



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1340 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

LOAD TRAILER (EA) LIMITED.....RESPONDENT

RULING

The Claimant, Amalgamated Union of Kenya Metal Workers has two applications dated 14th August 2018 and 13th February 2019 while the Respondent, M/s Load Trailers (E.A) Limited has one application dated 8th January 2019. The three Applications were heard together on 26th September 2019.

Claimant's Notice of Motion dated 14th August 2018

This application was filed on 17th September 2018. The Claimant/Applicant union seeks for orders that this Court summons the Respondent's Managing Director Mr. Jagdeep Singh Bhachu to appear in court in person to show cause why he has not complied with court orders. Further, for the Respondent to be restrained from harassing, intimidating, threatening, coercing and terminating employees by way of paying the price of judgment.

The application is supported by the affidavit of the Area Secretary of the Applicant, Benjamin Ong'amo who avers that there was a Trade Dispute on the Respondent's refusal to negotiate the parties' CBA which was determined in their favour by this court on 20th April 2018. That he and one Nixon Owino then approached the Respondent to compose the CBA and sign it but they never moved forward as Mr. Jagdeep always sought for more time. That they decided to compose the judgment into a CBA format and forwarded it to the Respondent with a proposed signing date of 2nd July 2018 but the Respondent through its letter dated 21st June 2018 requested for one more month to study the CBA. That it accepted the request vide a letter dated 29th June 2018 and fixed a new signing date for 24th July 2018 but the Respondent later wrote a letter dated 20th July 2018 stating the proposed new date would find Mr. Jagdeep out of the country and that he still needed more time to study the CBA. He avers that the Applicant communicated the same to its members/employees who did not readily accept this postponement.

That on the said 24th July 2018, employees saw Mr. Jagdeep present on duty and called him and Mr. Nixon and they rushed to the Respondent's premises and found him and that after persistence and insistence, there was a meeting. That Mr. Jagdeep requested for two days to jointly meet to sign the CBA but that was the last they saw of him as he resorted to a hide and seek game. That the Respondent has not implemented any single clause of the CBA despite receiving a copy of the judgment and that it has instead harassed, intimidated, threatened and coerced the union's members to withdraw their membership. That this has resulted to loss of employment of members like **Jared Otoro, James Bogonko, Ayub Weramondi** and **Godfrey Weringa** all of whom left employment of the Respondent after the said judgment. That it was forced to write a letter to the Respondent on 19th July 2018 about it. That the aggrieved employees continue to be prejudiced and its members continue losing employment at a high rate.

The Respondent replied in an affidavit dated 8th January 2019 sworn by Mr. Jagdeep Singh who denies that he refused to comply with the court's judgment or that he was evasive with signing the CBA. He avers that none of his employees has been harassed, intimidated and/or terminated unlawfully as alleged and that the Claimant should not be allowed to coerce the Respondent into signing the CBA without proper negotiation and consultation. That a CBA is neither compulsory nor automatic. That the Respondent has always felt parties should be given sufficient time to negotiate. That following the court's directions on 23rd October 2018, they invited the Claimant for engagements on 6th November 2018, 12th November 2018 and 21st November 2018 but it declined to honour the invitations. He prays that the application be dismissed with costs to the Respondent.

Respondent's Notice of Motion dated 8th January 2019

The Respondent/Applicant seeks for orders that this Court stays its judgment and set aside in entirety the orders issued on 20th April 2018, the signing, registration and implementation of the CBA dated 25th July 2018 and allow for fresh negotiation. Further, for costs to be in the cause.

The Application is supported by the Affidavit of the Applicant's MD, Jagdeep Singh Gurmeet Bhachu who avers that the said judgment of 20th April 2018 was delivered after the Claimant was heard in the absence of the Respondent. That the court declared the CBA shall be effective from 1st January 2018 and remain in force for 24 months and thereafter continue in force until amended by the subsequent CBA. That their partial participation in the negotiation and non-appearance in the court proceedings was not deliberate or contemptuous but was occasioned by failure of the Respondent's officer in charge of negotiation to inform the board of directors. That he has also been sick going in and out of hospital. He contends that the Respondent did not have an opportunity to be heard before the court's determination which curtailed its right to a fair hearing. That they have been engaging the Claimant and as at 8th October 2018, parties had mutually agreed to stay the implementation of the CBA and the court's judgment to allow for fresh negotiation of the CBA. That the impugned CBA contains clauses (Clauses 5, 6, 7, 14 and 18) that are contrary to the Employment Act which he tabulates at page 10 of his affidavit.

He continues to aver that the Claimant's forceful manner to compel the Respondent to sign the impugned CBA is irregular, illegal and contravenes the labour laws and the Constitution. That **Article 41 (5) of the Constitution** recognizes the right to engage in collective bargaining which is founded on the concept of social dialogue, freedom of contract and autonomy of parties. That the Constitution emphasizes the ability of the employer and trade unions to operate as partners rather than adversaries and not blackmailing a party into collective bargaining. He avers that unless the orders sought in the Application are granted, there is a danger that the Claimant shall move forward to have the impugned CBA registered and implemented to the detriment of the Respondent.

