



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 526 OF 2012

BETWEEN

KENYA ELECTRICAL TRADES AND

ALLIED WORKERS' UNION [K]CLAIMANT

VERSUS

KENYA POWER AND LIGHTING COMPANY LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Onyony & Company Advocates for the Claimant

KTK Advocates for the Respondent

JUDGMENT

1. The Claimant Union filed its Statement of Claim on 28th March 2012. The issues in dispute are stated in the Statement of Claim to be:

- Neglect/refusal/failure to adhere to, and flagrant breach by the Company of clause 1,9,10, 25 and Appendix C of the registered Collective Bargaining Agreement.
- Neglect/refusal/failure by the Respondent to remit Union Dues.
- Neglect/refusal/failure to adhere to, and flagrant breach by the Company of the Agreement relating to the Collective Agreement executed on 2nd November 2011.
- Neglect/refusal/ failure to renew and/terminate the 2 months' fixed term employment contracts.

2. Judgment is sought against the Respondent in the following terms:

- A declaratory order that failure, neglect and/or refusal by the Respondent to engage, notify and mutually amend the current CBA, violates clause 2 of the Parties' Recognition Agreement and the Preamble, clauses 1,9,10, Appendix C of the CBA, signed with the Claimant, and registered at the Industrial Court.
- Order for the restraining/halting and permanently interdicting the termination of the 2 months' fixed term employment contracts.
- Order for refund of the amounts of money unlawfully acquired that forms part of the Union's dues for the month of January 2012.
- Order for refund and unconditional implementation of the CBA and especially the Agreement dated 2nd November 2011, in respect of the 2 months' fixed term employment contracts due since 1st January 2012.
- Implementation of all check-off form orders served on the Company, relating to 2 months' fixed term employment contracts.
- Exemplary, punitive and general damages for loss.
- Any other remedy and relief the Court deems fit.

3. In a separate Cause, ***Industrial Court at Nairobi, Cause Number 1788 of 2011, between the same Parties***, the Court delivered a Judgment on 20th April 2017.

4. The issues in dispute, under **Cause Number 1788 of 2011**, are identified in the Judgment, to be:

- Non-conclusion of the CBA for the period 2011/2012.
- Permanent employment of Employees already on 3 months, 1 year and 3 years terms of service.
- Refusal to accord recognition to the Union to represent Employees on 2 months' contracts and temporary [non-regular] 1 year casuals.
- Unilateral conversion of temporary 1 day casuals into 2 months' contracts with the resultant decrease in their hourly rate, denial to pay extra hour worked, and refusal to pay day allowance whenever necessary.
- Discrimination in awarding longer contract terms i.e. 6 months, 1 year, and 3 years.
- Full implementation of the Memorandum of Agreement dated 18th September 2010 as regards representation of day casuals, operationalization of joint oversight committees on job contracting.
- Unconditional lifting of suspension letters issued to Union Officials and Members of Nairobi region.

5. Hearing of the substantive claim in Cause Number 526 of 2012 commenced at the Court in Nairobi, on 25th May 2013. Hearing concluded at the Court sitting in Mombasa, on 28th September 2018.

6. The Respondent belatedly raised objection to the Claim, based on the concept of **res judicata**. It is argued that Cause Number 526 of 2012, viewed against Cause Number 1788 of 2011, is **res judicata**.

The Court Finds:-

7. In **Paul Seki Nzau & 27 Ors. v Laico Regency Hotel, [2014]e-KLR**, the Industrial Court held that for objection based on the concept of **res judicata** to succeed, the Objector must show:

- There was prior litigation, in which identical claims, such as those raised in the second Claim, were raised, or could have been raised.
- Claims are identical, if they share a common nucleus of operative facts.
- Parties in the second Claim, must be identical in some manner to the Parties in the original litigation, or be in privity with the Parties in the original litigation.
- There must be a decision on merits, made under the original litigation.

8. **Res-judicata** bars re-litigation of claims. It also bars claims which could have been litigated in the first Claim.

9. The Parties in **Cause 1788 of 2011** and **526 of 2012** are undoubtedly the same. The only variation is that the Employer was the Claimant, and the Union the Respondent, in the earlier Cause. It is the view of the Court also, that same or similar issues are raised by the Claimant. They mainly relate to Employees working on short term contracts. In Cause 526 of 2012, the Claimant asks the Court to prohibit the Respondent, from terminating, or refusing to renew, 2 months' contracts.

10. In Submissions filed in Court on 30th November 2017, the Claimant emphasizes the centrality of the short terms contracts to the issues in dispute. The following questions are posed by the Claimant, in its Submissions: are the continuous short term contracts repetitively renewed for several years, then abruptly stopped, in violation of Employees' constitutional rights to fair labour practices? Did the Respondent create legitimate expectation of indefinite and long term contracts by the numerous extensions?

11. The issues framed in the Judgment in **Cause Number 1788 of 2011**, appear to the Court same or similar issues as stated by the Claimant in the current Cause. Focus is on short term contracts, particularly the 2 months' contracts.

12. It was ordered in the earlier Cause that: the Employer is at liberty to enter into employment contracts on terms and conditions agreed with each Employee; conversion of employment contract is at the option of the Employer, subject to terms agreed with the Respondent with regard to unionized Employees; and Employees have a right to be unionized without distinction.

13. The dispute in either case relates to the CBA of 2011/2012. The earlier Cause was still pending when the Claimant filed the current Cause. Why did not the Claimant seek to consolidate the 2 Claims, before Judgment was delivered in the earlier Cause, to avoid duplication and wastage of judicial resources? There is no doubt that the issues are the same, or similar, which could have been litigated under the same roof.

14. In his evidence in Court on 24th October 2017, Deputy-General Secretary told the Court the Claimant was seeking the Court to order the Respondent, not to terminate 2 month-period contracts. As the contracts have already been terminated, the Claimant now seeks to have affected Employees compensated based on a monthly salary of Kshs. 10,952.

15. The Court is not persuaded, even barring the defence of **res judicata**, that this approach by the Claimant is sustainable.

16. The affected Employees have not been clearly identified. In an Application dated 20th March 2012, the Claimant alleges that the Respondent intends to wrongfully, unfairly and maliciously terminate employment contracts of 4100 Employees. In his evidence in Court, the Deputy General Secretary referred to 2,076 Employees. The number and identity of Employees on whose behalf compensation is sought, is unclear. The Deputy General Secretary told the Court on 24th October 2017, that Respondent's Chief Manager's letter of 22nd November

2011, mentioned Employees on 2 and 3 months' contracts. The letter confirms that the Employees were Claimant's members. The nature of their employment, according to the Deputy General Secretary, did not negate their membership. In the earlier Cause, this is captured as issue [c] – refusal to accord the Union recognition to represent Employees on 2 months' contracts and temporary [non-regular] 1 year casual. The evidence of the Deputy General Secretary supports the submission, that same or similar issues were involved in the 2 Claims. The Claimant had the option of bringing the issues in Cause Number 526 of 2012, under Cause Number 1788 of 2011 which was only determined in 2017. After all the same CBA, and operative nucleus of facts, were involved.

17. The Court is satisfied that same, or similar issues, raised in this Claim, were or could have been raised, in the earlier Claim. There was a final determination made by the Court on short term contracts, and on associational rights of Members. Even had the Claim not been *res judicata*, there is no clarity on the identity, and number of Employees, on whose behalf the Claim is made. The Court cannot make a blanket order of compensation, to unnamed Employees. The Claim is not sustainable.

IT IS ORDERED:-

a) The Claim is dismissed.

b) No order on the costs.

c) This file shall forthwith be returned to the Registry at the E&LRC Nairobi.

Dated and delivered at Mombasa this 7th day of December 2018.

James Rika

Judge