



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 421 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

KENYA CHEMICALS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

MILLY GLASS WORKS LIMITED..... RESPONDENT

RULING

This court delivered its judgment in this suit on 8th February 2019 in the suit herein which concerned two clauses in the CBA which the parties had negotiated but failed to agree on. In the judgment, the court considered the time that had lapsed from the date the parties commenced negotiations which was in February 2013.

In the instant application before the court for determination which is dated 24th January 2020 and filed on even date, the claimant Union/Applicant seeks the following orders –

1. *That this application be certified urgent and heard ex-parte and on priority basis in the first instance.*
2. *That the Court do issue an Order compelling the Respondent to sign and ratify the Collective Bargaining Agreement as Judged by this Court on 8th February, 2019.*
3. *That in failure of compliance by the Respondent in observance of the aforesaid prayer sought in clause 2 above within seven (7) days from the date hereof the Court be pleased to issue an Order execution for Notice to Show Cause why execution should not issue by committing the Directors and/or authorized concerned agents and assigns of the Respondent to Civil Jail.*
4. *That costs of this application be provided for.*

In the supporting affidavit of Were Dibo Ogutu, the then Secretary General of the Applicant (now deceased), the affiant states that the Respondent has declined to comply with the aforesaid Order and Decree by refusing to sign and ratify the Collective Bargaining Agreement citing contention on already adjudicated matters despite several attempts by way of correspondence requiring them to convene a date for signing and ratification of the Collective Bargaining Agreement

That it is only fair in the interest of justice for this Court to issue an order compelling the Respondent to sign and ratify the Collective Bargaining Agreement as Judged by this Court on 8th February 2019 and further as ruled by the Court of first instance in Mombasa ELRC No. 74 of 2019 Before Rika J. as regards competence of enforcement jurisdiction.

The Respondent filed a replying affidavit of MOHAMED RASHID, its Managing Director sworn on 20th May 2020 in which he states that the application as drafted is unclear and imprecise as to the provisions of law invoked, the nature of the application, the reliefs sought and the grounds upon which the reliefs are sought. He specifically avers that –

- a. *Prayer 3 of the application appears to be an order usually sought in a contempt application but also mixed with an order for execution of a decree under Order 22 rule 31 of the Civil Procedure Rules 2010.*
- b. *Assuming it to be either a contempt or an execution application, there is no reference whatsoever to either Order 22 of the Civil Procedure Rules 2010; or the High Court (Organization and Administration) Act, 2015; or the Judicature Act Cap 8.*
- c. *There is an application for execution of a decree dated 24th January 2020 (under Order 22 rule 7 Civil Procedure Rule 2010) taken out by the Claimant where it similarly seeks execution through committal to civil jail of the Respondent's directors. The*

Claimant cannot invoke two different processes simultaneously.

d. The application does not state any ground on which it is premised contrary to rule 17(8) of the ELRC Rules 2016 and Order 51 rule 4 of the Civil Procedure Rules 2010. On this ground alone, the application is fatally defective and should be dismissed.

Further that the Civil Procedure Rules 2010, which are imported by Rule 32 of the Employment and Labour Relations Court Rules 2016, does not contemplate the arrest and committal to civil jail in the absence of a decree for the payment of money.

That under Order 22 rule 28 of the Civil Procedure Rules 2010, where the decree is one for specific performance, which is the case here, and the Judgment Debtor is a corporation, like the Respondent here, execution is by attachment of the Judgment Debtor's property. That the mode of execution invoked by the Claimant is impermissible and the application should be dismissed in *limine*.

That the Notice of Motion dated 24th January 2020 is fatally defective for violating Rule 23.6 and Rule 81.10(1), (2) and (3) of the United Kingdom's Civil Procedure Rules as well as Paragraphs 2.1 of Practice Direction 23A and paragraph 13.1 and 13.2(4) of Practice Direction 81.

The affiant further depose that the Respondent noted that the claimant had only 92 members out of its workforce of 486 unionisable employees, which matter it brought to the attention of the Applicant by its letter dated 3rd January 2020. That the number had reduced further to 80 as at 18th May 2020. That on the said 18th May 2020, the Respondent applied to the National Labour Board for revocation of the Recognition Agreement.

The affiant deposes that should the court order it to sign the CBA it will create an untidy situation as there can be no CBA without a recognition agreement and it would be embarrassing to the court to uphold the revocation. That it would be impossible for the Respondent to recover the monies paid under the CBA if it is subsequently set aside.

That in light of the foregoing, the admitted failure to sign the CBA is not a wilful disobedience of the Court's decree. It is an event brought about by subsequent fundamental changes in position with legal implications.

That if the Court finds that the draft CBA must be signed notwithstanding the foregoing, the Court should consider and uphold the requests made in the Respondent's letter dated 18th December 2019. That these circumstances have been exacerbated by the Covid-19 pandemic which has significantly affected the Respondent's income.

It urged the court to strike out the application.

In its further affidavit sworn by PETER OUKO ONYANGO in response to the Respondent's replying affidavit by the National Secretary General on 8th July 2020, the Applicant states that the Respondent has misconstrued the application. That the application as filed is clear and precise. That the prayers sought by the Claimant/Applicant are not simultaneous and that one is independent of the other. That the Respondent should appreciate the fact that *verba secundum materiam subjectam intelligi nemo est qjinesciat*. There is no one who does not know that words are to be understood according to their subject matter.

That Article 159 of the Constitution requires that justice be administered without undue regard to procedural technicalities.

That if the Court fails to grant the prayers sought, the workers of the Respondent stand to suffer irreparably since the workers have not benefited from the CBA up to date despite the Respondent recognizing the Claimant Union having attained the threshold of members required for recognition from 15th December 2013.

Submissions

The application was disposed of by way of written submissions. The Applicant however opted to fully rely on the application and the two affidavits it filed in support thereof. On its part, the Respondent filed written submissions dated 9th September 2020.

The Respondent submitted that although the Claimant sees the failure to sign the CBA by the Respondent as a brazen and blatant disregard for the rule of law, the events that occurred after the judgment have made it impossible for the Respondent to comply with the judgment. It submits that the court should not insist on the enforcement of the judgment because the union has lost members and now represents only 16% of unionisable employees. It relies on several authorities to emphasise its position. That in *Kenya Jockey and Betting Workers Union v Resort Kenya Limited* [2014] eKLR the Court held that;

“Where membership of a union has changed and there is no simple majority, there is the possibility of the subject union losing on recognition that they have previously enjoyed due to the simple fact of lack of a simple majority.”

That in *Kenya Union of Domestic Hotels, Educational Institutions Hospitals and Allied Workers v Pwani University & another* [2019] eKLR it was held that;

“It follows therefore that a trade union that no longer has a simple majority of unionisable employees within an establishment, as its members has no right to insist on recognition for purposes of collective bargaining. This in my view, is the essence of Section 54(1) of the Labour Relations Act.”

That the Employment and Labour Relations Court is joined by the Court of Appeal in that finding. That in *Civicon Limited v Amalgamated Union of Kenya Metal Workers* [2016] eKLR it was held that;

“However, any changes that reduces that unit below the simple majority will affect the recognition agreement. There are clear inherent risks where this happens.”

That it is a matter of law, a Recognition Agreement will be revoked or terminated where the Union no longer represents a simple majority of the unionisable employees. That *Rika J. in Bakery, Confectionery, Food Manufacturing and Allied Workers Union [K] v Mombasa Maize Millers Limited & 3 others* [2016] eKLR held that;

“...recruitment of Employees is a continuous process, and grant of recognition, does not end the requirement for the Trade Union to remain relevant, most representative, and with a healthy majority in the collective bargaining unit.”

That Section 54 of the Labour Relations Act 2007 requires a Trade Union to recruit no less than 50% of the unionisable employees before it can insist on recognition. That it is only after recognition that it can demand a CBA. That the Claimant is only at 16.4% and it would be against section 54 of the Labour Relations Act 2007 to insist on concluding a CBA. That a court of law has a duty to ensure its decisions accord with and do not violate the law.