The Claimant filed its Response on 22nd February 2019 in which it avers that the Respondent was duly served with the Claim in this suit and cannot therefore allege sickness to the point of not attending court proceedings. That it also kept the Respondent informed by serving all notices to it and that this case was therefore determined as an undefended cause in any case not been willing to adopt the CBA from the start as confirmed by the Respondent's email addressed to the Claimant on 5th August 2015. That it has a valid Recognition Agreement with the Respondent pursuant to **Section 57(1) of the Labour Relations Act** and must thus conclude a CBA guided by the word 'SHALL' in the said provision. That **Rule 26(2) of the Employment and Labour Relations Court Rules** prohibits a court from re-opening a hearing on a matter which had been determined and closed as in this case. That being aggrieved by the decision of the court, the Respondent should have instead filed either an application for review or an appeal but which it has not done to date.

Claimant's Notice of Motion dated 13th February 2019

The Applicant union seeks for orders that this Court adopts the attached tabulations (*from pages 6-29 of the Application*) as the decretal sum. The Application is supported by the affidavit of the Applicant's Assistant General Secretary, Nixon Owino who avers that despite the court's orders, the Respondent has not implemented the CBA as at the date of this Application. That adopting the said tabulations would enforce the said judgment as stipulated in **Section 13 of the Employment and Labour Relations Court Act** and **Rule 32 of the Employment and Labour Relations Court Rules**. That this court has the mandate and jurisdiction in this matter as provided for in **Article 23(1) and 162(2)(a) of the Constitution, section 12 of the Employment and Labour Relations Court Act** and **section 74 of the Labour Relations Act**. That unless the court grants the orders sought, the Applicant will suffer irreparable damage.

The Respondent replied in an affidavit filed on 25th February 2019. It avers that the said tabulation is oppressive and ought to have been arrived at by consensus of the parties. That the company cannot currently sustain the terms of the impugned CBA because of poor financial position and that the Report by the Central Planning and Monitoring Unit (CPMU) dated 19th June 2017 is not a true reflection of the Respondent's financial position as is indicated at *page 6 of the said report*. That the Respondent is in a business of manufacture of containers which has been low since the inception of the SGR project which greatly reduced road transport business and almost drove the Respondent out of business.

Proceedings

The Claimant/Applicant's counsel relied on the filed applications and submitted in court that the application dated 14th August 2018 is contempt proceedings against Mr. Jagdeep Singh and that as captured in *annexures 2, 3, 4, 5, 6 and 7*, the Applicant tried contacting the Respondent for purposes of signing the CBA but he declined. That the Applicant was thus left with no option but to come back to court to cite the Respondent for contempt. It invites the court to consider both fine and jail term. That in the second application dated 13th February 2019, the calculation is per individual employees with *page 29 of the application* showing the total figure which is the decretal sum of Kshs.1,761,650. He denied the Respondent's allegation that the Managing Director was sick saying that he could not have been sick for two years from 2016 to 20th April 2018 and further, that he has not attached any medical evidence to prove he was sick.

The Respondent's counsel while relying on the replying affidavit on record submitted that the application dated 14th August 2018 founded on the ground that the Respondent had refused to sign the CBA has been overtaken by events. This is because when they appeared before the court on 23rd October 2018, the court directed them to negotiate which the Respondent was willing to do. That they have made several attempts to have an out of court settlement on how the CBA is to be executed and that they also set out in the replying affidavit of Bhachu the reasons why they failed to attend proceedings in the claim. That the CBA is generally contractual and that while imposing the agreement, courts should take the contractual nature into account. That in respect to the CBA itself, they have set out the issues in contention that are contrary to the Employment Act and that they seek to negotiate once these issues are addressed to the satisfaction of both parties. He urged the court to look at their response.

In respect to the application dated 13th February 2019, the Respondent's counsel stated there should have been consultation with the

Respondent in doing the tabulation as they did not comply with the judgment. That the basis of that judgment included the report of CPMU whose conclusiveness they are opposing as the accounts were not complete at that time and do not reflect the true position of the company. That secondly, if the CBA is implemented as is, the Respondent will be forced out of business to the detriment of the Respondent and the Claimant's members. They urge the court to disallow that application and allow the parties to negotiate further.

In respect to their application dated 8th January 2019, the Respondent/Applicant's counsel referred the court to their *List of Authorities* dated 19th March 2019. They are saying the application is not opposed because grounds of opposition cannot rebut sworn statements set out in the affidavits of Jagdeep and referred the court to page 3 of the first authority; *Jemimah Wakini Kiarie v China Road and Bridge Construction Company Limited* paragraph 9. They pray that the said application be allowed as prayed.

The Claimant's counsel responded submitting that the Respondent/Applicant is relying on a document at page 68 of the application dated 8th January 2019 which he confirms they are not aware of and asked whether a judgment that has been delivered can be negotiated as alleged by the Respondent. That under the Labour Relations Act, it is mandatory to have a CBA and the same is not optional and reiterated that the court should consider fining and jailing Mr. Jagdeep.

