REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.106 OF 2018

BANKING, INSURANCE & FINANCE UNION (KENYA) .....CLAIMANT

VERSUS

PATNAS SACCO SOCIETY LIMITED .....RESPONDENT

RULING

The claimant filed application and Notice of Motion dated 19th June, 2019 seeking for orders that;

1. …

2. The respondent has refused and/or declined to comply with the orders of this court without reasonable justification in law.

3. …

4. The failure to obey the court orders shall occasion disrepute to the court.

5. It is in the interests of justice that orders sought be granted.

6. The respondent shall suffer no prejudice.

7. Costs of this application be provided for by the respondent.

The application is supported by the affidavit of Joseph Tipape and on the grounds that by a consent order recorded by the parties in court on 30th January, 2019 there was agreement to negotiate and come up with a settled Collective Bargaining Agreement (CBA). The order of the court as extracted and served upon the respondent with a penal notice and the claimant was keen to comply with the consent order and became the process to secure a meeting with the respondent by letter dated 4th February, 2019 with a request to the respondent to send the 2016/2017 CBA counter-proposal before the meeting but there has been refusal and failure to attend.

The claimant sent letter dated 1st March, 2019 giving the respondent another chance to share their counter-proposals of the CBA but this was ignored. The claimant has since shared its proposals to the respondent.

On 15th May, 2019 the matter came up for mention in court when the respondent sought for more time to negotiate on the CBA and 14 days were allowed but these lapsed and the respondent in contempt failed to act.

The respondent has not been willing to negotiate the CBA as indicated to the court. The claimant cannot negotiate on the CBA as the respondent has failed to give counter-proposals. The respondent should be found to be in contempt of court orders.

In his affidavit, Mr Tipape avers that he is the deputy secretary general of the claimant and supports the application by the claimant and the orders sought.

In reply the respondent filed the Replying Affidavit of Nelson Cheruiyot Rono the Chief Executive Officer and who avers that the allegations made by the claimant are without basis as there has been communication on-going and the members of the claimant wrote minutes of 17th November, 2017 resolving to their withdrawal from the union. Despite this withdrawal the respondent has been remitting their dues months.

The claimant has failed to serve the advocate on record and opted to serve the respondent directly with letters dated 5th march, 2019 and hence there is no refusal to negotiate as alleged. Application should be dismissed.

The claimant submitted and reiterated the contents of the application and affidavit and also that the failure by the respondent to negotiate the CBA for the period 2016/2017 is in disobedience of the court orders which totally disparages the rule of law as held in **Kenya Tea Growers Association versus Francis Atwoli & 5 others [2012] eKLR.**

The respondent submitted that the consent order of the court was clear to the extent that there was no time limit set compelling the respondent to submit CBA counter-proposal to the claimant. Parties were directed to sit, negotiate and come up with a settled CBA. Application dated 6th November, 2019 was withdrawn and letter dated 7th February, 2019 was not served upon the respondent as alleged.

The application by the claimant is made in bad faith and is premature. The respondent is ready and willing to discuss the CBA. Trade union dues are still being remitted to the claimant despite the withdrawal of employees from the claimant membership. In the case of **North Tetu Farmers Co. Ltd versus Joseph Nderitu Wanjohi HCCC No.13 of 2014** the court held that civil contempt to apply there must be proof that the terms of the order were within the knowledge of the respondent who has failed to comply thereof.

It is common cause that on 30th January, 2019 the parties herein attended court and entered a consent order in the following terms;

> 1. That the application dated 6th *November 2018 be and is hereby withdrawn.*
>
> 2. That the parties be and are hereby ordered to sit, negotiate and come up with a settled collective bargaining agreement in the circumstances.
>
> 3. Mention on 25.03.2019 for a report on settlement and the CBA.

The compromised application dated 6th November, 2018 was seeking to have the respondent be *directed to immediately or within 3 days of an order herein to serve the claimant/application with its counter proposal for the 2016/2017 Collective Bargaining Agreement.*

This was to allow the parties to *sit, negotiate and come up with a settled CBA.* The court allowed for a mention on 25th March, 2019 for a report on settlement and the CBA.

I take it both parties were consciously of the terms of the consent orders and that the sitting, negotiations and the CBA would be addressed before the mention date for the report on the same on 25th March, 2019.

The court reading of the consent order was to allow the party's time to be able to sit and negotiate the CBA as the pending application of 6th November, 2018 had been compromised for the parties to act in good faith.

In Mr Rono's Replying Affidavit he avers that the claimant failed to serve their advocates directly with letter dated 1st March, 2019 and the respondent replied thereto vide letter dated 5th March, 2019 and noted that there was a proposed meeting for 22nd February, 2019 but the claimant failed to attend.

In the written submissions, the claimant has not addressed this fact.

There being no timelines set out in the consent order for the scheduled sitting(s), negotiations and CBA parties were left on their own to organise. This has not been achieved and from the affidavits, where the claimant wrote to the respondent vide letter dated 4th February, 2019 seeking to meet the respondent on 22nd February, 2019 and then failed to attend this having been addressed by the respondent vide letter dated 1st March, 2019 both parties have stalled the sittings and negotiations for a CBA.

The respondent has also introduced the aspect that the claimant served them directly instead of their advocate. Employment and labour relations requires shop floor negotiations between the parties with a Recognition Agreement which in this case involves the claimant and the respondent and hence by the claimant directly serving the respondent with regard to negotiations of a CBA, this is within the provisions of section 57 of the Labour Relations Act, 2007 that;

> (1) An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.

At the shop floor there is the employer and employee, represented by the trade union.

The respondent has also introduced the issue that claimant members wrote the minutes vide letter dated 17th November, 2017 resolving their withdrawal from the union. With respect, such are matters outside the consent order of the court on 30th January, 2019 and not brought to the court's attention at the time and the same cannot apply to defeat the essence of the orders in force.

In any event where claimant members in the employment of the respondent have withdrawn their membership, the relationship between the parties regulated under the Recognition Agreement, to opt out the requisite procedure is as stipulated under the Labour Relations Act, 2007.

This is not the issue in dispute herein.

On the application dated 19th June, 2019 the above put into account, the court finds no contempt and shall allocate timelines within which both parties shall sit, negotiate and report back on the CBA. No orders on costs.

Delivered at Kericho this 2nd day of March, 2020.

M. MBARU

JUDGE

In the presence of: ……..…….. ……