That courts do not act in vain as was held in the case of *Kalya Soi Farmers' Cooperative Society v Paul Kirui & another* [2013] eKLR that;

“...the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes.”

The Respondent wonders what would happen should the National Labour Board ultimately approve revocation of the Recognition Agreement. It wonders whether the CBA would continue to apply without the recognition agreement. It submits that common sense dictates that enforcement of the judgment should await the outcome of the challenge to the recognition agreement. That given the principle that the courts will not act in vain, the court should withhold the reliefs sought.

On the prayer by the Applicant that this court issues a notice to show cause to the Directors of the Respondent to explain why they should not be committed to civil jail for failing to comply with the court orders, the Respondent submits that Rule 32 of the Employment and Labour Relations Court (Procedure) Rules provides that execution be in accordance with the Civil Procedure Rules. That Order 22 Rule 28(1) and (2) of the Civil Procedure Rules gives two avenues for enforcing decrees where specific performance is ordered being attachment of property and committal to civil jail. That for a corporation, the only remedy available is attachment of property. That Rule 28(5) applies where committal to civil jail and attachment of property are not applicable.

The Respondent submits that the law is very clear that the inherent powers of the Court cannot be used to override the clear provisions of the law. That in the case of *Eunice Auma Odera & 3 Others v Migori Teachers Co-operative SACCO Society Limited and 2 Others* the court stated that –

“The inherent powers of the court cannot be invoked where there is a clear procedure provided for in the law or in rules.”

It submits that it would be an abuse of the inherent jurisdiction to invoke the provisions where the rules have expressly provided an adequate relief.

Determination

I have considered the application together with the affidavits in support and in opposition thereto. I have further considered the submissions.

There are two issues that arise for determination. The first is whether the application is incompetent for being imprecise and unclear as to the provisions under which it is filed, while the second is whether the orders sought therein are merited.

Competence of the Application

On the face of the application, it is indicated that it is brought under Section 4, 5, 73 and 74 of the Labour Relations Act, Rule 31 and 32 of the Employment and Labour Relations (Procedure) Rules, Order 1 of the Civil Procedure Rules, Sections 1A and 3A of the Civil Procedure Act and any other enabling provisions of the law. The prayers sought as on the face of the record in my view are specific and unambiguous. They are sought consequentially so that the first prayer is to be granted and if the Respondent fails to comply, the second prayer is to be invoked.

The Respondent appears to have made assumptions about the provisions under which the application ought to have been made and proceeded to trash the provisions which are stated on the face of the application. The court finds no lack of precision or clarity in the application or the provisions under which it is made.

In any event, both Article 159(2)(d) and Section 20(1) of the Employment and Labour Relations Court Act require this court to apply substantive justice without undue regard to technicalities. What the Respondent has raised, being want of form, do not go to the substance of the prayers sought.

I have further noted that the Respondent has in the submissions not made any reference to the form of the application and will therefore presume that re-evaluated the averments in the replying affidavit and abandoned the reference therein to want of form of the application.

Whether the orders sought are merited

The Respondent admits that it has not complied with the orders of this court. At paragraph 4 of the submissions of the Respondent it submits —

“On 8th February 2019, the court handed down its judgment whose import was to set 1st January 2019 as the commencement date of the CBA which the parties were expected to sign. It is common ground that to date, the CBA has not been signed.”

Its reasons for noncompliance are that there have been intervening events since this court handed down its judgment which have made it impossible for the respondent to comply with the judgment. It cites the fact that the claimant’s membership has reduced to 16% as one reason and the fact that it has applied to the National Labour Board for revocation of the Recognition Agreement between the parties as the second reason. The final reason is that should the recognition agreement be revoked it would not be possible to revoke the CBA.

