



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 45 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

VERSUS

HEBATULLAH BROTHERS LIMITED.....RESPONDENT

RULING NO. 2

The application before me for determination is dated 27th March 2020 and is filed by the claimant herein, a trade union registered under the Labour Relations Act to represent workers in the engineering sector. In the application, the claimant seeks the following orders –

1. Spent.
2. That the Court do deem fit and adopt the parties' agreement on all issues that were in dispute before the Court as at Appendix 2 and 4 of the Amended Memorandum of Claim.
3. That the Court to accept the Amended Memorandum of Claim dated 27th day of March, 2020 to pave way for parties to submit on the issue of refusal to sign a duly negotiated and agreed CBA.
4. That the Court to allow parties to proceed by way of written submission on the issue of refusal by the Respondent to sign parties duly negotiated and agreed CBA and or in the alternative be given hearing date on priority basis.
5. That the cost of this application be met by the Respondent herein to the Claimant/Applicant.

The grounds in support of the application are set out on the face thereof as follows –

1. That the issue in dispute herein is provided for under Section 57 of the Labour Relations Act, 2007 hence the need for coming to this Court under certificate of urgency.
2. That the matter before the Court is provided for under Section 90 of the Employment Act, 2007 which has limitation of time as it is continuing Injury.
3. That the CBA in question is already in arrears of 23 months as the outgoing one lapsed on 30th March 2018 to pave way for the one before this Court to take effect on 1st April 2018.
4. That, the Respondent declined to sing the duly negotiated and agreed CBA without giving any valid reason seeking to introduce an illegal clause in the CBA restricting the same to individual employees which amounts to discrimination in breach of the parties Recognition Agreement.
5. That the Respondent had refused to produce the required documents for negotiation till when this Court issued orders on the same.
6. That upon service of the foresaid orders the Respondent returned to the negotiating table and agreed on all items that formed the issues in dispute.

7. That after parties agreed the Respondent declined to sign the CBA duly negotiated and agreed upon hence the reason we are here before this Court.

8. That after agreeing on all issues the draft CBA was prepared but the Respondent herein declined to sign.

9. That the Respondent was at liberty to give a counter proposal before parties agreeing on each and every issue that was in dispute then instead of signing the CBA as duly negotiated agreed she intended to introduce a discriminatory clause.

10. That if orders sought herein are not granted the Applicant and her members shall suffer irreparable damages.

In the supporting affidavit of Wycliffe A. Nyamwata, he repeats the grounds in the support of the application verbatim.

The respondent did not file a replying affidavit. Parties disposed of the application by way of written submissions.

In the submissions filed by the claimant union, it avers that the respondent has breached Articles 36, 41 and 47 of the Constitution on fair administrative action. Further that the respondent is in breach of Sections 57 and 59 of the Labour Relations Act for failure to sign the duly negotiated CBA. That the claimant is deliberately delaying to sign the CBA so that the claimant's members can lose confidence in the representation.

For the respondent it is submitted that the application has no merit and is an abuse of court process as it is intended to defeat justice in Cause 761 of 2019 filed by another union which has a recognition agreement with the respondent.

The respondent submits that the Claimant has failed to disclose material facts to this Court and we humbly pray that the application be dismissed with costs. That the Respondent was willing to sign the Collective Agreement in its original form but the Claimant refused to sign the CBA on the ground that he wanted it to be open and applicable to all employees when it was obvious that the Claimant represents a section of employees.

That in the present application where the claimant is purporting to amend the Claim and ask the Court to order the Respondent to sign a CBA to apply to all employees will prejudice the case filed in court that is yet to be determined if the Claimant union represents the majority in at the Respondent's work place on the first limb and whether the Claimant is the right Union in the sector.

That this court in **Cause No. 1761 of 2014**, Wasilwa J. relied on the case of **Weldon v Neal [1887] 19 Q.B.D. 394** where the Court held that:-

"The Court will refuse leave to amend where the proposed amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of the defense of limitation accrued since the issue of the writ."

That the instant application falls in the above category in that the Respondent may be prejudiced in raising a defense in case number 761 of 2019 which is pending before this Court in regard to level of representation by the Respondent and there is already a court order to that effect.

That in **Civil Suit No. 10 of 2010** the court cited case of **The King v The General Commissioners for the Purposes of Income Tax Acts for the District of Kensington: Exparte Princess Edmond De Pligac (1917) 1 KB 486**, Warrington LJ stated at page 509 that:-

"It is perfectly well settled that a person who makes an ex parte application to the Court that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it."

That the Claimant has failed to make that disclosure in terms of the pending litigation before this court which has a big bearing on the orders sought in this application.

The respondent submits that to allow the application will defeat justice and therefore it's a fit application for dismissal as its against the principle object of the Employment and Labour Relations Court Act which states thus;

3. Principal Objective

(1) The principal objective of this Act is to enable the

Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.

(2) The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).

(3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.

The respondent prayed that the application be disallowed.

Determination

I have considered the submissions of the parties. The prayers in the application are actually the substantive issues in the claim which seeks the following reliefs –

1. That the Court deem fit and find the action of the Respondent of refusal to produce the required documents to be unfair and in bad faith, therefore adopt the proposal by the Claimant and order parties to sign the same forthwith.
2. That in the alternative, the Respondent be ordered to produce the said records and parties given a duration shortest possible for parties to complete and sign the CBA and the matter be mentioned before the Court for confirmation of the same.
3. That the said salaries if accepted be adjusted to the current salaries after adjustment of the 7.5% that the Respondent opted to award her employees before negotiations.
4. That the 7.5% salary increment to the employees who has been left out be adjusted and paid from the same month the rest were awarded.
5. That among any other relief which this Court may deem fit to grant.
6. That the cost of this suit be met by the Respondent.

In the proposed amended claim, the claimant seeks the following prayers –

1. That the Court deem fit to issue Orders compelling the parties herein to sign the duly negotiated and agreed CBA as per Appendix 4 of this Amended Memorandum of Claim within the shortest time possible.
2. That the matter be given a mention date after the expiry of the time frame issued as per prayer 1 to confirm compliance.
3. Any other relief which this Court may deem fit to grant.
4. That the cost of this suit be met by the Respondent.

It would appear that there is a dispute over the signing of the CBA. In its reply and in the submissions, the respondent states it has not refused to sign the CBA, but has actually offered to sign the same in spite of the fact that the claimant has only 25 employees as all other employees have joined a rival union, the Kenya Glass Workers Union.

In view of the ambiguity in the prayers sought in the application, the court directs that the matter proceeds to hearing of the claim as originally filed so that the claimant can articulate its issues both in the claim and in the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF AUGUST 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