Determination

I have considered all the applications together with the grounds and affidavits in support thereof. I have further considered the responses to the applications and the submissions by the parties on the same.

The issues arising for determination from the three applications are the following –

1. Whether the judgment herein should be set aside and/or
2. Whether the respondent should be compelled to implement the said judgment.

On the first issue, the judgment herein was delivered on 20th April 2018. The record is clear that the respondent was properly served with all pleadings and notices of mention and hearing but never entered appearance. They further did not file defence to the claim and did not attend court for hearing. The case was thus heard and determined in its absence and without its participation

Upon entry of judgment, the claimant approached the respondent severally to implement the same. As averred in the affidavit of Benjamin Oyamo, Mr. Jagdeep Singh Gurmeet Bhachu, the Managing Director of the respondent, engaged in a cat and mouse game with the union over the implementation of the judgment from June 2018 to 14th January 2019, when the claimant approached the court with its application seeking to execute the judgment.

Mr. Jagdeep in his affidavit sworn on 8th January 2019 does not deny knowledge of the suit or judgment. He admits at paragraphs 4 and 8 and 16 of his affidavit that he was aware of the suit and the judgment and had engagements with the claimant both before and after the judgment. In the said paragraphs Mr. Jagdeep deposes thus –

“That our partial participation in negotiation and non-appearance in the proceedings before the court was not deliberate or contemptuous, it was occasioned by failure by the respondent's officer in charge of negotiation to keep the Board of Directors informed.

That the Report by the Central Planning and Monitoring Unit (CPMU) dated 19th June 2017 and filed on 20th June 2017 is not a true reflection of the Respondent financial position and indeed the said Report is not conclusive. At page 6 of the said report, it lends:

Accounts for the year ending 31st December 2016 have not been audited at the time the CPMU was collecting the Questionnaires. ”

That following the court's direction on 23rd October 2018, that parties do engage, we invited the Claimant's to attend and engage us on four occasions to being 6th November, 12th November, and 21st November, 2018, but it declined to honour the invitation at the eleventh hour.”

The claimant has through the affidavit of Benjamin Ong'amo demonstrated that the respondent did engage the claimant and severally sought more time to study the CBA with a view to signing the same as demonstrated in the letters from the respondent dated 21st June 2018 and 20th July 2018 and the correspondence dated 8th October and 13th November 2018 at pages 64 and 65 of the affidavit of Jagdeep sworn on 8th January 2019.

From the foregoing I find the unsigned and undated application by the respondent filed on 8th January 2019 not only to be an afterthought but also made in bad faith with the intention to delay the implementation of this court's judgment delivered on 20th April 2018. It is thus an abuse of court process.

The court has very wide discretion to set aside its judgments and rulings as provided in Section 16 of the Employment and Labour Relations Court Act in Rules 17(3) (the proviso thereto) and Rule 33 which provides for setting aside and review respectively.

In the case of Esther Wamaita Njihia and 2 Others –V- Safaricom Limited the court citing relevant cases on the issue held inter alia:-

“The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali) It also goes without saying that the reason for failure to attend should be considered.”

Also relevant is the case of Ongom vs Owota where the court held inter alia that the court must be satisfied about one of the two things namely:-

- (a) either that the defendant was not properly served with summons;
- (b) or that the defendant failed to appear in court at the hearing due to sufficient cause.

In the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me:-

"Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.”

In the present case, the respondent has admitted that it was served. It states that it did not have the opportunity to be heard. It however does not explain why it did not attend court from the commencement to the conclusion of the case.

There is clearly no sufficient cause to grant the prayers sought in the respondent’s undated and unsigned application filed on 8th January 2019 which as I have already stated is an abuse of court process. Being unsigned and undated, it is also bad in law and for striking out.

Turning to the two applications by the claimant, the first one dated 14th August 2018 sought the summoning of the Managing Director, Mr. Jagdeep Singh to court. The said Jagdeep having attended court in answer to the summons, this prayer has been overtaken by events.

On the second prayer, I do agree that the claimant has demonstrated sufficient cause for apprehension over the manner in which the respondent has treated its members in the recent past. The claimant has demonstrated that several employees namely Jared N. Otoro, James O. Bagonko, Ayub Weramondi Mutonyi, Daniel Ndunda Mwaniki and Godfrey Werinja have lost employment after the judgment, a fact that the respondent has not denied.

The second application seeks to implement the CBA that is yet to be signed and registered. This is premature. What the claimant should be seeking is the execution of the CBA so that it can be registered before it is implemented.

For the foregoing reason, all the applications are dismissed with each party bearing its costs.

The respondent is however cautioned that its failure to sign the CBA constitutes contempt of this court’s orders which is punishable in the manner provided in law. The respondent is thus directed to sign the CBA within 30 days from today’s date. The case will be mentioned on 16th December 2019 to confirm compliance.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019.

MAUREEN ONYANGO

JUDGE