



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.68 OF 2018

[Formerly Cause No.1997 of 2016 (Nairobi)]

KENYA PLANTATION & AGRICULTURAL WORKERS UNION CLAIMANT

VERSUS

KERIO VALLEY DEVELOPMENT AUTHORITY RESPONDENT

AND

SALARIES AND REMUNERATION COMMISSIONREPORT

JUDGEMENT

The claimant filed the Memorandum of Claim on 26th September, 2016.

The issue in dispute was registered as;

- (a) Wages;
- (b) House allowance; and
- (c) Leave travelling allowance

Orders and prayers sought;

- (a) That general wage increase be hereby reviewed at 25% increase for 2014 and another 25% for 2015 from 1st January, 2014.
- (b) That the respondent be and is hereby ordered to provide houses to all the employees and or pay a house allowance of ksh.15,000 per month to each and every employee;
- (c) That leave travelling allowance be and is hereby reviewed to ksh.10, 000.
- (d) That costs of this suit be provided for. Pending the determination of the matter, on 7th June, 2018 parties entered into consent and agreed as follows;

The respondent be at liberty to proceed with the voluntary early retirement of 314 employee who have agreed to the terms offered by the respondent.

- (1) Payment of 3 months basic salary in lieu of notice;
- (2) Payment of 1 ½ basic salary for every year served by all employees below the age of 50 years;
- (3) Payment of 1 ½ basic pay remaining years to retirement for all employees above the age of 50years;
- (4) Baggage allowance of Ksh.90,000.00 to every employee;

(5) Golden handshake of ksh.360,000.00 for every employee;

(6) Provident Fund as entitled to each employee;

(7) All outstanding leave days be encashed

(8) There be a waiver for PAYE;

(9) The salaries and Remuneration Commission to file a report in court which shall form the basis for the new CBA for the employees who have declined the voluntary early retirement.

The dues shall be paid based on the basic salary free of benefits.

(10) Payment to employee be made on or before 30th June, 2018; and

(11) Every employee covered under the consent shall be issued with a Certificate of Service.

Claim

1. The claimant is a registered trade union under the provisions of the Labour Relations Act, 2007 and the respondent is a state corporation dealing with agricultural activities. The parties have a recognition agreement and have negotiated several collective agreements (CBA) the last being dated 31st December, 2013.

2. The last CBA between the parties was effective for the period of 1st January, 2012 to 31st December, 2013. The claimant proposed for a review of the CBA to the respondent who sent a counter-proposal resulting into negotiations and most items were agreed upon save for three (3) items of;

a) General wage increase,

b) Housing; and

c) Leave travelling allowance.

3. The claimant reported a dispute with the minister and there was no agreement and a certificate of unresolved dispute was issued on 6th November, 2015.

4. The claimant is seeking for an increase of the general wage by 25% for the years 2014 and 2015 base don't he parameters set out in the Wage Guidelines of 2005 that is the Consumer Price Indices and Productivity gains (CPI). The claimant has suffered erosion of purchasing power caused by inflation for the period of January, 2012 when the CPI was 146.93 and December, 2013 the CPI was 134.21. A change in percentage to 9.48% to accommodate for loss of purchasing power should be awarded.

5. In productivity, the demand s productivity gains of value added per employee for the period under review of the CBA of 075% for 2012 and another 3.74% for 2013 giving a cumulative percentage change of 4.49% or a 5% should go towards compensating the employees for productivity gains.

6. On housing, the claimant is demanding that the respondent does provide all employees with houses in accordance with section 31 of the Employment Act, 2007 and in the alternative should pay ksh.15, 000.00 per month as house allowance based on the CPI.

7. On leave traveling allowance the claimant is seeking for an increase from 140.64% in 2012 to 161.36% which is 14.7% increase in cost of transport. Such leave traveling allowance should be paid at ksh.10, 000.00 per year for travel of family during leave.

Defence

8. In response, the respondent's case is that there is a recognition agreement and CBA with the claimant the last CBA covering the year 2012-2013. During the negotiations for the CBA for year 2014-2015 all items were negotiated and agreed save for wage increase, house allowance and travelling allowance.

9. The demand for a 25% increase in wage for the year 2014 and 2015 must be voted for and provided for by the government with the recommendation of the Salaries and Remuneration Commission (SRC). There are instructions by the cabinet secretary of the national treasury vide letter dated 2nd March, 2016 directing that confirmation for funding to cater for CBA with trade unions must be sought from national treasury and the advisory obtained from the SRC before agreement is sought. The implication being that the respondent cannot negotiate monetary items/terms without consent from the cabinet secretary, treasury and the SRC.

10. The SRC has given guidelines dated 4th July, 2012 on determination and review of remuneration in the public service. All CBA proposals must be submitted to SRC for analysis, verification and advice. The respondent complied and submitted proposals on 17th December, 2013. The SRC has since advised that the existing remuneration and benefit structure be retained pending the SRC planned exercise on

classification of state corporations for the purpose of advising on remuneration and job evaluation for the public service.

11. Treasury has since maintained the same budgetary allocation and if any meagre amount that cannot sustain any wage increase. The proposed increases from the respondent by treasury has not been made. The demand for increase by 25% for the wage, ksh.15, 000.00 for house allowance and Ksh.10, 000.00 leave travelling allowance cannot be sustained due to inability to pay.

12. The parties filed written submissions and the SRC has also filed a report. **SRC Report**

13. The SRC report is filed by agreement of the parties and approved by the court.

14. The SRC report is that it is based on its constitutional mandate under Article 230 of the Constitution, 2010 to advise on remuneration and benefits of state officers and to advise on remuneration and benefits on all public officers report is on the basis that by its circular of 4th July, 2012 it issued guidelines on determination and review of remuneration in the public service by all stakeholders sending their negotiated proposals for agreement for analysis, verification and advice by 31st December, 2012.

15. The respondent submitted its proposal in December, 2012 with proposal to cover all the employees both in management and unionisable employees and there was no mention of a CBA to be covered by the proposed reviews by the respondent.

16. The respondent was invited for a meeting on 16th August, 2013 and by letter dated 6th September, 2013 the SRC advised the respondent to keep the existing structure pending the planned classification of state corporations for the purpose of advising on remuneration and job classification for the public service. The 2012/2013 was to be retained at existing rates.

17. The SRC has not received any request from the respondent with regard to 2013/2017 CBA cycle or sought an advisory therefrom.

18. The SRC by letter dated 21st March, 2014 further reviewed the guidelines issued by letter dated 4th July, 2012 which included the requirement for public organisations to obtain advice of the commission before the start of the negotiations and approval of funding from the national treasury on proposed reviews.

19. The SRC has carried out job evaluations with a salary structure to be implemented in phases for the period of 2017/2021 and this is to guide institutions as they negotiate CBA for the period. By letter dated 6th December, 2017 the SRC released a salary structure for the respondent which further reviewed the existing salary structure.

Addressing th SRC Report

20. In reply to the SRC report, the claimant states that by the time the SRC issued advice and letter dated 4th July, 2012 the CBA between the claimant and respondent dated 10th July, 2012 had taken effect from 1st January, 2012 to 31st December, 2013 as agreed by the parties. This CBA was agreed on in accordance with Article 41(5) of the Constitution read together with section 59 of the Labour Relations Act, 2007 and guideline No.21 of the SRC, 2012.

21. The advice to the respondent issued by the SRC relates to employees not covered under the CBA as such unionised employees were covered by agreement. Failure to address the CBA by the SRC and respondent at the meeting held on 16th August, 2012 does not diminish the terms and conditions therein. The court has since directed the SRC to address the CBA and therefore Guideline 19(2) and (3) has been addressed.

22. There is no evidence of a job evaluation for all employees of the respondent especially those unionised. The salary structure now introduced by the SRC does not adequately cover unionisable employees.

23. With regard to the claims made the claimant submitted that the claim for a wage increase by 25% for the year 2014 and 25% for the year 2015 is justified based on the applicable CPI, 2015. The Economic Survey (2015) show the value added per employee increased from 2.22 million in the year 2010 to Ksh.2.280 million in the year 2011 which is an increase of 2.61%. There has been an increase of 0.75% and 3.74% for the years 2012 and 2013 respectively and for the year 2014 the increase was 6.34%.

