



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 648 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

**KENYA BUILDING, CONSTRUCTION, TIMBER
AND FURNITURE INDUSTRIES EMPLOYEES UNION.....CLAIMANT**

VERSUS

**ROADS AND CIVIL ENGINEERING
CONTRACTORS ASSOCIATION (RACEDA).....RESPONDENT**

JUDGMENT

The Claimant filed this cause on the 3rd May 2018 under certificate of urgency seeking orders as follows

- 1) A declaration that the Collective Bargaining Agreement revised by the parties for the years 2017, 2018 takes effect from the 1/1/17 and not 1/1/18.
- 2) An order to issue declaring a nullity any reasons advanced by the respondent for failure to sign a duly negotiated and *agreed* CBA.
- 3) An order directing the Respondent to sign the *revised* CBA for the years 2017,2018 with the effective date of 1/1/17 within a time frame to set by this Honourable court.
- 4) An order to issue directing the *respondent* to fully participate in the registration process of the CBA to be signed as (b) above.
- 5) In the alternative, an order to issue authorizing the claimant to proceed to register the negotiated CBA as above notwithstanding failure to sign by the Respondent.
- 6) Costs of the claim.

The respondent is an employers association, drawing its membership from the Roads and Civil Engineers Contractors. The respondent appointed the firm of Ameyo Guto, Etole and Company Advocates who filed a memorandum of appearance on 29th May 2018 but did not file a defence against the claim

It is the claimant's case that the parties' CBA for the years 2015, 2016 lapse date was 1 January 2017. The Claimant, with a view to commence negotiations to review the lapsing CBA reached out to the respondent and sent its proposals for consideration.

The parties held their first joint negotiation meeting on the 17 January 2017. The minutes for the said meeting are document No 2 on the Claimant's list of documents. The parties covered a lot of ground during the said meeting as the minutes reveal. The parties continued with their negotiations through several meetings with advocate DAN. K. AMEYO of Ameyo Guto, Etole and Company Advocates being present in the said meetings.

That by Middle June 2017, the parties had agreed on almost all issues of the CBA. An agreement of the agreed issues was hand drawn and signed by both parties on the 19th June 2017 in the handwriting of Mr Dan K Ameyo, Advocate. The hand written agreement is document No 4 on the Claimant's list of documents.

A look at the said agreed issues reveals that the first item the parties agreed upon was the commencement date of the CBA under review. The date is 1st January 2017.

That the two remaining issues as at the date of drawing the agreement were/Basic minimum rate wages and increase to existing unaffected employees.

The parties eventually concluded the CBA, which was prepared for signing.

That when the parties met for the signing of the CBA on the 19th December 2017, the respondent's representatives declined to sign the same and introduced new issue namely; The effective date of the CBA changes from 1st January 2017 to 1st January 2018.

The claimant/Union rejected the new proposals by the Respondent and on grounds that the effective date had long been agreed upon by the parties.

The respondent fully refused to sign the concluded CBA and insisted the *effective* date be changed to the 1/1/18 from 1/1/17. A letter by the Respondent's Counsel demanding the change of the effective date is document No 6 on the Claimant's list of documents.

The Claimant reported the dispute to the minister for conciliation and a Conciliator, Mr Gatimu appointed to conciliate parties. Letter reporting the dispute is documents No 4 on the Claimant's list of documents.

That due to an industrial unrest amongst the claimant's members in the employment of the respondent's membership, a strike notice was issued. Attempts to further conciliate parties on the face of the strike notice were unsuccessful. The conciliator issued a certificate and the claimant filed this cause.

Determination

The dispute herein is unopposed. The claim was filed under certificate of urgency on 3rd May 2018 on which date the court granted the following orders ex parte –

1. That the application be and is hereby certified urgent and fixed for hearing inter partes on 14th May 2018.
2. That the respondent's members are restrained from terminating or varying the terms of employment of claimant's members pending hearing and determination of this application inter partes.
3. That applicant to serve the application forthwith.

The respondent was served on 8th May 2018 but did not attend court on 14th May 2018 since the matter was not listed on the cause list for that day. The court gave the respondent the benefit of doubt and rescheduled the hearing of the application to 9th July 2018.

