



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

(Before Hon. Lady Justice Maureen Onyango)

**C.B.A NO. 1 OF 2020**

**INTER PUBLIC UNIVERSITIES COUNCILS CONSULTATIVE FORUM OF THE  
FEDERATION OF KENYA EMPLOYERS..... EMPLOYER**

**VERSUS**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATION INSTITUTIONS  
AND HOSPITAL WORKERS (KUDHEIHA)..... UNION**

**WITH**

**MINISTRY OF EDUCATION.....1<sup>ST</sup> INTERESTED PARTY  
MINISTRY OF LABOUR.....2<sup>ND</sup> INTERESTED PARTY  
ATTORNEY GENERAL..... 3<sup>RD</sup> INTERESTED PARTY  
SALARIES AND REMUNERATION COMMISSION.....4<sup>TH</sup> INTERESTED PARTY**

**AND**

**C.B.A NO. 2 OF 2020**

**INTER PUBLIC UNIVERSITIES COUNCILS CONSULTATIVE FORUM OF THE  
FEDERATION OF KENYA EMPLOYERS.....EMPLOYER**

**VERSUS**

**THE UNIVERSITIES' ACADEMIC STAFF UNION (UASU).....UNION**

**WITH**

**MINISTRY OF EDUCATION.....1<sup>ST</sup> INTERESTED PARTY  
MINISTRY OF LABOUR.....2<sup>ND</sup> INTERESTED PARTY  
ATTORNEY GENERAL.....3<sup>RD</sup> INTERESTED PARTY  
SALARIES AND REMUNERATION COMMISSION.....4<sup>TH</sup> INTERESTED PARTY**

**AND**

**C.B.A NO. 3 OF 2020**

**KENYA UNIVERSITIES' STAFF UNION (KUSU).....CLAIMANT**

**VERSUS**

**INTER PUBLIC UNIVERSITIES COUNCILS CONSULTATIVE FORUM.....RESPONDENT**

**RULING**

There are three CBAs before me for registration. These are CBA No. 1 of 2020 between Inter Public Universities Councils Consultative Forum of the Federation of Kenya Employers (the Employer) and Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA) [the Union].

CBA No. 2 of 2020 between Inter Public Universities Councils Consultative Forum of the Federation of Kenya Employers (the Employer) and The Universities' Academic Staff Union (the Union) and CBA No. 3 of 2020 between Kenya Universities' Staff Union (the Union) and Inter Public Universities Councils Consultative Forum (the Employer).

The CBAs came up for registration on 15<sup>th</sup> January 2020 but the registration was objected to by the Employer and Salaries and Remuneration Commission (SRC). The two objected to clause 0.1 of the addendum by the CBA on retirement age and the implementation master scales.

Ms. Kirwa for the Employer submitted that at the time of signing the CBA the employer was under the impression that all was well but later received advise that retirement age should be in accordance with public policy and that implementation of master scale would go beyond funds allocated by Treasury for implementation of the CBA.

Mr. Sitenei submitted that when the CBA drafts were submitted to SRC for approval it did indicate the formula to be used and gave a costing arising from the workings adopted by SRC and National Treasury at Kshs.8.8 billion. That the CBA seems to have taken a different approach and if registered in the current form there are likely to be challenges in implementation. That the clause on implementation would require amendment in line with advise from SRC.

Mr Siteneni further submitted that SRC opinion on retirement clause was that it need not be in the CBA but if it does, it ought to be aligned with the policy in the public sector for public officers.

He urged that the two clauses be amended before registration.

Mr. Peter Mulwa presenting the Ministry of Labour submitted that the Ministry had no objection to registration of the CBA subject to the advice by SRC on the two impugned clauses.

Ms. Akuno, State Counsel representing the Ministry of Education submitted that the Ministry had reservation with the retirement clause.

Mr. Mwangi representing the union in CBA No. 1 of 2020 submitted that the union had no objection to registration of the CBA No. 1 of 2020. He submitted that the union was aware about reservations on the retirement clause but not on the implementation schedule. He submitted that the objections were tactics to delay registration of the CBA.

For CBA No. 2 of 2020 which is between the Employer and Universities Academic Staff Union (UASU), the Employer, SRC, Ministry of Labour and Ministry of Education maintained their positions as per CBA No. 1 of 2020 above.

Mr. Titus Koceyo, Counsel for the union submitted that he will rely on the union's submissions filed on 3<sup>rd</sup> March 2020. The submissions are very detailed and the court will address the issues therein in the final judgment as this ruling is limited to the interim/partial implementation of the CBA.

Mr Koceyo submitted that the issues stopping the registration of the CBA were agreed upon by the parties. That once a CBA is signed parties cannot change their minds. He submitted that in a letter dated 30<sup>th</sup> September 2019, SRC states that lecturers are entitled to automatic annual increments before CBA increments. That this is what brought the notches in the implementation matrix. That in another letter dated 13<sup>th</sup> December 2019, the SRC again stated that in addition to CBA increment, there is automatic annual increment. That this automatic increment is what the SRC wants to do away with. That SRC asked universities to source for funds from their private sources to fund the annual increments.

Mr. Koceyo further submitted that paragraph 4.4. of the CBA provides for a Joint Implementation Committee to deal with implementation which is what the SRC and the Employer were addressing the court on.

On the retirement age clause, Mr Koceyo submitted that Judges and Lecturers are excluded from the retirement at age 60. That parties agreed to harmonise the retirement age and 72 years was the employer's proposal.

He urged the court to proceed and register the CBA.

In CBA No. 3 of 2020, the Employer, SRC, Ministry of Labour and Attorney General for Ministry of Education maintained their positions as in CBA No. 1 of 2020. Mr. Onyony for the union submitted that the CBA has an inbuilt solution as it provides for an implementation committee. That the current impasse will be solved by the Committee. That the parties are in this situation because of SRC resiling on its advice. He submitted that parties can agree on interim implementation. He proposed that in the interim the CBA implementation be on horizontal matrix and the arrears can await the decision of the court.

The court gave the parties several opportunities to try and agree on the two contested issues but they failed to do so. It was therefor agreed that the court makes an interim/partial determination to facilitate the relapse of the funds that have already been set aside by Treasury for CBA implementation.

### **Determination**

I have considered the parties' submissions. It is not in dispute that parties negotiated and agreed on all issues in the three CBAs following which the same were forwarded to the Minister for Labour and Social Protection who is responsible for processing the same for registration. The three CBAs were received in this court for registration vide the letters dated 10<sup>th</sup> January 2020 from the Minister for Labour and Social Protection. The letters refer to the advice of SRC by the letter dated 13<sup>th</sup> December 2019 addressed to the Ministry of Education advising that implementation of the CBA be undertaken based on the allocated amount of Kshs.8.8 billion which is inclusive of all associated costs, including pension liabilities resulting from the review of the three CBAs (UASU, KUSU, KUDHEIHA).

From my consideration of the correspondence, especially between SRC and the Employer, it is apparent that there was consultation of the SRC before, during and after negotiations of the CBA. It is also apparent that the figure of Kshs.8.8 billion came up after the CBA had been signed and that during negotiations there were no financial limitations. I say this because there is mention of several figures in the correspondence.

Section 60 of the Labour Relations Act provides for registration of CBAs as follows –

#### **60. Registration of collective agreement**

- 1. Every collective agreement shall be submitted to the Industrial Court for registration within fourteen days of its conclusion.**
- 2. The employer or employer's organisation which is party to an agreement to be registered under this section shall submit the agreement to the Industrial Court for registration.**
- 3. If an employer or employers' organisation fails to submit the collective agreement to the Industrial Court as specified in subsection (1), the trade union may submit it.**
- 4. The Industrial Court may request the parties to a collective agreement to supply further information or make oral or written representations to it for the purposes of this section.**
- 5. The Industrial Court may register an agreement—**
  - a. in the form it was submitted by the parties; or**
  - b. with any amendment or modification agreed to by the parties.**
- 6. The Industrial Court shall not register a collective agreement that—**
  - a. conflicts with this Act or any other law; or**
  - b. does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister.**
- 7. The Industrial Court—**
  - a. may register a collective agreement within fourteen days of receiving it;**
  - b. may refuse to register a collective agreement unless all parties to the agreement have had an opportunity to make oral representations to the Industrial Court; and**
  - c. shall give reasons for refusing to register any collective agreement.**

Further Section 15(5) and (6) of the Employment and Labour Relations Court Act provides 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.**

From the foregoing, it is clear that this court is not bound to register the CBA as presented by the parties and may amend or modify the same before registration, or even reject the same

From what the parties have presented to court it is not clear how the figure of Kshs.8.8 billion became an issue, whether before or after negotiations were concluded. The parties have also not clarified to the court how the said figure of Kshs.8.8 billion was arrived at, whether it was the figure availed by Treasury or whether it was set by SRC. I have also noted that in the course of the time, several figures came up, some lower and others higher than the Kshs.8.8 billion.

It would also be important for parties to explain to the court how earlier CBAs have been implemented as there is no agreement whether to impellent the CBA both horizontally and vertically, which is what is implied in the signed CBA, or only horizontally, which is what SRC is advising to be done. There will be further need for the court to be clear about the point at which this departure between the parties arose so that the court can establish which of the parties is responsible for the apparent misunderstanding and how to resolve it.

All these issues will be considered in the final judgment.

What is not contested is that the three CBAs as presented to the court for registration are signed by all parties. It is therefore the opinion of the court that apart from the issue of retirement age which appears not to have been subjected to the opinion of SRC before the CBA was concluded, all other issues were agreed upon after input of SRC and the only issue is the implementation and the capping of the said implementation to Kshs.8.8 billion.

For these reasons, the court makes the following interim orders for partial implementation: -

- 1. All the three CBAs Nos. 1, 2 and 3 of 2020 are accepted for registration as presented to the court with the exception of the retirement age clause which will be determined in the final judgment and is therefore excluded from the CBAs.**
- 2. The implementation will be on horizontal basis pending further orders of the court after consideration of the issues set out herein above.**
- 3. The retirement age currently in force will continue until the dispute herein is finally determined.**
- 4. The issue of whether to implement the CBA both horizontally and vertically will abide the final determination of the dispute herein.**
- 5. All parties herein are directed to file submissions on the issues set out herein above within 30 days.**
- 6. These matters will be heard by way of highlighting of the further submissions to be filed together with the submissions already on record on a date to be set by the court at the time of delivery of this ruling.**

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF JULY 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, the 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 the 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**