24. Cumulatively the percentage increase is 4.49% which should apply for the CBA under review. The respondent has not submitted its financial records in accordance with section 57(2) of the Labour Relations Act, 2007. There is nothing to challenge the economic survey and the CPI applied by the claimant in this case.

25. A combined award of 13.97% wage increase per annum should apply on the basis of the Wage Guidelines, 2005.

26. Housing provision is claimed in accordance with section 31 of the Labour Relations Act or provide an allowance. There has been no review of the current house allowance of ksh.5, 000.00 and the current provision is insufficient under the law and economic changes prevailing.

27. Leave travelling allowance should be reviewed in accordance with section 28 of the Employment Act, 2007 read together with Clause 14 of the CBA and provide a rate of Ksh.10,000.00 per year. The Central Planning Monitoring Unit (CPMU) in its reports and analysis of the employees of the respondent and the travel distances to be covered upon taking annual leave make a reasonable provisions as claimed by the claimant for the amount of ksh.10,000.00 annual leave travelling allowance.

28. The respondent submits that the memorandum of claim dated 27th September, 2016 claiming a wage increase at 25% of the year 2014 and 25% for the year 2015 and a house allowance and leave travelling allowance should be dismissed.

29. The claimant also filed claim dated 21st February, 2018 to stop the voluntary early retirement on the grounds that this was meant to frustrate the CBA negotiations should be dismissed.

30. Consent has since been agreed upon and adopted by the court and the issue remaining in dispute is whether the CBA claimed to be applicable is valid. Based on the SRC report dated 12th October, 2018 and filed in court the validity of the CBA is challenged. By circular and letter dated 4th July, 2012 the SRC directed all public organisations to undertake remuneration analysis before negotiating CBA. The respondent submitted a proposal to the SRC in December, 2012 and there was no mention of a CBA with the claimant and in response the SRC advised that remuneration be retained as subsisting.

31. On 21st March, 2014 the SRC issued another directive requiring all public organisation to obtain its approval prior to commencement of any negotiations and to also obtain approval from the notational treasury before any proposed remuneration reviews.

32. The CBA sought to be reviewed was executed on 10th July, 2012 way after the SRC guidelines and therefore not valid.

33. The CBA dated 10th July, 2012 is subject to the SRC circular and letter dated 4th July, 2012 as it was not negotiated within the framework of the guidelines in force. The advice of the SRC was necessary before the CBA could be executed for enforcement as held in the case of Teachers Service Commission versus Kenya National Union of Teachers & 3 others [2015] eKLR. The advice of the SRC is binding in accordance with Article 230(5) of the Constitution.

34. Regulation 19 of the SRC Guidelines requires public service organisations with unionisable employees to seek the advice of the SRC before the commencement of any CBA negotiations and where negotiations are successful the employer should confirm the fiscal sustainability of the negotiated package with the SRC before signing the agreement.

35. Section 59(4) of the Labour Relations Act, 2007 provides that a CBA can only be valid where it is signed by both parties. The subject CBA was signed on 10th July, 2012 after the coming into force of the SRC advisory on 4th July, 2012. It was not in compliance the guidelines issued prior.

36. The subject CBA was not submitted to the SRC for approval and advice. There was no consideration of the fiscal position of the respondent. In the case of **KUDHEIHA Workers versus SRC [2014] eKLR** the court held that even where there is a right under Article 41(5) for negotiations for a CBA to ensure the public wage bill is sustainable, individual CBA be assessed by the SRC by invoking article 230(5) of the Constitution.

37. In this case the SRC was denied the chance to assess and advice on the CBA executed on 10th July, 2012. The CBA is illegal and unenforceable as held in **Social Service League, M.P. Shar Hospital versus KUDHEIHA [2018] eKLR**.

38. In this regard, the respondent's salary structure must be within the framework of the SRC recommendation. By circular and letter dated 6th December, 2017 the SRC released a salary structure for all the respondent's employees based on the classification and job evaluation conducted on state corporations. It provides for the scope of negotiations within a four (4) year cycle from 2017 to 2021. This is not challenged by the claimant. The demand of remuneration and benefits independent of the SRC recommendation is untenable.

