REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CBA NO.165 OF 2019

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION..APPLICANT

VERSUS

WELLSFARGO LIMITED.....RESPONDENT

RULING

The applicant filed application and Notice of Motion dated 25th September, 2020 and seeking for orders that;

1. Spent.

2. Pending the hearing and determination of the application this court do stay the implementation of clause 9.2 and 9.1 of the Collective Bargaining Agreement signed on 27th June 2020 [2019] and registered on 23rd July 2020, pending the respondent's compliance with the statutory provision in issue.

3. Pending the hearing and determination of this application, the respondent be directed by this court to revert to the old method of calculating and paying overtime to its employees.

4. The court do make an order of injunction restraining the respondent members either by themselves, employees, servants or agents from depriving workers overtime for the hours worked.

5. The court do direct the Federation of Kenya Employers and or the respondent to supply the applicant with the original copy of the Collective Bargaining Agreement and minutes for perusal and the same be placed in the court file.

6. The court do direct the respondent to pay the overtime arrears to the affected employees from the month of August, 2020.

7. Costs of this application be provided for.

The application is supported by the annexed affidavit of Isaac Andabwa and on the grounds that the applicant is a registered trade union representing the industrial interests of employees engaged and employed in the private security industry.

The applicant and the respondent signed a recognition agreement on 11th August, 2020 and a collective bargaining agreement (CBA) was registered in court on 23rd July, 2020 for a period of 2 years until 23rd July, 2022.

The respondent has been paying overtime to its employees on daily basis even after signing the CBA but upon the registration of the CBA the formula for calculating overtime changed which deprive the employees the daily overtime on the grounds that such overtime pay was agreed upon by the parties in the CBA. The applicant members have since been deprived the overtime pay against the Employment Act, the Regulation of Wages (Protective Security Services) Order 1998 which sets the normal working hours at 52 hours spread over 6 days.

The Federation of Kenya Employers (FKE) handed the CBA documents to the respondent and attempted to sneak the CBA through the back door by avoiding the normal procedure of reverting to the conciliator instead rushed the documents to the Minister for rubber stamping yet it was not a party to the negotiating team.

The applicant wrote to FKE and the respondent requesting for a meeting to address the pending items and to conclude the registration process of the CBA.

The change of formula for calculating overtime by the respondent has brought acrimony among employees affected by the reduced overtime pay and the workers have threatened industrial action. Overtime pay is regulated in the same manner with hours of work.

Under the Regulation of Wages (protective Security Services) Order 1998, paragraph 7(2) stipulates that the formula for calculating overtime shall be basic hourly rate, where the employee is not employed by the hour, be deemed to be one over two twenty-fifth (/225) of the employees' basic wage.

Clause 1.0 provides that parties shall follow the applicable law and where there is a conflict, to apply the provision to give the employee the beneficial position.

The respondent has violated clause 2.0 which requires every employee be given an employment contract. The Labour Commissioner has in the past recommended payments as follows;

a) For time worked in excess of normal number of hours per week at one and a half times the normal hourly rate;

b) For time worked on the employees normal rest day or public holiday at twice the normal hourly rate; and

c) That in situations where there exists more than one order, the practice that the one order, the practice is that the more favourable is used over the less favourable one.

The method of calculating overtime as adopted from the protective security service Order is not the same method being used by the respondent and the wording of weekly instead of hourly has been inserted hence disadvantaging the employees who are members of the applicant.

Section 27 of the Employment Act provides that an employer shall regulate the working hours of each employee in accordance with the provisions of the law. the bare minimum at the moment is 8 hours a day for normal office hours.

The failure to preserve the workers terms and conditions will occasion great injustice and the application herein is meant to restore administration of justice.

Mr Andabwa avers in his affidavit that he is the national general secretary of the applicant and in support of the application herein. The respondent has been paying overtime on a daily basis but since the registration of the CBA the payment formula changed to one which is unfavourable to the employees which is contrary to the spirit and provisions of section 27 of the Employment Act and the Wage Regulation Orders for private security workers.

The issue of overtime calculation has brought acrimony among the applicant members to the extent that some want to down their tool in an industrial action or be forced to withdraw from the membership of the applicant. The CBA is protected under section 54 of the Labour Relations Act and Article 41 of the constitution. Section 48 of the Labour Relations Act requires the employer to deal with union matters relating to rights and interests of the members of the union.

On 28th October, 2019 the applicant demanded for the original certified copies of the CBA and the minutes since the applicant was not involved in the process of registration and on that regard objected to the registration. The orders sought should be issued.

In reply, the respondent filed Grounds of Opposition and the Replying Affidavit of Willis Ayieko-Onyango on the grounds that the CBA was registered by the court on 23rd July, 2020 with the consent of the parties and the attempt to challenge it amounts to applying to set aside the consent whereas the applicant has not met the conditions required for the grant of such orders. There is no mistake, the consent was not influenced and resulted from discussions culminating to the registration of the CBA and there was no fraud which conditions are addressed by the Court of Appeal in the cases of **Flora N Wasike versus Destimo Wamboko [1988] eKLR** and **Board of Trustees National Social Security Fund versus Michael Mwalo [2015] eKLR.**

The applicant challenges the CBA executed by the parties on 27th June, 2019 and registered in court on 23rd July, 2019. To apply for review of its terms is to ask the court to re-write the CBA, a contract between the parties contrary to the law as held in **National Bank of Kenya Limited versus Pipeplastic Samkolit & another [2002] 2 EA.**

By seeking to stay and implementation of the CBA and applicant is inviting the disregard of the cardinal principles of freedom of contract and the court cannot compel the parties to enter into an agreement on the terms proposed by one party.

The application is in abuse of the court process. The applicant is seeking for a copy of the CBA which they have, did sign and consented to registration.

In his affidavit, Willis Ayieko-Onyango avers that he is the ground human resource director of the respondent with authority to respond herein.

The applicant and the respondent are parties to a CBA executed on 27th June, 2019 and registered in court on 23rd July, 2020 for a period of 2 years pursuant to clause 35.1 of the CBA. The CBA registration was a culmination of discussions between the parties and clause 9 on calculation and payment of overtime was agreed upon.

Clause 9 on overtime was negotiated on and it was agreed that working hours for all employees shall be minimum 52 hours a week spread in 6 days and any work beyond the limit set would be treated as overtime and compensated at 1.5 times the normal rate in case an employee's works on a normal day and two times the normal rate of wages in case the employee works on a public holiday and two times the normal rate of wages per hours in case an employee works on a rest day.

On 26th June, 2019 a meeting was held between the parties and the overtime tabulation agreed upon with a given formula.

All parties had copies of the draft CBA including the applicant. Each executed the CBA on 27th June, 2019.

Under section 60 of the Labour Relations Act, it is the duty of the employer to submit the CBA to the court through the Central Planning and Monitoring Union within 14 days of execution for registration and which was done. The CBA registered sets out the wage scales, working hours, training, health and safety, overtime and grievance mechanisms among other terms.

The CBA was negotiated in good faith and once it became registered it is enforceable and biding on the parties to it and should be implemented as agreed for 2 years. since August, 2020 the respondent has paid employees in accordance with the CBA.

The discretion provided in the negotiation process is not restricted to the provisions of Protective Security Services Order and the terms of the CBA do not have to be a replica of the same. The applicant voluntary singed the CBA and the respondent has continued to pay the employees as agreed.

Mr Oyango also avers in his affidavit that initially and during the negotiations parties held meeting at FKE offices and the applicant was represented culminating to signing the CBA on 24th June, 2019.

When the CBA was submitted in court all parties attended on 9th and 24th October, 2019. On 9th October, 2019 the respondent had no objections to the registration of the CBA and the applicant objected on the grounds that there were unresolved items which did not relate to overtime and the registration was deferred to 24th October, 2019 when the applicant advanced new reasons that they had no copy of the CBA and the court deferred and referred the CBA to the Minister for parties to agree.

On 18th February, 2020 the Minister invited the parties for a conciliation meeting and parties agreed to file submissions.

The applicant moved the court seeking registration of the CBA. On 23rd July, 2020 the applicant attended court and consented to registration of the CBA. The respondent did not sneak any provision(s) in the CBA. The allegations that the respondent has changed the formula on overtime pay under clause 9 of the CBA is not correct as the same was negotiated and agreed upon and both parties executed the CBA and not proper for the applicant to seek the respondent be compelled to follow its formula. The alleged disadvantage to the employee is without foundation and the application should be dismissed with costs.

Determination

The applicant is seeking the court to stay the implementation of clause 9 of the CBA registered with the court on 23rd July, 2020 and that the respondent be directed to revert to the old method of calculating and paying overtime to its employees and that the respondent be restrained from depriving the employees overtime pay for hours worked and that the court do direct the FKE or the respondent to supply the applicant with original copy of the CBA and minutes and the same be filed in court. the applicant is also seeking that the respondent be directed to pay the overtime arrears to the affected employees from August, 2020.

The grounds to the application by the applicant is that the parties executed the CBA on 27th June, 2019 and the same was registered in court on 23rd July, 2020 but the respondent changed the formula of calculating overtime and went ahead to deprive the employees the daily overtime on the guise that it was agreed upon by the parties in the CBA.

The respondent's case is that the subject CBA was negotiated upon and the parts executed it and the court registered the same on 23rd July, 2020 and there is no matter for change of terms as alleged since the applicant was involved in the discussions resulting in the CBA.

The sanctity of a CBA is addressed pursuant to section 59(1) of the Labour Relations Act, 2007 (the Act) in the following terms;

> *(1) A collective agreement binds for the period of the agreement—*
>
> *(a) the parties to the agreement;*
>
> *(b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or*
>
> *(c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.*

The central element of a registered CBA is that it becomes part of the employment contract pursuant to section 59(3) of the Act;

> *(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.*

And the rationale is that once the CBA is registered with the court it becomes a binding and enforceable agreement against the party's t it pursuant to section 59(5) of the Act.

(5) A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.

The court only registers a CBA after a long process. It is a culmination of the parties engaging in discussions and negotiations and whereupon the employer in conjunction with the Minister must submit the executed CBA and upon which parties attend court to confirm its registration. It is not a single day matter. Parties must have burnt the midnight oil resulting in the registration of a CBA.

In the case of **Nairobi City County Government versus Kenya County Government Workers Union; Salaries and Remuneration Commission (Interested Party/Applicant) [2019] eKLR** the court held that;

... A CBA generally is a binding contract between the parties whose effect is provided under Section 59 of the Labour Relations Act and whose implementation takes effect after its registration in Court.

Consequently, a CBA just as a contract may be set aside on the same principles that would apply in setting aside a contract. In ***Social Service League, M.P. Shah Hospital v Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers [2018] eKLR****, [the court held];*

A collective agreement is a contractual agreement like any other left to party autonomy, save that it is underpinned by specific statutory provisions which if breached would render it or the offending clauses illegal.

Apart from the illegality, the normal legal principles in setting aside a contract would apply, and these include establishment that there was fraud or misrepresentation.

On 9th October, 2019 parties attended court for the registration of the submitted CBA. The applicant made objections on the grounds that there were unresolved items of the submitted CBA. The court adjourned to 24th October, 2019.

On the due date, 24th October, 2019 the applicant stated they had no copy of the CBA which was secured by the court and the matter was referred back to the Minister.

By letter dated 29th June, 2020 the application wrote to the court as follows;

Re: Collective Agreement No.C/A 165 of 2019

Kenya national Private Security Workers Union and Wells Fargo Limited

We refer to the above subject matter and request the same to be placed urgently before the Judge for registration on the earliest date possible. The parties have consented to the registration of the Collective Agreement Yours faithfully

Kenya national Private Security Workers' Union [signed]

Isaac G.M Andabwa

National General Secretary.

Upon this request, the court allocated 23rd July, 2020 and in the presence of the parties to the CBA, by consent the CBA was confirmed for registration.

The presiding Judge with regard to the CBA registration singed the same on 29th July, 2020.

The CBA effectively became a binding agreement between the parties to it by consent and approval by the court.

As set out above, unless there are good reasons that such agreement was obtained by fraud, mistake or duress.

The applicant is seeking to review the payment of overtime on the grounds that the Regulations of Wages (Practice Security Services) Order 1998 sets out the normal working hours at 52 spread over 6 days and that the formula for the payment for calculating payment of overtime hours worked should be;

The basic hourly rate, where the employee is not employed by the hour, be deemed to be one over two twenty-fifth (1/225th) of the employees basic monthly wage.

In the Registered CBA the parties had under clause 9(2) agreed to calculate overtime in the following terms;

For the purpose of calculating payment for overtime, the overtime hours will be computed and paid based on weekly worked hours as set out in the Regulations of Wages (Protective Security Services) Order, 1998 as amended. Any hours worked in excess of the 52 hours per week as stipulated in 9.1 above will be considered as overtime hours and will be used to compute the overtime allowance.

The basic hourly rate shall, where the employee is not employed by the hour, be deemed to be one-two hundred and twenty-fifth (1/225) of the employee's basic monthly wage.

The proposal by the applicant in comparison to the CBA terms as agreed indeed relates to the applicable Wage Orders. Even where three maybe a difference in wording, which is not the case here, the court cannot *suo motto* move the change the terms of the CBA which has since been registered with the consent of the parties to it. To do so would be to circumvent very fundamental principle of law which is the fundamental grounding of our judicial system replicated under Article 41 and section 59 and 60 of the Act providing for the right to negotiate and register a CBA which is binding on the parties to it.

The court finds no mater to interfere with the terms and conditions of the CBA registered on 23rd July, 2020.

In this regard, the averments by Mr Andabwa that the applicant members are aggrieved and agitated to take industrial action due to the calculation of overtime pay, such action and the reasoning of it shall be ill-advice following such members having been represented in the negotiations for the CBA and attended court on 23rd July, 2020 and by consent the same was approved for registration.

The terms and conditions of the registered CBA herein is binding upon the parties to it and including the applicant pursuant to section 59(50 of the Act.

With regard to the applicant seeking to be supplied with the original copy of the CBA and minutes for perusal and the same be placed in the court file, first such matter has since been addressed by the court on 24th October, 2019 and there is an original copy of the CBA executed by the applicant herein. Where such original record is required, a letter of request to the Court Registrar shall suffice and the matter shall be addressed administratively. Secondly, the records sought from FKE, such entity is not a party herein.

The averments by the respondent that the employees in its service are paid the due overtime in accordance with the CBA is not challenged. The alleged overtime pay arrears is therefore without any material evidence.

parties shall adhere to the applicable CBA for its term and where there is a dispute on its terms, the dispute resolution mechanism agreed upon shall apply.

Accordingly, the court finds the application dated 25th September, 2020 is found without merit and is hereby dismissed. As the parties are engaged under an on-going CBA and to maintain industrial peace, there shall be no orders on costs.

DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2020.

M. MBARU

JUDGE