



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**COLLECTIVE BARGAINING AGREEMENT NO. CA 195 OF 2019**

**KINGSWEAR LIMITED.....EMPLOYER**

**V**

**KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS UNION....RESPONDENT**

**RULING**

1. On 6 November 2019, the Court accepted for registration a collective agreement between the Kenya Union of Food, Commercial & Allied Workers Union (the Union) and Kingswear Ltd (the employer).
2. The Ministry of Labour had on 6 August 2019 issued a no-objection certification to the registration of the collective agreement.
3. On 11 November 2019, the employer moved the Court under a certificate of urgency seeking orders
  - 1.
  - 2.
  3. THAT this Court specifically and in the alternative be pleased to issue an order of stay of the implementation of the offending clauses being clauses 20 and 27 of the Collective Bargaining Agreement pending the hearing and determination of this Cause.
  4. THAT this Court be pleased to review and set aside the registration of the Collective Bargaining Agreement registered on 6<sup>th</sup> November 2019 as CA No. 195 of 2019 or the offending clauses to pave way for due compliance with section 35(5) as read with section 35(6) of the Employment Act.
  5. THAT this Court otherwise recalls its order for the registration of the Collective Bargaining Agreement on grounds of fraud, misrepresentation and want of compliance with statutory provisions.
  6. THAT costs be in the cause.
4. The grounds/reasons advanced in support of the application were that clauses 20 and 27 (the offending clauses) were not agreed upon during negotiations but were sneaked in by the Union and were thus fraudulent; that the offending clauses did not conform with the provisions of section 35(5) & (6) of the Employment Act, 2007; that there was bad faith on the part of the Union and that the employer had not been heard before the registration of the collective agreement.
5. In the affidavit in support of the application, a director of the employer deposed that he had objected in writing to the offending 2 clauses a few days before the registration of the collective agreement.
6. The Union did not file any formal response to the application but the Court allowed it to make oral submissions when the application was argued on 30 January 2020.
7. The Court has considered the application, affidavit in support and the oral submissions made by the parties.
8. Although asserting that it had raised objections in writing to the offending clauses a few days before the registration of the collective agreement, the employer did not exhibit any such written objection to the supporting affidavit.

9. The Court will, therefore, agree with the Union's submission that no objections were raised before the Labour Officer and or with it (Union) and that this ground was an afterthought.
10. The employer also contended that the Union sneaked in the offending 2 clauses on *termination of employment* and *retirement but*.
11. A collective agreement, like any other contract, can be set aside or annulled where consent was procured through fraud, collusion, material non-disclosure of facts, misrepresentation, or where it is contrary to some public policy or the law (see *Brooke Bond Liebig Ltd vs Mallya (1975) EA 266*, *Flora Wasike vs Destimo Wamboka (1988) 1 KAR 625* and *Samson Munikah t/a Munikah & Company Advocates vs Wedube Estates Limited (2007) eKLR 13*).
12. Regrettably, there were no particulars of how the fraud or misrepresentation was done. The employer did not explain how long it had to review the collective agreement before it appended its signatures. The Union stated from the bar that the employer had the final draft from as early as 2018 (the collective agreement was signed on 11 March 2018 and was placed before the Court for registration on 6 November 2019).
13. Is it possible that the employer became aware of the offending clauses just before registration in November 2019?
14. The Court does not think so, for if the employer genuinely believed there was a misrepresentation, it had ample time to formally bring the same to the notice of the Union and the Ministry of Labour after signing the agreement in March 2018.
15. It cannot be that the employer signed the collective agreement with its eyes closed when its director(s) initialled each page of the agreement on March 2018.
16. The employer did not demonstrate that it did not have the opportunity to review and/or read the collective agreement before appending its signatures. The collective agreement was presented in Court for registration over 1 year after execution.
17. Another ground relied on by the employer was that clauses 20 and 27 were inconsistent with section 35(5) & (6) of the Employment Act, 2007 which provide for eligibility for service pay.
18. One of the primary objectives of the Employment Act, 2007 as expressed in the preamble is to define the fundamental rights of employees and provide basic conditions of employment.
19. The terms and conditions set out in the Act are therefore irreducible minimums, and where the parties agree on more generous terms, such an agreement, in the view of the Court cannot be said to contrary to public policy or illegal.
20. Section 35(6)(b) of the Employment Act, 2007 expressly leaves it to the employer and a Union to provide (or establish) a fund for gratuity.
21. Clauses 20 and 27 of the Collective Agreement, therefore, cannot be contrary to public policy or illegal as contended by the employer.
22. What the Court is seeing is a recalcitrant employer who wants to use all tricks in the procedural law books to forestall the implementation of a Collective Agreement voluntarily entered into.
23. The Court finds no merit in the application dated 8 November 2019 and dismisses it with costs to the Union.
24. It is regretted this Ruling could not be delivered as earlier scheduled due to the Covid19 pandemic.

**Delivered through Microsoft teams/email, dated and signed in Nairobi on this 29<sup>th</sup> day of May 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For employer Mr. Kiti instructed by K & K Law LLP Advocates

For Union Mr. Nyumba, Industrial Relations Officer

Court Assistant Judy Maina