The court is alive to the fact that the judgment herein which the Respondent admits it has never complied with, was delivered on 8th February 2019, about one year before the instant application was filed. All the issues raised by the Respondent to have prevented it from complying with the decision of this court arose long after the delivery of the judgment, and it is not even clear how these reasons could have prevented the Respondent from implementing the decision of this court. Further, the issue of membership was only raised by the Respondent in May 2020, long after this application was filed and just days before the replying affidavit of the Respondent was filed in court. The letter to the National Labour Board which incidentally there is no proof that the same was received by the National Labour Board and which is curiously not copied to the Applicant herein although it is a party to the recognition agreement sought to be revoked, is dated 18th May 2020, just two days before the date of the replying affidavit. It is not farfetched to assume that the letter was strategically written to provide evidence to be attached to the replying affidavit.

Further at the time of negotiation of the CBA, the issue of the number of members of the union was not an issue. It would appear as if the Respondent’s intention is to frustrate the members of the union by denying them the benefits in the negotiated CBA to make them despair and leave the union. Waiting from 2013 to 2020 is indeed a very long time. This amounts to unfair labour practice.

The respondent further refers to the refusal of the Applicant to discuss review of the CBA. The Respondent is aware there is provision for review of judgments and orders which it has not taken advantage of.

The foregoing notwithstanding, the revocation of the Recognition agreement would have no effect on the CBA. As is provided in Section 59 of the Labour Relations Act, the terms of a Collective Bargaining Agreement once registered are incorporated into and become part of the terms of employment of the employees for whose benefit it has been negotiated. This would not be affected by the termination of either the collective agreement or the recognition agreement. In fact, all CBAs contain a clause that the terms would be in force until amended.

Further, Section 26(2) of the Employment Act recognise the terms of employment as either decreed in a judgment or award of the court or as negotiated in a collective bargaining agreement.

It is further important to note that a dispute over the revocation of a recognition agreement would constitute a different and independent cause of action from negotiation or implementation of a collective bargaining agreement and cannot therefore prevent the Respondent from implementing a concluded CBA.

The attention of the Respondent is further drawn to the provisions of Section 20(4), (7), (8) and (9) of the Employment and Labour Relations Court Act with respect to the enforcement of orders of this court. The Section provides that

(4) For the purpose of dealing with any matter before it, the Court may by order in writing signed by or on behalf of the Court require any person to—

- (a) furnish in writing or otherwise, such particulars in relation to such matters as it may require;
- (b) attend before it;
- (c) give evidence on oath or otherwise; and
- (d) produce any relevant documents.

...

(7) A person who—

- (a) without reasonable cause fails to comply with an order duly given under subsection (4); or
- (b) is required by an order made under subsection (4) to furnish information, and who makes any statement or furnishes any information which the person knows, or has reasonable cause to believe, to be false or misleading in material particular,

commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both.

(8) If an order made under subsection (4) is directed to a—

(a) firm or to a body corporate, every partner of the firm, and every director and officer of the body corporate shall comply with the order; or

(b) trade union, employers' organisation or federation, every official or officer of the trade union, employers' organisation or federation shall comply with the order.

(9) Where an offence is committed by a firm, body corporate, trade union, employers' organisation or federation in respect of any order made under subsection (4), every partner, director, officer or official concerned shall be guilty of the offence unless they prove that—

(a) the offence was committed without their consent or connivance; and

(b) they exercised all due diligence to prevent the commission of the offence.

The Respondent's submissions with respect to contempt of court proceedings are thus not applicable to the application before the court.

Orders

Having found as above, I find that the application is meritorious and make the following orders: -

1. The Respondent is directed to sign the Collective Bargaining Agreement as negotiated between it and the Claimant and as determined by the court in this suit within 30 days from the date hereof.

2. Should the Respondent fail to do so the Applicant is free to move the court in terms of Section 20 of the Employments and Labour Relations Act for orders summoning the Managing Director of the Respondent Mr. MOHAMED RASHID to appear before this court to show cause why he should not be punished for disobedience of orders of this court.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF DECEMBER 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