



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 258 OF 2018

(Before Hon. Justice Mathews N. Nduma)

KENYA UNION OF SUGAR PLANTATION & ALLIED WORKERS...CLAIMANT

VERSUS

WEST KENYA SUGAR COMPANY LIMITED.....RESPONDENT

RULING

1. The applicant filed a notice of motion praying for an order in the following terms:

- (a) That this honourable court be pleased to give a legal interpretation on the scope of mandate of the claimant union in reference to the parties recognition agreement and the existing laws of our land.
- (b) That this court be pleased to give a legal interpretation on the CBA coverage in respect to who are the beneficiaries of the CBA in line with the parties recognition agreement, the CBA provisions and other relevant provisions of the law.
- (c) That the respondent be ordered to immediately implement the negotiated CBA terms to all unionisable employees irrespective of their employment categories as to whether they are casuals, contracted, outsourced or permanent.
- (d) That this honourable court be pleased to order for payment of salary arrears for all the affected employees in respect to the CBA clause 32 and 34.
- (e) That the court be pleased to grant such other orders or relief as it deems fit and just in the circumstances herein.
- (f) That the cost of this application be provided for by the respondent.

2. The application is based on grounds set out on the face of the Notice of Motion to wit that, in an earlier ruling by the court delivered on 18th July 2019, the court ruled that the claimant had prematurely come to court before the CBA was registered. That the CBA has now been registered on 14th February 2019 under entry RCA NO. 29 of 2019.

3. That the respondent has implemented the CBA in respect of workers it deems to be permanent and pensionable but has discriminated workers it wrongfully regards as casuals.

4. That the court compels the respondent to implement clause 34 of the CBA pursuant to which all employees were granted a general wage increment ranging from 12% to 13% in different categories as per the consent of the parties endorsed by the court on 20th September 2018, pursuant to which the CBA was registered.

5. The application is opposed vide grounds of opposition filed on 15th October 2019 by the respondent. The respondent argues that the matter is *functus officio*, the court having heard, considered and determined the dispute pursuant to the consent endorsed by the court on 20th September 2018 and the ruling of the court delivered on 18th July 2019. That the application is misconceived therefore and it be struck off for being res judicata and bad in law.

Determination

6. In my ruling delivered on 18th July 2019, the court stated as follows:

“If there is ambiguity as to the category of workers to whom the salary increase applied, it is up to the applicant to move court for interpretation but not cite the employer for contempt of court”

7. The application for interpretation of clause 34 of the CBA is now before court for determination. The issue was not determined by the consent of the parties pursuant to which the CBA was registered nor was it determined by the court in its ruling of 18th July 2018. The court is not *functus officio* on the matter nor is the issue *res judicata*.

8. The application clause in the CBA, being clause 2 thereof reads:

“(2) Application

The terms of this Agreement shall be observed by West Kenya Sugar Company Limited subject to the exclusions created by the joint agreement between the Federation of Kenya Employers (FKE) and the Central Organization of Trade Unions, Kenya (COTU, -K) on Managerial, supervisory and confidential staff.”

9. Clause 28 of the CBA reads as follows:

“(28) Casual/Contract Employment

(a) Casual employment shall be managed in accordance with the applicable law.

(b) Temporary employees shall be issued with temporary employment contracts of three (3) months, renewable at the discretion of management”.

10. Thirdly, clause 34 of the CBA reads:

“Minimum Rates and Wage increments.

There will be the following general wage increase payable in Kenya currency as follows:

Grades UG1-UG7- year one (with effect from May 1st, 2017) – 7%.

Year two (with effect from May 1st 2018 – Kshs. 6%.

Grade UG8-UG13- year one (with effect from May 1st 2017-7%;

Year two (with effect from May 1st 2018 – 5%”.

11. The parties also set out under the clause all job titles covered under UG1 to UG 8 stating the respective “monthly minimum Basic Wage with effect from 1st May 2017 and also with effect from 1st May 2018.

12. It is clear from the judgment of Maureen Onyango J. dated 18th June 2018 and delivered by myself on 12th March 2018, that the negotiated CBA between the parties included casual workers and employees on fixed terms contracts. The learned judge stated:

“The CBA contains a clause on casual employees and acting allowance. The respondent negotiated the CBA with the claimant in which a clause was agreed upon relating to casual employees. The claimant has Locus Standi to enforce a clause in its CBA..... the respondent is estopped from denying the right of the claimant to represent the casual employees”.

13. In the particular case, the judge also found that all casual employees had been converted to fixed term contracts employees in terms of clause 28 of the CBA.

14. The dispute before the court then was about representation and the one before court is to determine whether so called casual employees given three (3) months renewable contracts are eligible to the salary increment under the CBA.

15. Section 37 of the Employment Act, 2007 reads:

“(1) Notwithstanding any provisions of this Act, where a casual employee

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be

deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service”.

16. It follows therefore where a casual employee works for a continuous period of not less than one month or performs work which cannot reasonably be expected to be completed within a period of three months in aggregate, that employee automatically converts from a casual employee to a term contract.

17. In particular, Section 37(3) provides:

“An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee” (Emphasis Mine)

18. Therefore, it is the finding by the court that all employees who had been employed as casuals initially, and had served the respondent for a continuous period of two months are entitled to the negotiated terms of the CBA and in particular, the salary increment under clause 34 of the CBA for the period 2017-2018. The respondent is directed to increase the salary of all employees under the stated category accordingly.

19. In the final analysis, judgment is entered in favour of the claimant as against the respondent with no order as to costs. The salary increment to all employees left out who fall under the defined converted status, and had served for continuous period of two months be paid arrear salary in terms of increment under clause 34 of the CBA within 30 days.

Ruling Dated, Signed and delivered this 16th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 has 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 18 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.

Mathews N. Nduma

Judge

Appearances

P.D Onyango for claimant.

D.M. Ouma for F.K.E for Respondent

Chrispo – Court Clerk