



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 66 OF 2016**

(Before Hon. Justice Mathews N. Nduma)

**KENYA ENGINEERING WORKERS UNION.....CLAIMANT**

**VERSUS**

**AUTO FINE FILTERS AND SEALS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The issue in dispute is failure by the parties to agree on the terms and conditions of service and the jurisdiction of the court has been invoked to resolve the economic dispute.
2. The claimant submitted CBA proposals to the respondent on 23<sup>rd</sup> December 2013 to review the outgoing CBA. The respondent refused to negotiate. The dispute was reported to the Ministry of Labour under *Section 62 of LRA 2007*. A conciliator was appointed on 26<sup>th</sup> June 2014. The dispute was not resolved and a certificate of unresolved dispute was issued on 7<sup>th</sup> August 2014. The proposal made by the union was produced as annex 1 to the claim. The respondent did not make any counter proposal on the items for negotiations in terms of the outgoing CBA.
3. The suit is opposed by a replying affidavit sworn by Mr. Mansoor Sorathia, the managing director of the respondent company.
4. The respondent admits that a proposal to review the CBA was received and that parties failed to agree on the terms and conditions of service even upon intervention by a conciliator.
5. The respondent admits that it has a recognition agreement with the claimant union and that there is in existence a CBA which has expired and is due for renegotiations.
6. The respondent however states that the respondent has 18 employees 4 of whom had joined the union. That the claimant union lacks a simple majority to sustain the relationship in terms of *Section 54(1) and 2 of CBA*. That the claimant union therefore lack capacity to negotiate a new CBA since even the four employees who were members of the claimant union withdrew their membership.
7. That since the claimant union does not represent any employee of the respondent it cannot sustain the suit any longer nor does it have capacity to negotiate a CBA with the respondent.
8. As is the practice and procedure, the court directed the CPMU unit of the Ministry of Laobur to investigate the dispute and make an economic report to the court. The report was filed in court on 9<sup>th</sup> April 2018 by M/S Suprose M. Achieng for the chief economist, CPMU.

**Determination**

9. The issues for determination are:

- i. Whether the claimant union has any members left in the employment of the respondent.
- ii. If the answer to (i) above is in the negative, whether the claimant has *Locus Standi* to negotiate a new CBA when it has no member.
- iii. What reliefs may be granted by the court.

## Issue I

10. The report by the labour officer Suprose M. Achieng from the CPMU Unit confirms the contention by the respondent under part 7.3.1 of the report that the four (4) employees who were members of the claimant union no longer work for the respondent.

11. The claimant has the onus of proving that it represents unionsale employees of the respondent in the intended negotiations with the respondent. The claimant has not averred in the statement of claim whether it has any members in the employ of the respondent. The claimant union did not adduce any oral evidence to demonstrate that it has membership in the employ of the respondent. To the contrary, the respondent has adduced in a sworn affidavit that the claimant union had recruited only four (4) employees out of the 18 unionsable employees and that the said four (4) employees had since left the employ of the respondent.

12. This evidence by the respondent is collaborated by the labour officer in the CPMU report. It would appear and is the finding by the court that the claimant union no longer has any members in the employ of the respondent.

13. The next issue is whether the claimant union may negotiate with the respondent terms and condition of service if it does not have a single member in the enterprise.

14. The answer to this lie under *Section 54 and 57 of the CBA 2007* which provides:

i. An employer.... Shall recognize a trade union for purposes of collective bargaining if that trade union represent the simple majority of unionsable employees.

“57(i) an employer....that has recognized a trade union in accordance with the provisions of this part shall conclude a collective agreement with the recognized trade union setting out terms and conditions of service for all unionsable employees covered by the recognition agreement.”

“59(2) a collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union.”

15. A careful consideration of the facts before court and the law applicable leads the court to the conclusion that the claimant union no longer has any unionsalbe employees as members in the respondent’s employ.

16. This being the case, and until the claimant union recruits new members, it lacks capacity to negotiate a new CBA notwithstanding existence of a recognition agreement between the claimant union and the respondent.

17. Further, the concluded CBA remains in force and binds the respondent until a new CBA is negotiated.

18. Furthermore, the respondent is bound by law to implement any minimum wage increments made in the general wage order in respect of all unionsable employees irrespective of whether a new CBA is concluded or not.

19. To this effect, the court finds that the CBA for the period 2013/2014 remains in place and binds all the parties and the employees.

20. The court declares that the respondent is bound to implement the minimum wage under the General Wage Order for the period 1<sup>st</sup> January 2014 to 31<sup>st</sup> December 2015 in respect of all its unionsable employees.

21. Having said that and for the avoidance of doubt,

i. The Recognition Agreement between the claimant union and the respondent is valid until it is lawfully revoked.

ii. The current CBA for the period 2012/2013 remains in place and binding on all parties.

iii. The respondent is directed to implement the minimum wages under the General Wage Order for the period 1<sup>st</sup> January 2014 to 31<sup>st</sup> December 2015 in respect of all its unionsable employees. The minimum wages are effective from the date the Gazette (General Wage Order) for the period 2014/2015 came to effect.

iv. Any arrears salaries arising from the General Wage Order for the period 2014/2015 to be calculated and implemented within 45 days of this judgment.

**Judgment Dated, Signed and delivered this 20<sup>th</sup> day of May, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Omolo for claimant.

Mr. Manani for the Respondent

Chrispo – Court Clerk