REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1519 OF 2018

(Formerly Nyeri ELRC Cause No. 104 of 2018)

Before Hon. Lady Justice Maureen Onyango

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.......CLAIMANT

VERSUS

BOUNTY LIMITED..RESPONDENT

JUDGMENT

The Claimant is a trade union registered under the Labour Relations Act to represent the interests of employees in the sectors set out in its constitution. The Respondent is a limited liability company carrying on the business of bottling safari king natural spring water and safari booster energy drink.

Following the signing of a recognition agreement between the claimant and the respondent dated 18th March 2010, the parties successfully negotiated a CBA that covered the period of 24 months from 1st November 2014, with provision for amendment thereof. Upon expiry of the CBA, the Claimant presented its proposals for review of the terms of the CBA for the period 2016/2018.

Parties reached consensus on most of the issues in the proposals but failed to agree on 10 clauses being termination, basic minimum wage, house allowance, general wage increase, retirement, redundancy, long service, risk allowance, bonus and meals.

The claimant reported a trade dispute to the Cabinet Secretary of Labour who appointed a conciliator. The parties again failed to reach consensus and a certificate of disagreement was issued by the conciliator.

The Claimant filed this claim on 20th June 2018 in the Employment and Labour Relations Court at Nyeri. On 21st September 2018, the Court delivered a ruling on the Respondent's application of 18th June 2018 allowing the transfer of the file to this Court since the cause of action arose in Nairobi. The Claimant seeks the following reliefs-

a. That the Central Planning and Monitoring Unit of the State Department of Labour to prepare and file an economic report covering the financial position of the Respondent and the proposals put forth by the parties.

b. A declaration that the Respondent's employees have a fundamental right to bargain collectively as a means of improving their terms and conditions of service.

c. A declaration that the Respondent acted in breach of employees' fundamental right by refusing to negotiate and conclude a collective bargaining agreement for the period 1st November 2016, for a two-year duration.

d. An award that the proposals as put forth by the Claimant under paragraph 14 herein are fair and affordable.

The Respondent filed its reply to the claim on 10th May 2018 seeking to have the claim dismissed with costs.

The dispute was disposed of by way of written submissions.

Claimant's Case

The Claimant avers that the Respondent has refused to engage in CBA negotiations to renew the expired CBA and has undermined the process. It is averred that the Respondent threatened to terminate the recognition agreement but withdrew the letter of notice of termination but effected unlawful redundancies instead which redundancies were halted by a Court order.

The Claimant submits that in its proposals for review of CBA it proposed the following: long service award, risk allowance, bonus and meals. It submits that it proposed to retain the termination clause but the Respondent proposes that the provision for service pay in the outgoing CBA which provides as follows –

> "***TERMINATION - CLAUSE 4.***
>
> ***(i) Current clause***
>
> *After completion of probationary period in employment, either party may terminate services by giving one month's notice or pay in lieu of one month's notice. The employee shall be entitled to 40 days' pay for each completed year of service subject to be replaced with NSSF Act as soon as the Court finalizes the pending case.*
>
> ***(ii) Union proposal***
>
> *Retain the current Clause.*
>
> ***(iii) Employer's proposal***
>
> *After completion of the probationary period of three months in employment, either party may terminate services by giving one months' notice or pay in lieu of one month's notice. No payment of service to employees, however the company to fully comply with pension provisions of NSSF Act, 2013."*

As regards the basic minimum wage clause, the Claimant proposed that the minimum wage to be increased by the higher of 50% or Kshs.1,000.00. The Respondent counter proposed a minimum wage that is below the statutory minimum wages for 2014 by approximately Kshs.100 across to grades from 1 to 12.

As regards house allowance, the Claimant proposed to an increase from Kshs.3,700.00 to Kshs.6,000.00 but the Respondent proposed that unionisable employees who were not provided with accommodation should be given a house allowance of 15% of their gross salary.

On the general wage increase clause, the Claimant proposed a yearly increment of 25% for all permanent unionisable employees, while the Respondent proposed a yearly increase of 10%, for the duration of the CBA.

As regards the retirement clause, the Claimant proposed payment of 90 days' years of service for each completed year, while the Respondent proposed payment of pension as per the NSSF Act 2013. On the redundancy clause, the Claimant proposed 90 days' severance pay for each completed year of service while the Respondent proposed 15 days' severance pay for each completed year of service.

The Claimant avers that the Respondent did not submit any counter-proposal regarding the new clauses.

Respondent's Case

The Respondent avers that the claim is frivolous, vexatious and an abuse of court process as the Claimant is using this Court to undermine the its business engagements.

The Respondent avers that there are ongoing cases in Milimani ELRC Cause 1517 of 2017 and Miscellaneous Application 4 of 2018 and that the present suit is *sub judice*.

The Respondent contends that there is no recognition agreement between the parties as there are no union members among the respondent's employees.

The Respondent contends that agreeing to the Claimant's propositions would lead to the company's closure due to financial constraints. It denies any ill will in the CBA negotiations and contends that the Claimant's unattainable demands were made in bad faith in order to frustrate the process.

The Respondent urges this Court to take judicial notice of the economic state at the time of negotiations where companies were closing down and employees were being rendered jobless. The Respondent denies violating any statutory provisions.

Claimant's Submissions

The Claimant submits that from all the negotiations between the parties, it was resolved that the following clauses be included in the CBA: preamble, probationary period, gazetted public holidays, retirement (a, b, c), certificate of service, sexual harassment, warning procedure, acting allowance, medical attention, safari allowance, retirement (d, f), payment of wages, overtime, compassionate/special leave, night shift allowance, application, promotion, maternity/paternity leave, redundancy (a, b, c), agency fees, effective date/duration, uniforms, work injury benefits, mid-month allowances, sick leave, redundancy (d), hours of work, annual leave and death of an employee.

The Claimant submits that the Central Planning and Monitoring Unit (CPMU), Department of the Ministry of Labour, did not seek its views regarding the outstanding clauses and urges this Court to find that the Report only considered management's submissions.

The Claimant submits that CPMU's report did not explain why there was a huge drop in wages earned by unionisable employees between 2014 and 2015. The Claimant further submits that the Respondent's losses were not attributable to the employees but to low sales due to stiff compensation and high overheads, and in particular, huge wage bill attributable to management staff.

It is the Claimant's submissions that since the Economic Report continues to cover the year 2018 with no unionisable staff and 12 management staff, the Respondent has not closed its business and continues to operate with unionisable employees. It is the claimant's position that the unionisable staff are the ones who bottle and sell the Respondent's products and not the management staff.

The Claimant submits that the CPMU report did not factor in the order restraining the Respondent from declaring redundancies of the 52 employees who were declared redundant in 2017.

Respondent's Submissions

The Respondent submits that this Court should not impose contractual terms upon the parties as it will contravene its rights under Article 41(5) of the Constitution, relying on the opinion of Odek J.A in the case of **Teachers Service Commission v Kenya Union of Techers & 3 Others [2015] eKLR** where he observed as follows-

> "*It is my considered view that collective bargaining is neither compulsory not automatic. It is the source of voluntary negotiated terms and conditions of service of an employee.*

It is the Respondent's submissions that this Court is only mandated to check and uphold the implementation of the prescribed minimum standards, by dint of Section 26(1) of the Employment Act hence cannot compel the Respondent to make concessions beyond the minimum standards.

The Respondent submits that it has participated in the negotiating process and is not obligated to reach an agreement. It contends that it has not violated the employees' collective bargaining rights as no evidence has been adduced to prove this fact.

The Respondent submits that it has demonstrated to this Court that acceding to the Claimant's proposals would cripple the company, leading to its insolvency which would disadvantage the Claimant's members. The Respondent contends that the Claimant's demands are unsustainable. It relies on the case of **Kenya Tea Growers Association v Kenya Plantation and Agricultural Union [2018] eKLR** where the Court of Appeal observed that a court faced with a question of wage increment ought to take into account productivity, cost of living and the ability to pay by the employer.

The Respondent submits that clause 19D on retirement and clause 20D on redundancy amount to double compensation as the Claimant's members are covered by NSSF which is remitted by the Respondent on their behalf.

It is the Respondent's submissions that long service, risk allowance, bonus and meals are not recognized by the Employment Act and that the wage increase covers these aspects hence accepting this proposal would amount to double compensation.

Determination

I have carefully considered the pleadings filed by the parties, the evidence adduced, the CPMU Report together with the submissions filed in the matter. The issues for determination are –

a. Whether entertaining this matter shall prejudice the ongoing claims in Cause Number 1512 of 2017 and Miscellaneous Application 4 of 2018.

b. Whether the CBA negotiations have been overtaken by events.

c. Whether the items not agreed in the CBA 2014/2015 should be reviewed by the Court.

d. Whether the Claimant is entitled to the reliefs sought.

Sub judice

In its submissions, the Claimant submitted that the ruling by Nzioki Wa Makau J. of 21st September 2018 which transferred this matter, from Employment and Labour Relations Court, Nyeri to Nairobi did not consider the other grounds of the Respondent's preliminary objection dated 17th April 2018. As such, it is necessary to address the same before making a finding on the subsequent issues.

On 17th April 2018, the Respondent filed a preliminary objection on the ground that the claim was a clear violation of the principle of *sub judice* as Cause No. 1512 of 2017 and Miscellaneous No. 4 of 2018 pending for hearing and determination relates to the same parties, same subject matter and same issues as in the claim herein.

Further, the Respondent averred in its Reply that the issue of negotiations raised in the memorandum of claim were pending for deliberations in Cause No. 1512 of 2017 and Miscellaneous No. 4 of 2018, hence it could not comment on the same, to avoid prejudicing the ongoing proceedings.

I have examined the ruling delivered on 21st September 2018 and I agree with the Claimant's position that the issue of *sub judice* as raised in the preliminary objection was not addressed by court. The basis of the transfer of this claim from Nyeri to this court was that the cause of action arose in Nairobi and hearing the matter in Nyeri would cause great expense to the parties.

Further, I have examined the Memorandum of Claim filed in Cause No. 1512 of 2017 (Annexure 8, page 56 of the Respondent's Bundle of Documents), and it is clear that the issues in the claim is the unlawful redundancy and eventual lock out of 52 employees of the Respondent.

I have further examined the Notice of Motion Application in Miscellaneous No. 4 of 2018 (Annexure 26 at pages 108 to 110 of the Respondent's Bundle of Documents), which relates to the reconstruction of the court file in Cause No. 1512 of 2017.

As such, whereas parties are the same, the subject matter and the issues in both Cause No. 1512 of 2017 and Misc. No. 4 of 2018 are not the same as the issues before this court hence the suit herein is not *sub judice*. The issues in the two matters relate to redundancy and reconstruction of a court file while the issue in this claim relates to CBA negotiations.

Viability of the CBA Negotiations

The Respondent has submitted that the CBA negotiations have been

overtaken by events since the Respondent no longer employs any of the Claimant's members. Both parties have admitted that there is a pending suit regarding the legality of the redundancies undertaken in respect of 52 of the Respondent's employees.

Further, the Claimant has annexed the order of 2nd August 2017, restraining the Respondent from declaring 52 of its employees redundant. As such, their employment status is still unknown. The Respondent did not adduce evidence to controvert this fact. Therefore, this Court cannot disregard the negotiations between the parties based on a position that has not yet been established. The negotiations have hence not been overtaken by events.

I have further noted the respondent's submissions that this court should not impose contractual terms on the parties as it would be against the respondent's rights stipulated in Article 41(5) of the Constitution which provides for negotiations out of parties own free will. The respondent has further submitted that Section 26(1) of the Employment Act provides for discretion of the employer to go above the minimum terms provided therein and the court has no jurisdiction to look beyond the minimum standards. I would consider these averments misinterpretation of the law based on a lopsided reading of the law.

Article 41(5) of the Constitution provides as follows –

> **(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.**

Section 26 of the Employment Act provides as follows –

> **26. Basic minimum conditions of employment**
>
> **(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.**
>
> **(2) Where the terms and conditions of a contract of service are regulated by any regulations, <u>as agreed in any collective agreement</u> or contract between the parties or enacted by any other written law, <u>decreed by any judgment award or order of the Industrial Court are more</u> favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.**
>
> [Emphasis added]

Further Section 54(1) of the Labour Relations Act provides as follows –

> **54. Recognition of trade union by employer**
>
> **(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.**

From the forgoing it is evident that collective bargaining is a constitutional right that all employees enjoy and an employer cannot choose to refuse to negotiate. Once an employer has recognised a trade union, it has an obligation to negotiate. Secondly, this court has jurisdiction to determine a dispute on collective bargaining agreements as provided under Section 73 of the Labour Relations Act which provides that; -

> **73. Referral of dispute to Industrial Court**
>
> **(1) If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in**

accordance with the rules of the Industrial Court.

(2) Notwithstanding the provisions of subsection (1), if a trade dispute—

(a) is one in respect of which a party may call a protected strike or lockout, the dispute may only be referred to the Industrial Court by an aggrieved 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; or

(b) is in an essential service, the Minister may, in

addition, refer the dispute to the Industrial Court.

(3) A trade dispute may only be referred to the Industrial Court by the authorised representative of an employer, group of employers, employers' organisation or trade union.

Further Section 12(1)(b) of the Employment and Labour Relations Court Act gives this court jurisdiction to determine disputes between employers and trade unions while Section 15(5) and (6) provide specifically for resolution of trade disputes concerning disagreements during negotiations of CBAs as follows –

(5) In the exercise of its powers under this Act, the Court may be bound by the national wage guidelines on minimum wages and standards of employment, and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance.

(6) Nothing in this section shall preclude the Court from making reference to the guidelines as may be published from time to time by the Salaries and Remuneration Commission to the extent to which they may be relevant to the dispute.

The respondent's averments that this court has no jurisdiction to impose term of a CBA or parities is therefor at variance with what is provided for in the law.

Reviewing the Collective Bargaining Agreement

The parties have conceded that they failed to agree on 10 clauses

of the and the subsequent conciliation process did not yield any results. The court gave directions for preparation of an economic report by the Central Planning and Monitoring Unit of the Ministry of Labour (CPMU) which was filed on 2nd May 2019. The CPMU Report made a finding that the Respondent's performance under the period of review was unhealthy.

In making the report, the CPMU relied on parties' views and responses to questionnaire and their submissions together with the Respondent's audited financial accounts. In light of the findings made in the report, and after considering the proposals, counter proposals and the positons taken by the parties during negotiations, I order as follows –

1. General Wage Increase

The Claimant's demand for general wage increase of 25% in each year was countered by the Respondent's proposal of 10%. The report indicated that Claimant's offer, the Respondent's offer and the CPI of 6.9% would cumulatively translate to Kshs.4,306,300.90, Kshs.1,607,685.52 and Kshs.1,092,927.67 respectively.

Bearing in mind the foregoing, and the Respondent's deteriorating financial position, its proposal of 10% general wage increase would be reasonable. I accordingly award a wage increase of 10% each year.

2. Retirement

To be retained as per outgoing CBA.

3. Redundancy

To be retained as per outgoing CBA.

4. Long Service

To adopt union's proposal.

5. Bonus and Meals

These are new clause. In view of the prevailing circumstances, the

same are declined. The union is encouraged to propose the same for discussion at the next CBA.

6. Risk Allowance

This is a new proposal. The same is declined and the union encouraged to propose the same at the next CBA negations.

7. Termination Clause

To be retained as per outgoing CBA.

8. Basic minimum wage

The minimum wages to be fixed at 10% above the statutory minimum rates of pay.

9. House Allowance

The court awards an increase of Kshs.3,800 or 15% of basic pay, whichever is higher in respect of house allowance.

The parties are directed to compile and execute the new CBA and present it for registration within the next 30 days from today.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF JUNE 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B** 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.

MAUREEN ONYANGO

JUDGE