39. The claimant further submits that the issue of the voluntary early retirement arose after the claim herein had been filed and was addressed to ensure the claims made were not rendered nugatory.

Determination

40. It is common cause that there is recognition between the claimant and respondent. Within such framework and recognition the parties have negotiated CBA. The last such CBA was executed on 10th July, 2012.

41. The claim herein is with regard to the negotiations for the 2014 and 2015 CBA where the parties have not agreed on 3 items being the general wage, housing and leave travelling allowance.

42. It is also common cause that the respondent is a state corporation incorporated pursuant to the provisions of the Kerio Valley Development Authority Act. As a state corporation, the respondent is subject to the SRC advice with regard to remuneration of its employees.

43. With recognition between the parties herein Article Section 41(5) of the constitution, 2010 gives a right to negotiate a CBA;

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

44. Such right therefore secured cannot be negated by subsidiary legislation save for the constitution itself.

45. Therefore under Article 230 of the Constitution, 2010 the SRC is given power to advice government with regard to remuneration and benefits for public officers. The respondent being a state corporation fall sunder such mandate. Article 230((4)

(b) of the constitution, 2010 provides as follows;

(b) Advise the national and county governments on the remuneration and benefits of all other public officers.

46. The SRC has developed **Guidelines, Salaries and Remuneration (Review of Salaries and Remuneration, Submission of Proposals and Pay Determination and Advice) Regulations, 2012** with regard to its constitutional mandate under Article 230. The respondent as a state corporation is subject to these Guidelines.

47. In this case, where the parties had an existing recognition agreement and CBA the Guidelines required the respondent as a state corporation to cause to be informed the SRC for analysis and advice on the CBA. Under Guideline 10(1) (f) the duty is on the respondent to inform the SRC of the existing CBA.

48. To proceed and negotiate with the trade union and execute a CBA well aware of the issued Guidelines is to put the trade union and the claimant into unnecessary expense taking into account section 57(2) of the Labour Relations Act, 2007 which requires an employer to put to the notice and information of the trade union any relevant material that will assist the parties to negotiate a CBA.

(2) For the 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.

49. The Guidelines issued by the SRC have transitional provisions with regard to CBA negotiated and executed before the date the Guidelines took effect. The respondent as a state agency has material and information with regard to its annual audit reports and at its disposal is the expertise deposited with the Minister especially the Central Planning Monitoring Unit (CPMU) to assist and facilitate the necessary assessments and wage payable. The role of the SRC taken into account, these agencies are available to the respondent.

50. To proceed with negotiations and make confirmation by signing a CBA and later denounce such commitments is to engage in unfair labour practices. Such is a practice outlawed and contrary to Article 41 of the Constitution, 2010.

51. The court properly moved by a party whose has suffered unfair labour practice can redress. This is putting into account the provisions of Article 226 (5) of the Constitution which requires the accounting officer who has put into waste public funds by his/her actions to be personally accountable for such loss;

(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.

52. Where the respondent therefore made submissions with the SRC and held a meeting on 16th August, 2013 and with notice of the existing Guidelines vide circular and letter dated 4th July, 2012 the failure to abide the Guidelines cannot be visited upon the claimant.

53. Even where the respondent failed to abide the Guidelines issued by the SRC, the subject of the suit herein relates to the CBA negotiations and terms for the years

2014 and 2015. The contested CBA for the period 2012 executed on 10th July, 2012 took effect on its terms and applicable for the period of 1st January, 2012 to 31st December, 2013 a period out of the circular and letter dated 4th July, 2012. Such period is not subject of the suit herein. The parties cannot go behind what was agreed to avoid the current suit with regard to the terms for negotiations for the years 2014 and 2015 as since, the SRC has issued the applicable guidelines.

54. The parties are bound by the agreed upon terms in the 2012/2013 CBA. Such is enforceable under the provisions of Article 41(5) of the Constitution, 2010 read together with section 59 of the Labour Relations Act, 2007.

55. On the claim for a 25% increase in wage for the year 2014 and another 25% wage increase for the year 2015 as noted above, the Guidelines now issued by the SRC on 4th July, 2012 apply. This was the purpose for which the SRC was invited herein vide consent of the parties on 7th June, 2018.

56. Even where the Guidelines provides that the SRC shall not negotiate with trade unions, the SRC having been invited herein for the assistance of the court in addressing the CBA terms negotiated and 3 items not agreed upon, the subject CBA is brought to the knowledge and attention of the SRC.

57. The position taken in the SRC report dated 12th October, 2018 that the CBA is not submitted with them and that there exists a salary structure for the respondent does not assist the court and the registered suit/dispute in any material way. Reason should have been given to the specific issues in dispute being;

(a) The general wage payable for the years 2014 and 2015;

(b) House allowance; and

(c) Leave travelling allowance.

58. The terms of the consent and for which the SRC was invited was clause 9 (9) *The salaries and Remuneration Commission to file a report in court which shall form the basis for the new CBA for the employees who have declined the voluntary early retirement.*

59. To file a report outside such mandate is to avoid the subject of litigation herein and take a partisan position that is not assistive of the court process. Such is to negate the constitutional mandate bestowed on the SRC by the people of Kenya. Called upon, and required to assist the court, the SRC should honour and attend.

60. The SRC shall attend as directed taking into account noting the negotiated CBA between the parties and executed on 10th July, 2012 where the due wage is not agreed. There shall be a targeted analysis, verification and advice for the court confirmation and covering the period of 2014 and 2015. The competed job evaluation and advice now issued vide letter and circular of 6th December, 2017 with regard to unionisable employees shall apply.

61. The SRC shall address the issue of the wage due to unionisable employees in the service of the respondent covering the period of 2014 and 2015 years.

62. Such directions are issued in recognition of the constitutional rights due to each party under article 41 of the Constitution, 2010 with regard to fair labour practices and in recognition of the SRC constitutional mandate under Article 230. Noting the dispute herein properly lodged with the court, the matter is referred to the SRC under section 20(4) of the Employment and Labour Relations Court Act, 2011.

63. On the claim for provision of housing or a house allowance of Ksh.15, 000.00 per month for the unionised employees, section 31 of the Employment Act, 2007 give this right and requires every employer to provide housing to every employee covered under the Act or give an appropriate allowance in lieu thereof.

64. Where the parties failed to agree on the item of housing and or an allowance, the Wage Orders applicable make provision for a 15% allowance based on the basic wage. Such provisions shall apply where housing is not provided. However, in addressing the due house allowance the respondent shall take into account the prevailing provision of ksh.5, 000.00 house allowance, where the 15% of the basic wage for the purpose is lower, and the higher provision shall apply.

65. With regard to leave travelling allowance, with the right under section 28 of the Employment Act, 2007 secured, such right being with full pay, the parties have made provision for Ksh.4, 000.00 travelling allowance. Such provision for every employee is hereby found reasonable and until future negotiations, such shall remain as agreed.

Accordingly the following orders are hereby issued;

(a) There is a valid Recognition Agreement between the parties and previous CBAs the last covering the years 2012/2013 which agreements shall guide the parties in the next phase(s) of negotiations;

(b) on the Guidelines of the SRC now issued vide letters dated 4th July, 2012 and further reviewed by letter dated 21st March, 2014 the respondent shall attend and cause to be submitted with the SRC the subject CBA for the period of 2014 and 2015 and for good measure to the current period for analysis, verification and advice with regard to the payable general wage within the next sixty (60) days.

(c) Where (b) above is positively addressed, a mention date shall be secured for confirmation by the court;

(d) Where the respondent fails to attend as (b) above, the claimant shall move the court in accordance with Rule 36 read together with Rule 37 of the Employment and Labour Relations Court (Procedure) Rules, 2016;

(e) Housing shall remain as provided or an allowance paid at prevailing rates or at 15% of the basic wage whichever is higher.

(f) Parties are at liberty to negotiate the leave travelling allowance in future CBA negotiations.

(g) Each party to bear own costs.

Delivered at Nakuru this 14th day of March, 2019

M. MBARU JUDGE

In the presence of: