REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1272 OF 2014

CONSOLIDATED WITH CAUSE NO. 650 OF 2015

(FORMERLY KISUMU 276/2014)

BEFORE HON. LADY JUSTICE MAUREEN ONYANGO

UNION OF NATIONAL RESEARCH INSTITUTES STAFF OF KENYA (UNRISK).....CLAIMANT

VERSUS

KENYA SUGAR RESEARCH FOUNDATION (KESREF).....1ST RESPONDENT

KENYA AGRICULTURAL RESEARCH INSTITUTE (KARI).....2ND RESPONDENT

AND

KENYA AGRICULTURAL AND LIVESTOCK RESEARCH ORGANISATION (KALRO).....3RD RESPONDENT

JUDGMENT

On 31st August 2015, the Claimant, Union of National Research Institutes Staff of Kenya (UNRISK), filed a Harmonised Statement of Claim dated 25th August 2015 after consolidation of this claim with the claim dated 6th October 2014 in Cause No. 650 of 2015 in respect of the proposed Collective Bargaining Agreement (CBA) with the 1st Respondent, Kenya Sugar Research Foundation (KESREF), 2nd Respondent, Kenya Agricultural Research Institute (KARI) and the 3rd Respondent, Kenya Agricultural and Livestock Research Organisation (KALRO) have declined to negotiate on.

The Claimant avers that it has a valid Recognition Agreement with KESREF duly signed on 19th March 2004 and a valid Recognition Agreement with KARI duly signed on 17th April 2013 with both according it recognition as a properly constituted labour organisation representing unionisable workers in employment of the Respondents. That after forwarding the CBA Proposals to KESREF on 25th April 2014 and to KARI on 17th April 2014, no progress was made and it was forced to report a trade dispute whereby a conciliator was duly appointed in both instances. That pursuant to **Sections 52, 55, 56 and 57 of the Kenya Agricultural & Livestock Act 2013**, KALRO inherited the CBA liabilities of the 1st and 2nd Respondents and that the CBA dispute between the Claimant and the Respondents is for the period of 1st July 2012 to 30th June 2014. Further, that the 3rd Respondent is therefore responsible for the two consolidated suits. The claimant states that the 9 items or issues in dispute as per the Statement of Claim dated 6th October 2014 (in Cause 650 of 2015) remain:

1. House Allowance

2. Leave Allowance

3. Medical Claim

4. Night Out

5. Commuter Allowance

6. Special/Extraneous Allowance

7. Gratuity

8. Percentage (General wage increase) of salary and allowances increase

9. Effective date and duration of the Agreement.

The Claimant union prays that this Court awards and orders the Respondents to effect payment as prayed in the Statement of Claim dated 6th October 2014.

The Claimant also wishes to rely on the Statement of Claim dated 1st August 2014 (in Cause 1272 of 2014) and all the appendixes/annexures save for a few adjustments and that the harmonised CBA Demands as per this statement of claim include:

1. Redundancy/retrenchment ETC Entitlement.

2. Incremental Credit.

3. Job Stagnation.

4. Commuter Allowance.

5. Leave Allowance.

6. Acting Allowance

7. Special Duty Allowance.

8. Hardship Allowance

9. Transfer Allowance

10. Risk Allowance.

11. Extraneous Allowance.

12. Telephone/ Airtime Allowance.

13. Security Allowance.

14. House Allowance.

15. Accommodation Allowance.

16. Basic Salaries

17. General Wage Increase

18. Effective date and duration of the Agreement.

That the Claimant's demands are realistic considering that the 3rd Respondent has been promoted to a superior category of State Corporation-PC 6A as contained in the General Director's communication to all staff dated 28th November 2014 and annexed as App 'J' and that the Director also promised the staff harmonised and better pay/ terms and conditions of service in a Circular/communication marked App 'K'.

Respondent's Case

KALRO filed a Response to Memorandum of Claim dated 2nd February 2015 stating that it is not bound by any Recognition Agreement between the Claimant and the 1st and 2nd Respondents and that no legal instrument has been brought to its attention regarding any CBA. That it cannot start recognizing separate CBAs signed by corporations it took up under Act No. 17 of 2013 because of the disparity in salaries paid to employees of those former corporations. That it has to harmonize the salaries and benefits of all its employees including those of former corporations and which cannot be done through separate unions but through the mandated body which is the Salaries and Remuneration Commission (SRC). Further, that it has no mandate to set or review salaries and benefits of the Claimant union's members as the same fall

under the SRC Act No. 11 of 2011 and the SRC 2013 Regulations and that it can only commence, negotiate, adopt and/ or implement any CBA with authority from the SRC.

The Respondents later filed a harmonised Statement of Response dated 27th October 2015 indicating that the 3rd Respondent had taken over the staff from 1st and 2nd Respondents and that it was in the process of harmonizing their salaries.

Claimant's Submissions

The Claimant submits that the Respondents have never filed any counter proposals since they were served with the Claimant's proposals. That while the central Planning and Monitoring Unit of the Ministry of Labour provided its report on 30th March 2016 as per directions issued by Nduma Nderi J. on 5th October 2016, the SRC has failed to provide any report more than two years later despite several reminders by the Claimant. It submits that since the 3rd Respondent is now legally responsible for the corporations it took in, it cannot refuse to negotiate with the Union or put a counter proposal to the union's proposal on the collective agreement. That Article 41(2) of the Constitution of Kenya provides rights for workers to fair remuneration and reasonable working conditions and further, that Article 41(5) provides rights for every trade union, employer's organisation and employer to engage in Collective Bargaining. That Section 57(1) of the Labour Relations Act states that an employer, group of employers or an employer's organisation that has recognised a trade union shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement. That Section 57(2) further states that for purpose of conducting negotiations under subsection (1), an employer shall disclose to a trade union all relevant information that will allow the trade union to effectively negotiate on behalf of employees. That the Respondents have by conduct violated the law and embarked on an unfair labour practice.

The Claimant relies in the case of Peter Wambugu Kariuki & 16 Others –v- Kenya Research Institute [2013] eKLR where the court in expounding "fair labour practices" stated that its elements are elaborated in Article 41(2), (3), (4) and (5) of the Constitution and that these constitutional provisions constitute the foundational contents of the right to fair labour practices. That the courts in upholding the importance of trade unions and their role in collective bargaining agreements have referred to Article 41(5) read together with Section 57(1) of the Labour Relations Act and that this Court should therefore compel the Respondents herein to fulfil their legally mandated role as employers.

It is submitted by the Claimant that since the 3rd Respondent is a high ranking state corporation, its employees should benefit from such promotion. That the Respondent's failure to file a counter proposal is unlawful and unfair since they never furnished it with information that would help it conclude the negotiations as read in Article 35 of the Constitution. That the SRC has failed to discharge its role of provision of advice having been given ample time to do so and that it is not justifiable to hold this matter in abeyance anymore. That the court would in the circumstances have to rely on the CPMU report and the proposals by the Claimant in its determination and that the absence of counterproposals from the Respondents or a report from the SRC should not be held against the Claimant's members.

Further, that such reports only act as opinions or guidelines but not concrete decisions affecting the outcome of a CBA dispute as has been illustrated in Chemilil Sugar Company Limited & 2 Others –v- Kenya Union of Sugar Plantation & Allied Workers [2014] eKLR, where the court while stating that the applicants are state corporations within the meaning set out in Section 2 of the Corporations Act, further noted that the applicants' employees were not public officers because the applicant was a commercial state corporation wherein the government is a mere investor and so the applicant was not subject to the mandate of the SRC.

It is submitted by the Claimant that the Respondents have no justification for not agreeing to negotiate a CBA that would govern the terms and conditions of employer-employee relationship between them and the Claimant's members. That in Agricultural Employers Association –v- Kenya Plantation & Agricultural Workers [2015] eKLR, the Association invited and submitted its proposals to the Union for a fresh collective bargaining agreement so as to start negotiations for a new agreement but no agreement was reached due to the Union objecting to the composition of persons representing the Association. The Court stated in paragraph 15 that: "Section 57 of the Labour Relations Act creates a positive obligation upon an employer or group of employers that has recognised a union to conclude a collective bargaining agreement with the union."

It finally submits that the only cause of dispute is that the Respondents have refused to grant it the right to negotiate a suitable and workable CBA and that in the absence of any counter proposals, it has proved its case on a balance of convenience and prays that the court allows its claim as prayed in its Harmonized Statement of Claim.

Respondent's Submissions

The Respondents submit that the Recognition Agreements are no longer in existence and or are invalid because they were made with the 1st and 2nd Respondents, which entities no longer exist and that because of the nature of their obligations and circumstance, the 3rd Respondent could not absorb them. Secondly, that the Claimant does not maintain a simple majority of 50 + 1 of KALRO's employees as required by **Section 54(1) of the Labour Relations Act** which provides that an employer shall recognize a trade union for purpose of negotiating a Collective Bargaining Agreement if the trade union represents a simple majority of their unionisable employees. Thirdly, that the Claimant and other unions were in the process of recruitment and the alleged recognition is premature. They cite the case of ***Kenya Union of Printing, Paper Manufacturers & Allied Workers –v- Packaging Industries Limited & Another [2014] eKLR*** where Rika J. held that with regards to the Recognition Agreement of 1988, the same was no longer valid as the question whether the Interested Party retained simple majority had been asked but not answered. Further, that it is settled law that recognition agreements are variable and can be vacated or amended on several grounds either by their own terms, through a court order or the intervention of the National Labour Board.

They submit that the Claimant ought to have first sought recognition with KALRO after dissolution and merger of former institutions, establishment of KALRO. That the rights and obligations in the said recognition agreements and CBAs cannot be deemed to be rights and obligations of KALRO because employment contracts unlike commercial contracts cannot be absorbed by KALRO. That since such employees were members of different unions, it is impractical to tell with certainty which union of the former institutions enjoys a simple majority and that once a recognition agreement is concluded between a trade union and an employer, all other unions with unionisable

members of the employer are downgraded to the level of representation without recognition or collective bargaining power. They rely in the case of ***Union of Kenya Civil Servants –v- Kenya County Government Workers Union & Another [2014] eKLR*** where Ndolo J. also held as follows:

> "This court is fully aware of the rights of trade unions to negotiate on behalf of its members. Nevertheless, it seems to me that as things stand, the actual membership status of the various trade unions with member working in the County Governments cannot be ascertained. To this extend I agree with Counsel for the Applicant that the recognition agreement between the 1st and 2nd Respondents dated 27th February, 2014 is premature. The devolved system of government set out in the Constitution 2010 which is yet to fully evolve has major implications on trade unions and their members. It is therefore too early in the day to determine which trade union has achieved a simple majority status for purposes of recognition and collective bargaining."

It is submitted by the Respondents that the salaries and allowances of the staff of KALRO were approved by the Cabinet Secretary in charge of KALRO and the SRC as required by law and that this case has therefore been overtaken by events. That **Section 61 of the Labour Relations Act** takes away the jurisdiction from the Employment Court in the absence of a collective agreement, to set the basic salary and allowances of public officers as was held by the Court of Appeal in ***Teachers Service Commission (TSC) –v- Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR***. That this court therefore lacks jurisdiction to issue the orders sought by the Claimant and that it should down its tools.

The Respondents also submit that the mandate of the SRC as provided under the Constitution and the SRC Act was discussed by Mwilu J. and Koome J. in the ***TSC v KNUT*** Court of Appeal decision above being to set and determine salaries of employees. That in the same decision, Githinji J. further stated in paragraph 35: "*that the advice by SRC under Article 230(40 (b) of the Constitution is binding and that SRC has a role to play in collective bargaining agreements on matters relating to remuneration and benefits of public officers, including teachers*." That the advice of the SRC on remuneration and allowances of public officers is therefore binding and that any power or function exercised without that advice is invalid. That the said advice is also required for conclusion of a CBA and that no CBA can therefore be concluded and or registered by this Honourable Court because the Claimant in this case has no recognition agreement with KALRO. They submit that their employees are public officers by virtue of **Article 260(b) of the Constitution** which provides that a public officer is any person other than a state officer who holds a public office.

That the only lawful remedy to challenge the decision made or inaction by the SRC is by way of a constitutional petition, judicial review and or a remedy under Fair Administrative Action Act and that Koome J. in the ***TSC v KNUT*** case above preferred judicial review as a remedy. That there have been no proceedings brought against the SRC for its inaction in this instant case and that the Claimant cannot therefore seek to have its proposals allowed without the mandatory input of the SRC as such decision would be without a legal basis. That the analysis report by the CPMU is also of no basis and cannot be used to determine the salaries for the Respondent's employees. That the said report acknowledges that KARI had another different union apart from the Claimant.

Determination

It is not in dispute that the claimant entered into a recognition agreement with Kenya Sugar Research Foundation (KESREF) and Kenya Agricultural Research Institute (KARI). It is further not disputed that both KESREF and KARI were vide the Kenya Agricultural and Livestock Research Act No. 17 of 2013 merged with Kenya Marine and Fisheries Research Institute, Kenya Trypanosomiasis Research institute, Kenya Forestry Research Institute, Agricultural Science Advisory Research Committee and Coffee Research Foundation, Tea Research Foundation of Kenya and Kenya Sugar Research Foundation under KALRO.

It is further not disputed that Coffee Research Foundation had signed a recognition agreement and negotiated several collective bargaining agreements with a different union, the Kenya Union of Commercial Food and Allied Workers.

In Cause No. Nairobi 1272 of 2014 and in Kisumu Cause No. 272 of 2014, the issue in dispute is the revision of existing collective bargaining agreements.

Section 53(1) and (2) of the Kenya Agricultural and Livestock Research Act provides –

> **53. Transfer of staff**
>
> > **1. Every person who, immediately before the appointed day was an officer or member of staff of a former institution, not being then under notice of dismissal or resignation shall, on the appointed day and subject to subsection (2), become an officer or staff of the Organisation as the Cabinet Secretary may, by order, determine on the same or improved terms and conditions of service.**
> >
> > **2. A person who does not intend to become an officer or member of staff of the Organisation, as the case may be, shall, within a period of fourteen days from the appointed day, give a notice in writing to the Organisation, and such person shall be deemed not to have become such an officer or member of staff under subsection (1) but to have retired from the service of the former institution on the day preceding the appointed day**

Section 54 and 55 provides:

> **54. Assets and liabilities on the appointed day—**
>
> > **a. all funds, assets, and other property, moveable and immovable which, immediately before such day were vested in the former institutions, shall, by virtue of this paragraph, vest in the Organisation as the Cabinet Secretary may, by**

order, determine;

b. every officer having the power or duty to effect or amend any entry in a register relating to property, or to issue or amend any certificate or other document effecting or evidencing title to property, shall, without payment of a fee or other charge and upon request made by or on behalf of the Organisation, do all such things as are by law necessary to give final effect to the transfer of property referred to under paragraph (a); and

c. all rights, powers, liabilities and duties whether arising under any written law or otherwise howsoever, which immediately before the appointed day were vested in, imposed on or enforceable by or against a former institution shall, by virtue of this paragraph, be transferred to, vested in, imposed on or enforceable by or against the Organisation.

55. Legal proceedings

On or after the appointed day, all actions, suits or legal proceedings whatsoever pending by or against a former institution shall be carried on or prosecuted by or against the Organisation as the case may be, and no such action, suit or legal proceedings shall in any manner abate or be prejudicially affected by the enactment of this Act.

The court has noted that although the 3rd respondent has stated that Kenya Union of Commercial Food and Allied Workers had a recognition agreement and had negotiated several collective bargaining agreements with Coffee Research Foundation which was affected by the Kenya Agricultural and Livestock Research Act, the said union has not applied to be enjoined in these proceedings and neither has the 3rd respondent. It would therefore be speculative to make any findings in respect of the said union.

Under Section 53 of the new Act, the staff of the 1st and 2nd respondents were to be absorbed on same or improved terms and conditions of service. Under Section 55 any court proceedings were to be carried on or prosecuted by or against the 3rd respondent herein.

I therefore find the argument by the 3rd respondent on simple majority to be misplaced as the recognition agreement that was existing between the claimant and the 1st and 2nd respondents respectively was taken over by the 3rd respondent and the terms of service negotiated for the staff of the 1st and 2nd respondents were transferred either at the same or improved level. Recognition is therefore not an issue in this case but rather, the negotiation of terms and conditions of service.

The 3rd respondent's argument on threshold for recognition is further not supported by any evidence of the number of employees in the 3rd respondent's employment after the merger who are members of the claimant union as against those who are not. The issue of lack of simple majority s argued by the 3rd respondent is thus not an issue as there is no evidence to support the same.

There is therefore no proof that the level of membership of the claimant went below the threshold of simple majority. Further, the 3rd respondent has not initiated any process for termination of recognition agreement on the basis of lack of a simple majority in the manner provide for in law. It is worth noting there is no provision under the law for automatic lapse or termination of a recognition agreement on the ground that the union no longer has a simple majority among staff of an employer.

I however agree with the 3rd respondent that following the collapse of the 1st and 2nd respondents together with other research institutions into one body, there is need for reorganisation of the relationship between the claimant and the 3rd respondent and it will not be possible to proceed with the claim herein as filed. I also do not think that SRC features in such reorganisation as SRC is only to be consulted at the time of negotiation of terms and conditions of employment where they touch on the areas that SRC is mandated to set or advise on such terms and conditions of employment.

Conclusion

For the foregoing reasons I make the following orders –

1. That the suit herein, that is Nairobi Cause 1272 of 2014 as consolidated with Kisumu ELRC Cause 276 of 2014 are not capable of being prosecuted as filed due to the impact of the Kenya Agricultural and Livestock Research Act which merged all research institutions dealing with research in agriculture and livestock under the 3rd respondent KALRO.

2. That the parties (the claimant and 3rd respondent) are directed to meet with a view to agreeing on a relationship for purposes of future negotiations.

3. That the members of the claimant who have been absorbed by the 3rd respondent will continue with their membership as their right of association is not affected by the Kenya Agricultural and Research Act.

4. That for the foregoing reasons the suit herein is terminated and should there be any dispute the same will have to be processed as a fresh dispute in the a manner provided in the Act.

5. That each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE