



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 93 OF 2019**

**BAKERY CONFECTIONERY FOOD MANUFACTURING**

**AND ALLIED WORKERS UNION.....CLAIMANT**

**- VERSUS -**

**ENNSVALLEY BAKERY LIMITED.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 23<sup>rd</sup> October, 2020)**

**JUDGMENT**

The initial memorandum of claim was filed on 14.02.2019 through Daniel M. Amalemba Advocate. The amended memorandum of claim was filed on 31.10.2019. The issue in dispute is refusal to issue appointment letters to unionisable employees in violation of clause 19 of the collective bargaining agreement (CBA).

The claimant's case is that parties have concluded a recognition agreement as well as the CBA dated 01.08.2017 and which was pending registered in Court. The CBA is for the period 01.01.2017 to 31.12.2018. Clause 1 of the CBA provides engagement on 2 months' probationary period. After successful probationary service the respondent is required to issue a letter of appointment to the unionisable employee per clause 19 of the CBA. By the letter dated 18.10.2017 the union demanded that the respondent issues an appointment letter to each of the 89 unionisable employees who has been engaged on casual terms of service for a substantial period of time with the respondent. On 19.11.2018 parties discussed the issue but no amicable agreement was reached. Further the claimant protested redundancy process initiated by the respondent to defeat the demand for appointment letters. The issue of redundancy of 23 employees in issue has since been resolved by the consent order given herein on 17.06.2019. The respondent is required to issue letters of appointment to the remaining 66 grievants whose names are annexed to the memorandum of claim. The 66 employees continue to serve without letters of appointment. The claimant's further case is that the respondent has placed the employees on fixed term contracts and in violation of the terms and conditions of service in the CBA. The claimant therefore seeks an order striking out the fixed term contracts issued to some unionisable staff. The claimant prays for judgment against the respondent for:

- 1) A declaration that the 89 grievants herein are entitled to issuance of appointment letters in line with the provisions of clause 4 as read with clause 19 of the existing CBA between the claimant and the respondent from the date of their respective engagement with the respondent upon completion of their probation period.
- 2) A declaration that the respondent's refusal to issue the said grievants with appointment letters as provided by clause 19 of existing CBA signed between the claimant and the respondent is illegal, null and void and in violation of the CBA.
- 3) A declaration that the respondent's engagement of the 66 grievants outside the terms and conditions of service set out in the CBA including issuance of inferior fixed term contract is in contravention of the existing collective agreement.
- 4) An order directing the respondent herein to forthwith issue the remaining 66 grievants whose names and details are attached to the schedule to the memorandum of claim with appointment letters in accordance with clause 19 of the existing collective agreement within a period of 30 days from the date of judgment.
- 5) An order of injunction to issue restraining the respondent herein from victimizing any of the 66 grievants whose names are attached to the memorandum of claim or from unlawfully terminating their services, unlawfully rendering them redundant or interfering with their employment in any way.
- 6) An order to issue for computation and immediate payment of all underpayments of wages or unpaid allowances arising from the

CBA executed between the claimant and the respondent and registered with the Court.

7) Any other relief which the Honourable Court may deem fit to award.

8) Costs of the suit.

The respondent filed the memorandum of reply on 20.01.2020 through Kibanya and Kamau Associates. The respondent admits that parties have executed a recognition agreement. The CBA for 01.01.2017 to 31.12.2018 was not duly registered in Court but the suit was filed after the CBA had expired. The CBA provided for casual employment and it was unnecessary that the grievants are provided letters of appointment. Clause 19 on letters of appointment did not apply to casual employees. Further, the claimant's case was not that the respondent complies with the CBA but that grievants are placed in employment for unspecified tenure and issued with appointment letters backdated to respective dates of initial appointment. Further, the respondent's case is that clause 19 of the CBA did not bar the respondent from issuing letters of appointment upon fixed term contracts – and the fixed term contracts as issued were lawful. The claimant should not therefore be allowed to change the terms and conditions of service as agreed between the grievants and the respondent. The redundancy issues had been resolved by a consent order in cause ELRCC No.393 of 2017 at Nairobi. The respondent continued suffering financial losses leading to redundancy of a further 23 employees and their redundancy had been amicably resolved by a consent order. The respondent prayed that the suit be dismissed with costs.

The parties filed their respective final submissions. The Court has considered all the material on record and makes findings as follows:

1) There is no dispute that the CBA in issue in clause 19 required the respondent to issue letters of appointment to unionisable staff. The respondent submits that the CBA lapsed long before the filing of the suit. The Court finds that even if the CBA had lapsed, the requirement to issue the letters of appointment had become incorporated in the grievants' individual contracts of service.

2) Clause 19 of the CBA required staff to be issued with letters of appointment. Clause 29 of the CBA provides for casual employees. Clause 29 (b) provides that where a casual employee works for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month, or, performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in aggregate to 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. The Court considers that otherwise casual employees who have satisfied clause 29(b) of the CBA should be issued with the relevant letter of appointment as per clause 19 of the CBA. That is consistent with section 37 of the Employment Act, 2007 on conversion of casual service to one subject to minimum terms in that Act upon the prescribed conditions being satisfied. Even if CBA was not registered, the declaration would issue in view of section 37 of the Act.

3) As submitted for the respondent, clause 19 of the CBA does not bar issuance of letters of appointment upon fixed term contract and the Court returns that unless it is shown that the terms in the fixed term contracts violate the CBA or law one way or the other, the fixed term contracts would be legitimate. In the present case the claimant has not shown how the fixed term contracts in issue were offensive.

4) There is no dispute that the CBA had not been registered by the Court as per section 60 of the Labour Relations Act, 2007. Being not so registered it did not thereby become enforceable as per section 59(5) of the Act. Thus in so far as the claim is based on clause 19 of the CBA, the same will fail.

5) The respondent relies on the impugned CBA to submit that the conciliation proceedings had not concluded and the suit was premature. In so far as the CBA was unregistered, the Court returns that the respondent's submission was unfounded. Further, the parties had been referred to the conciliator and specific agreements arrived at and the residual dispute continued to hearing. Accordingly, the suit was not premature.

6) The claimant introduces a claim for underpayments of wages without evidence and pleading of particulars in that regard. The Court considers that the prayer was unjustified.

7) While the CBA was not registered, the claimant has as well provided no evidence to show that the 66 grievants have been engaged upon terms outside the provisions of the CBA.

In conclusion, the suit is hereby determined with orders:

1) As clause 29(b) of the CBA is consistent with section 37 of the Employment Act, 2007, the declaration is hereby issued that the respondent to issue the relevant letter of appointment to any of the 66 grievants who has satisfied provisions of clause 29 (b).

2) Each party to bear own costs of the suit.

**Signed, dated and delivered by the court at Nairobi by video-link this Friday 23<sup>rd</sup> October, 2020.**

**BYRAM ONGAYA**

**JUDGE**