On 9th July, the respondent was represented by counsel who sought leave to file response to the application. This was strenuously opposed by Miss Chege, Advocate for the claimant/applicant. After considering the application, the court was of opinion that the respondent was not serious with prosecution of the application as counsel filed a notice of appointment dated 23rd May 2018 on 29th May 2018 but thereafter took no further action even though the matter was filed under certificate of urgency and certified urgent. The court therefore granted prayer 4 of the application to restrain the respondent from terminating, discriminating and/or varying, reviewing or in any way whatsoever amending terms of employment for all members of the claimant/union pending the hearing and determination of the case.

The court further directed that the other prayers in the application, which were similar to the prayers in the claim, be heard together with the claim. The court gave directions for the parties to proceed by way of written submissions on the main claim. The claimant was directed to file and serve within 14 days while the respondent was to file and serve within 14 days of service.

When the matter came up for highlighting of submissions on 24th September 2018, the respondent had again not complied and sought leave to file within 7 days which was rejected. In view that the claim was undefended the court dispensed with highlighting of submissions and reserved judgment for 12th October 2018.

I have deliberately set out the history of this case to demonstrate the apathy of the respondent in defending this claim.

Issues for Determination

The issues for determination in this claim are the following –

- 1) Whether there was agreement on the effective date of the Collective Bargaining Agreement.
- 2) Whether the claimant is entitled to the orders sought.

Whether there was agreement on effective date

The claimant produced minutes of a meeting held on 19th June 2017 at which the parties agreed on effective date for collective bargaining agreement to be 1st January 2017.

In the report of the Conciliator appointed by the Minister for Labour to reconcile the parties, the Conciliator states as follows –

*“I understand the issue in dispute to be: **“Effective date of the Current Bargaining Agreement.”**”*

Both parties attended a Conciliation meeting on 2nd February 2018 and submitted as follows:

The Union submitted that they negotiated for all the terms and conditions for the current CBA and concluded only the Management to withdraw on the effective date which has been agreed in their negotiation.

The Union further submits that the last CBA expired on 31/12/2016 hence as per the practice and law the next CBA shall be effective on 1st January 2017.

The Management submitted that they negotiated the CBA in utmost good faith and agreed on all the issues a part from the effective dates.

They further submit that due to the prevailing economic situations and availability of contracts they feel the burden of paying arrears will heavily affect their operations. They conclude by submitting that effective date be January 2018 or a rider for waiver of arrears for 2017 be inserted.

Recommendation

After careful consideration of both parties’ submissions, it is recommended that the effective date of the current bargaining agreement be 1st January 2017. If it is acceptable the parties can proceed and sign the CBA if not the parties can proceed to the next level of dispute resolution mechanism.”

It is therefore apparent from the evidence on record that the claimant and respondent held negotiations and agreed on all clauses of the CBA including effective date, but the respondent changed its mind at the point of signing of the CBA.

According to the Conciliator’s report, the reason for the respondent’s refusal to sign is not because the effective date was not agreed on, nor because the clause was not agreed upon, but because the respondent was concerned about payment of arrears.

In the case of **KENYA CHEMICALS AND ALLIED WORKERS UNION – KEL CHEMICALS LIMITED (2015) eKLR**, where Mbaru J. was confronted with a similar case, where the respondent after negotiators and conclusion of the CBA sought to change the effect date of the CBA to the 26th August 2014, from the original agreed date of 1st December 2012. In her determination the learned Judge observed thus –

“However, in negotiating a new CBA parties are bound by the overriding objective of negotiating within the realm of fair labour relations so that one party does not negotiate so as to defeat the purpose and engage in bad faith. To negotiate a CBA in a manner that takes advantage of one party such is to negate and circumvent fair labour practices and go contrary to article 41 of the constitution.”

I agree with the sentiments of the Judge and would say the same in the instant case.

Whether the claimant is entitled to the orders sought

Having found that the parties agreed on the effective date of the CBA, I make the following orders –

1. That the effective date of the CBA is 1st January 2017.
2. That the respondent’s representatives are directed to sign the revised CBA for the period 2017 – 2018 within 14 days from the date of judgment.
3. That the respondent is directed to fully participate in the registration process of the CBA.
4. That the case be mentioned on 12th November 2018 to confirm compliance.
5. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE