Articles 159 [1] and 162 [2] [a] of the Constitution of Kenya, and Section 12 of the E&LRC Act. Section 73 of the Labour Relations Act requires that trade disputes are referred to the E&LRC where they are not resolved through conciliation. Notwithstanding this provision, if a dispute is in respect of which a Party may call a protected strike or lockout, the dispute may only be referred to the E&LRC by a Party that has made a demand in respect of an employment matter, or the recognition of a Trade Union, which has not been acceded to by the other Party to the dispute.

15. The Salaries and Remuneration Commission [SRC] is not a dispute resolution mechanism. It is not a Court or Tribunal, or Alternative Dispute Resolution Mechanism. The Commission as variously submitted by the Parties is an Advisory Commission. It advises one Party, the Public Service Employer, in collective negotiation and bargaining of terms and conditions of service of Employees, in the National and County Governments Public Service. It sets and regularly reviews the remuneration and benefits of all State Officers. Article 230 of the Constitution clearly delineates SRC mandate in setting remuneration and benefits of all State Officers, and that of advising County and National Governments on the remuneration and benefits of all other Public Officers. With regard to the Claimant's Members, the SRC could only advise the 1st Respondent, not set the remuneration and benefits of the Claimant's Members. The other Party, that is to say the Trade Union, normally has its own advisors. Article 41 [5] of the Constitution grants every Trade Union and Employer's Organization, and Employer, the right to engage in collective bargaining. This right is rooted in ILO Right to Organize and Collective Bargaining Convention No. 98 of 1949. This is one of the eight fundamental Conventions of the ILO. Convention No. 98 is complemented by Labour Relations [Public Service] Convention No. 151 of 1978, and Labour Relations [Public Service] Recommendation No. 159 of 1978. These Legislations and Recommendations of the ILO are reflected in Article 41 of our Constitution. Their objective mainly, is to promote free and voluntary collective bargaining, which precludes interference by Public Authorities which are not party to the collective bargaining. Article 230 of the Constitution recognizes it is not the role of the SRC to set remuneration and benefits of Public Officers, leaving the room for collective bargaining. Convention 151 of 1978 requires that settlement of disputes in connection with determination of terms and conditions of employment, shall be sought through independent and impartial machinery [Judiciary or other dispute resolution mechanisms]. The Commission's role is to render advice to the Employer. It does not have a role, unless in giving of evidence in Court, once there is a dispute on the CBA.

16. The Court therefore has jurisdiction in dispute settlement, while the mandate of the SRC is to offer advice to the Public Service Employer, at National and County levels. It also has an undoubted role in setting and regularly reviewing remuneration and benefits of State Officers, which are not subject to collective bargaining. In Industrial Court at Mombasa, Cause No. 338 of 2014 between the 1st Respondent and the Claimant herein, [*Kenya Ferry Services Limited v. Dock Workers Union [2015] e-KLR*] it was the Employer, the 1st Respondent herein, who initiated the Claim. Parties had reached deadlock on the previous round of collective bargaining and the Employees were on the verge of striking. The Employer, 1st Respondent herein filed that Claim, asking the Court to outlaw the intended strike, and to assist in settling of outstanding collective bargaining subjects. How is it that the same Court does not have jurisdiction, when the Union is now the Party initiating action over a similar dispute?

17. **Joinder/Misjoinder of Parties:** The dispute at hand is on collective bargaining, about identifiable subjects and between 2 Parties who have a Recognition Agreement, and who have concluded CBA in the past. The labour contracts concluded by the Claimant and the 1st Respondent, do not involve the other Parties.

18. The 1st Respondent is a State Corporation duly registered, with its own legal identity, capable of suing and being sued. It has its own Counsel in the dispute before Court, Mr. Elija Kitur, who also served as a Member of the Parties' JIC. The 1st Respondent is the Employer to Claimant Union's Members. It does not conduct its labour relations, on the instructions of the Ministry, the 2nd Respondent herein. The Ministry was not represented in the JIC. The Attorney- General, 3rd Respondent's joinder, is similarly without foundation. The 3rd Respondent was not party to the collective bargaining forum. The Court is of the view that, while Witnesses could be sourced by either the Claimant or the 1st Respondent from amongst the 2nd and 3rd Respondents, 2nd and 3rd Respondents are not necessary Parties in the Claim. ***They are discharged from further proceedings.***

19. The joinder of the SRC as an Interested Party is necessary. Rule 37 [2] of the E&LRC [Procedure] Rules 2016, requires the SRC to file a Report in Court, within 30 days of service of the Pleadings, or such other time as the Court considers necessary, in any dispute involving State or Public Officers. The Rule suggests that the SRC must be served with Parties' Pleadings and file its own Report within the specified period. Rule 18 allows the Court, of its own motion, where it considers fit, to order service of Pleadings on any Party whom it is satisfied may be interested in the matter being considered. The SRC gave advice to the 1st Respondent. It has been proposed by the 1st Respondent that this advice concluded the dispute. The SRC is an Interested Party and is properly joined as such, under the E&LRC [Procedure] Rules 2016.

20. **Declaratory and Mandatory Injunction Orders:** There is no dispute that the Parties have a Recognition Agreement. It is also correct that the Court cannot re-write that Agreement. The Court does not issue orders in vain. Why does the Court have to declare the existence of a Recognition Agreement whose existence or validity has not been questioned by the Parties?

21. The Court is prayed to declare that *“by its own commitment and conduct, the 2nd Respondent has a responsibility to ensure and facilitate*

the 1st Respondent.” The prayer at paragraph 37 of the Statement of Claim, is not in clear terms. If the Court understands the Claimant, the Court is being asked to order the Government to assist the 1st Respondent financially, in meeting the cost of implementing the proposed CBA. The Court is of the view that it is outside its jurisdiction, to determine where finances to satisfy CBA obligations, should come from. The futility of making this sort of order, is captured in this Court’s **Kenya Union of Domestic, Hotels, Education Institutions, Hospitals and Allied Workers v. Association for the Physically Disabled of Kenya [2015] e-KLR**. The Court made a non-executory recommendation, intended to elucidate litigants’ rights, to the effect that the Government of Kenya releases to the Employer a subsidy of Kshs. 5 million annually, from the National Development Fund for Persons with Disabilities, to avoid a situation where tens of Persons with Disability were marked for loss of employment through redundancy. The recommendation [not an order] agitated the Government, and was roundly condemned as having issued *per incuriam*, until gratefully, it was overturned by the Court of Appeal, which appeared convinced, that the Lower Court had issued an **order** capable of execution, rather made a **recommendation** intended to elucidate litigants’ rights. The role of the Court is not to merely adjudicate; the Court can make non-binding proposals to the Parties, which assist the Parties in further negotiations, even after the Court has made its Judgment. The rendering of a Judgment does not foreclose continuation of negotiations. Not all aspects of a dispute can be resolved through Judgments of the Court. The Court in the current dispute is not in a position to issue an order as sought, asking the Government to financially honour its obligations to the 1st Respondent, to aid in implementation of the proposed CBA. The prayer for declaratory orders on Government’s obligation to the 1st Respondent, and mandatory injunction compelling the Government to release financial grant to the 1st Respondent are outside the sphere of collective bargaining and intervention of the Court. In the negotiations overseen by the JIC, it was agreed that certain issues, such as double taxation of Employees’ house allowance, were not collective bargaining subjects. The Claimant undertook to pursue the issue with the Treasury. Financial obligations of the Government to the 1st Respondent, should similarly be pursued with the Treasury. So too is the question whether the 1st Respondent should be allowed to collect revenues from ferry services independent of the National Government. These are matters for the Government which owns the strategic asset that is Kenya Ferry Services Corporation, to determine in consultation with the stakeholders. The Claimant should place its argument with the Government, and nudge the Government into making a policy determination favourable to the Claimant. It is also open to the Parties to invite representatives from the Government to the JIC, as they have invited other non-parties in past sessions, if it is deemed the issues relating to financial grant, should form part of the wider collective bargaining process and outcome. The Court does not think it is the proper authority to move the Government in offering financial assistance to the 1st Respondent.

22. **Court’s intervention on 5 disputed collective bargaining subjects:** The disputed items are basic salary; house allowance; commuter/transport allowance; leave traveling allowance; and luggage allowance on retirement.

23. Parties propose and counter-propose amendments as follows:-

- **Basic salary increment** at 39%; counter-proposal at 10%.
- **House allowance**, FU1 at Kshs. 22,800, FU2 at Kshs. 20,400, FU3 at Kshs. 18,000, FU4 at Kshs. 15,400, and FU5 at Kshs. 13,200; counter-proposal is FU1 at Kshs. 19,000, FU2 at Kshs. 17,000, FU3 at Kshs. 15,000, FU4 at 13,000, and FU5 at Kshs. 11,000.
- **Commuter/ Transport allowance**, FU1 at Kshs. 8,400, FU2 at Kshs. 7,800, FU3 at Kshs. 5,600; counter-proposal is FU1 at Kshs. 7,000, FU2 at Kshs. 6,500 and FU3 at Kshs. 5,500.
- **Leave traveling allowance** at FU1 & 2 at Kshs. 60,000, FU3 & 4 at Kshs. 55,000, and FU5 at Kshs. 50,000; counter-proposal FU1 & 2 at Kshs. 14,750, FU3 & 4 at 14,500 and FU5 at Kshs. 13,750.
- **Luggage allowance on retirement** at Kshs. 90,000; counter-proposal at Kshs. 55,000.

24. There was no middle ground, after various and concerted negotiations, held at Hotels in Malindi and Mombasa by the Parties’ JIC.

25. Advice of the SRC is contained in its Report filed in Court.

26. The SRC reports, the 1st Respondent had proposed to the Claimant basic salary to be increased by 10% to 20% in two phases of between 4% to 8% in the first phase [Financial Year 2015/2016 to 2016/2017] and between 6% to 12% in the second phase, 2017/2018 to 2018/2019. The 1st Respondent proposed house allowance increment of 10% in 2 phases of 5% each. It was proposed to introduce risk and safety allowance at the rates of Kshs. 2,000 and Kshs. 1,500 per event. Other allowances were to be retained.

27. The SRC was of the view that the 1st Respondent would have challenges meeting the CBA amendments as proposed by the 1st Respondent. It was said that the 1st Respondent was making operation losses. The SRC noted there was no commitment from the National Government to fund the proposed CBA amendments. The SRC advised the 1st Respondent to increase basic salaries by 10 % spread in two phases of 4% and 6% in the first and second phase respectively. All allowances were to remain as they were.

28. The SRC states it was informed Parties had collectively bargained and settled on 29 items, while they were not able to settle on 5 items. The SRC, states that the 1st Respondent never appealed against SRC’s advice. In the opinion of the SRC, should the 1st Respondent appeal on any items as advised, the SRC would reconsider and give fresh advisory.

29. The push and pull between the 1st Respondent and the SRC, itself seemingly replete with proposals and counter-proposals, and the delayed initiation of collective bargaining process by the Claimant Union, has had the effect of delaying the completion of the CBA covering the period 2015-2019. Such delays do not promote collective bargaining, and adversely affect collective bargaining cycles, creating obligations in arrears, and thereby affecting the ability of the Employer to meet its end of the collective bargain.

30. Once the Parties have placed their dispute in Court, the Court would not be helping the Parties by ruling that they have not exhausted alternative dispute resolution mechanisms, and by asking them consequently to go back to the negotiating table, as proposed by the 1st Respondent. Already many sessions of the JIC have convened, deliberated on the disputed subjects, without agreement. The SRC report

suggests the 1st Respondent should appeal against advice given by the SRC to the SRC, while the process is held in abeyance, and the next 4 year collective bargaining cycle has arrived. Parties are still not agreed on whether the 1st Respondent, has in fact, met all the obligations which accrued from the Court-imposed CBA that expired in 2015. Failure to conclude CBAs, within the extended period of 4 years, and implement them as agreed or ordered by the Court, is a fertile seedbed for industrial disharmony.

31. To assist the Parties therefore, the Court must intervene and impose a solution concerning the 5 deadlocked collective bargaining subjects.

32. The SRC in giving advice, states it considered the principles of pay under Article 230 [5] of the Constitution, which include the need to ensure that public compensation bill is fiscally sustainable; the need to ensure public services are able to attract and retain the skills required to execute their functions; the need to recognize productivity and performance; and transparency and fairness.

33. The Claimant argues it considered various factors in making its proposals which traditionally include the cost of living indices for the relevant period, taken from the Kenya Bureau of Statistics [18.45%]; productivity which can be deduced from 1st Respondent's revenue growth from Kshs. 411 million in 2013 to Kshs. 490 in 2018 [19.4%], increase in vehicular and human traffic at the ferry; withheld annual increment from 2015 to-date ; real wage; and comparability considering in particular that the 1st Respondent is jointly owned by the Government and the Kenya Ports Authority [KPA]. The Employees of the 1st Respondent and the KPA are in the same maritime sector.

34. The 1st Respondent, in making its counter-proposals, relies on the advice of the SRC. It relies on its grading structure. The SRC advised the 1st Respondent to implement a model gross salary structure by retaining the current salaries, where they are above the model gross salary structure. The 1st Respondent's proposals are based on its Budget for the relevant period. The Budget for the period 2015/2019 contain salary increment in line with the proposals made by the 1st Respondent, which are in line with the Public Finance Management Act 2012. The proposals by the Claimant are not fiscally sustainable. In the financial period 2015 to 2018, the 1st Respondent reported deficits. A survey of registered CBAs in the Public Sector shows salary increment of 5.5 % to 18%. 10% proposed by the 1st Respondent is within this range. The skills possessed by the 1st Respondent's Employees do not warrant compensation beyond what the 1st Respondent has offered.

35. The Court has taken into account all the factors argued by the Parties as being the primary movers, in wage determination. It has been considered that the 1st Respondent offers essential services, and breakdown in collective bargaining and negotiations, has the potential to disrupt the smooth flow of vehicles and persons, across the channels served by Kenya Ferry Services. It has also been taken into account that Claimant's Members were entitled to 2.5% salary increment, which was automatic each year, prior to 2015. The Claimant states, without much contestation from the Respondent, that this automatic adjustment was withdrawn by the Respondent. The 2.5% increment is claimed as a separate prayer, under paragraph 39 of the Statement of Claim.

36. If granted, the separate prayer would result in a cumulative 10% increment over the period of 4 years, over and above any other increment the Court awards. The Claimant submits it is 12.5%. The Claimant submits its proposal for 39% basic salary increment, factored in, the removal of 2.5% automatic salary increment.

37. Automatic salary increments are aimed at offsetting the effects of inflation on Employees. They are in the nature of cost of living adjustments (cola), which are generally made, equal to the percentage increase in the Consumer Price Index.

38. It is doubtful that annual automatic salary adjustment, should remain in place, where salary review is made periodically, through the mechanism of collective bargaining. Automatic adjustment ensures Employees' salaries do not stagnate, but so does the basic salary increment made in a CBA. In considering salary increment under collective agreements, the same core factor of Consumer Price Index (and/or Cost of Living Index), is taken into account. There must be caution not to compensate the cost of living twice. The Claimant has not persuaded the Court to grant 2.5% salary increment in arrears. The increment was not granted through the CBA in the first place. It was not part of the collective bargaining subjects. It is an aspect of the 1st Respondent's pay structure which Parties can revisit, and re-look into, after the current CBA dispute is resolved. It need not be taken up with the 5 deadlocked collective bargaining subjects.

39. In the view of the Court, automatic adjustments should apply to Employees who are not subject to collective bargaining mechanism, such as State Officers. The Court thinks there is no justification in the prayer for restoration of 2.5% automatic annual increment.

40. **The Court Awards:-**

a. Basic Salary: increment of 20% over the period 2015-2019, spread evenly at 5% for each of the 4 years, translating into the following monthly rates-

FU1...Kshs. 52,020 to Kshs. 64,424.

FU2...Kshs. 41,654 to Kshs. 49,985.

FU3...Kshs. 33,354 to Kshs. 40,025.

FU4...Kshs. 26,707 to Kshs. 32,048.

FU5...Kshs. 21,385 to Kshs. 25,662.

b. House allowance:

FU1...Kshs. 19,000 to Kshs. 22,800.

FU2...Kshs. 17,000 to Kshs. 20,400.

FU3...Kshs. 15,000 to Kshs. 18,000.

FU4...Kshs. 13,000 to Kshs. 15,600.

FU 5...Kshs. 11,000 to Kshs. 13,200.

c. Commuter/ Transport allowance:

FU1...Kshs. 7,000 to Kshs. 8,400.

FU2...Kshs. 6,500 to Kshs. 7,800.

FU3, 4 & 5...Kshs. 5,500 to Kshs. 6,600.

d. Leave traveling allowance:

FU1 & 2...Kshs. 14,750 to Kshs. 17,700.

FU3 & 4 ...Kshs. 14,250 to Kshs. 17,100.

FU5...Kshs. 13,750 to Kshs. 16,500.

e. Luggage allowance on retirement:

Kshs. 55,000 to Kshs. 66,000.

f. 2nd and 3rd Respondents are discharged from the proceedings.

g. No order on the costs.

Dated and delivered at Mombasa this 28th day of January 2020.

James Rika

Judge