



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**MISC C.A. NO.49 OF 2017**

**CONSOLIDATED**

**MISC. NO. 38 OF 2017**

**KENYA ELECTRICAL TRADES & ALLIED**

**WORKERS UNION (KETAWU).....APPLICANT**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY LIMITED....RESPONDENT**

**RULING**

1. The respondent, Kenya Power & Lighting Company Limited by application dated 28<sup>th</sup> February, 2017 and seeking for orders that;

1. ...

2. *This Court be pleased to stay its ruling and order issued on 27<sup>th</sup> February, 2017 pending the hearing and determination of this application inter parties.*

3. *This Court be pleased to set aside in its entirety the orders issued on 27<sup>th</sup> February, 2017 and the implementation of the collective bargaining agreement on 27<sup>th</sup> February, 2017.*

4. *This Court be pleased to order cancellation of entry RAC No.62 of 2017 from the Register of Collective Bargaining Agreements maintained by the Court which entry is with relations to the Collective Bargaining Agreement dated 27<sup>th</sup> January, 2017 registered as such pursuant to the order of the Court issued on 27<sup>th</sup> February, 2017.*

5. ...

2. The application is supported by the Affidavit of Dr Francis Kangure, Eng. John Ombui, Cynthia Siele, Mohamed Somo, Eng. Mwichigi, Elijah Koskei, Abubaker Swaleh and Jude Ochieng and on the grounds that the ruling and order was issued in open and in breach of the elementary principles of natural justice in that the respondent/employer was not represented and was denied an opportunity to be heard; the ruling and order is not registrable as the input of the Salaries and Remuneration Commission (SRC) was not embodied in the Collective Bargaining Agreement (CBA) between the parties hereto

notwithstanding the fact that the Respondent as the employer is a state corporation and the expenditure of public funds contemplated by the CBA requires the sanction by the SRC pursuant to the Public Finance Management Act and as required by Article 230(4) of the constitution.

3. Further grounds in support of the application are that pursuant to the order and ruling, the CBA has been entered into the Register of CBA as entry No. RCA No.62 of 2017 and a Certificate of Registration has been issued to that effect and is in breach of the constitution of Kenya and will threaten peaceful industrial relations between the parties.

4. In the affidavit of Dr Kangure he avers that as the Manager, human resource services with the Respondent have authority to support the application herein. On 27<sup>th</sup> January, 2017 a CBA was registered by the Court and as part of the negotiating team for the same and representing the Respondent as the employer, upon its conclusion the CBA was forwarded to the Principal Secretary, Ministry of Energy and Petroleum in line with existing protocols for onward transmission to the SRC for study, advice and to give its recommendations.

5. Dr Kangure also avers that the Respondent did a summary of developments leading to the CBA in a letter dated 22<sup>nd</sup> February, 2017 to the Ministry. On 27<sup>th</sup> February, 2017 the deponent got a hearing notice of 24<sup>th</sup> February, 2017 at a time when the advice of the SRC was still awaited but the Court notice indicated the Court would consider application for the registration of the CBA. He sought immediate audience with the Chief Legal Officer for advice and noting the notice issued was short, he was advised to proceed to Court to establish the status of the matter. He found the matter had been addressed and the Court confirmed the CBA for registration. Present were Koskei Kolil for the Union and Kamau for the Respondent/Employer and Beatrice Okwayo for the CPMU.

6. Dr Kangure also avers that the Respondent did not brief any advocate by the name of Kamau or any person to represent it at the hearing on 27<sup>th</sup> February, 2017.

7. While there was a search for this file at the registry, another file came to the attention of the deponent Misc. Appl. No.38 of 2017 seeking similar orders, the registration of the CBA which was heard *ex parte* on 22<sup>nd</sup> March, 2017. The application therein filed under Certificate of Urgency has never been served on the respondent.

8. The proceedings on 27<sup>th</sup> February, 2017 were in breach of the rules of natural justice in that the Respondent was not represented at the hearing of the CBA now registered. The proceedings were commenced in bad faith and in abuse of the Court process. The CBA was registered without the involvement of the respondent/employer. The SRC had not given advice and thus process incomplete. Under article 203 of the constitution, the SRC and the Employment and Labour Relations Court Act, the SRC has mandate in the employment and labour relations matters where public bodies such as the Respondent are involved.

9. The process adopted by the Union to have the CBA registered is flawed and therefore a nullity. The deponent has confirmed with various officers of the Respondent that they never gave instructions to anyone to represent the Respondent in Court in this matter on 27<sup>th</sup> February, 2017 when the CBA was registered. Attached are affidavits of, Eng. John Ombui, Cynthia Siele, Mohamed Somo, Eng. Mwichigi, Beatrice Meso, Elijah Koskei, Abubaker Swaleh and Junde Ochieng as to their role.

10. In reply, the Applicant Union filed Replying Affidavit sworn by Kosgey Kolil the Deputy General Secretary and avers that by letter dated 24<sup>th</sup> February, 2017 the Court notified parties herein of the hearing on 27<sup>th</sup> February, 2017 where the CBA would be considered for registration. Parties appeared in Court as directed and their consents to the registration of the CBA were given and the Respondent as represented by Ms Kamau of the Federation of Kenya Employers and as a result, the Court ordered the registration of the CBA. Such CBA has subsequently been registered as RCA No.62 of 2017.

11. At the time of registration of the CBA the parties had signed the CBA dated 27<sup>th</sup> January, 2017 and

the Respondent cannot disown the same on the basis that consultations have not been exhausted. The SRC has no jurisdiction or authority over the CBA as the Respondent is neither a state corporation nor a public body for purposes of SRC. Even where the SRC has a role, its contributions ought to have been sought before the Respondent signed the CBA. To move the Court to set aside the orders of 27<sup>th</sup> February, 2017 is in bad faith and the application should be set aside and the registered CBA allowed to take effect.

12. Misc. appl. No.38 of 2017 was filed for the purpose of registering the CBA signed on 27<sup>th</sup> January, 2017 and such application has since been overtaken by events. Misc. appl. No.49 of 2017 arose from the Court Notice to the parties to attend and have CBA registered.

13. the Union filed **application dated 7<sup>th</sup> March, 2017** and seeking to have the orders on 2<sup>nd</sup> March, 2017 setting aside the orders of the registration of the CBA of 27<sup>th</sup> January, 2017; that the orders of the Court on 27<sup>th</sup> January, 2017 be reinstated; that the registration of the CBA under entry No.62 of 2017 be deemed to be procedural and lawful and therefore valid.

14. The application is supported by the affidavit of Kosgey Kolil and on the grounds that parties attended Court on 27<sup>th</sup> February, 2017 following notice of the Court and the Respondent was represented by Ms Kamau of the FKE. There were no objections and the Court procedurally ordered for the registration of the CBA and a certificate has since been issued under No.62 of 2017. The submissions by the Respondent that the SRC has not been consulted is made in bad faith as both parties had negotiated and signed the CBA in January, 2017. Such cannot be a good basis to cancel the CBA.

15. In reply, the Respondent filed the Affidavit of Jude Ochieng the Chief Legal Officer – Litigation and Prosecution with the Respondent and avers that the Respondent did not instruct Ms Kamau of the FKE to represent the Respondent in Court on 27<sup>th</sup> February, 2017 when the hearing of the CBA registration came before court. Such information has since been confirmed by Ms Kamau in Court on 8<sup>th</sup> March, 2017 that she happened to be in court.

16. The Respondent is not a private limited company and is subject to the Public Finance management Act where SRC is required to give advice on any employment and labour relations matters and with regard to the CBA between the parties. Even though the Respondent is registered under the Companies Act, the government has a substantial share in the company. Article 203 of the Constitution give the SRC the mandate over public bodies to be involved. When the CBA was registered the input of the SRC had not been obtained. The CBA thus remains incomplete and unenforceable.

17. Both parties made their oral submissions in court.

18. The Court adjourned for 7 days to allow the Respondent to get the SRC input as requested for in January, 2017 but such feedback was not given from the SRC.

19. The Applicant Union has filed a List of Authorities which I shall put in account.

## **DETERMINTION**

20. The consolidation of Misc. Appl. No.38 of 2017 herein was for the purpose that the Union had misrepresented facts when they filed such application and were directed to serve the Respondent for hearing which was not done and by filing the current Misc. Appl. No.49 of 2017 was duplicating matters. Indeed the Union has confirmed filing of Misc.38 of 2017 which was done on 22<sup>nd</sup> February, 2017 and the matter was before the judge on the following day where directions were given for the Respondent to be served and attend Court for hearing on 2<sup>nd</sup> March, 2017.

21. As the motions in Misc. Appl. No,38 of 2017 were on-going, the Court issued notice dated 24<sup>th</sup> February, 2017 for the registration of the CBA dated 27<sup>th</sup> January, 2017. On this notice, parties were to attend Court on 27<sup>th</sup> February, 2017. The 24<sup>th</sup> being a Friday while the 27<sup>th</sup> was a Monday, I take it there

are high chances that what Dr Kangure avers in his affidavit is true that the notice was received late and attendance on such short notice became a challenge. This is apparent as on the due date, the Respondent was not in Court and Ms Kamau out of call for duty for a client they had previously represented, and out of courtesy made presentations before Court to the effect that the CBA should be confirmed for registration. As the Court had no objections to the same at the time and upon such representation of both parties, the CBA was ordered for registration.

22. As such, the filing of Misc. Appl. No.38 of 2017 was for good cause, same was seeking for the registration of the CBA between the parties and before the motions could be complete, the Court did that which the Union had applied to be done. A notice went out to commence the process that had otherwise been initiated by the Applicant. In my assessment of Misc.Appl. No.38 of 2017, the Union had complied with sections 59 and 60(3) of the Labour Relations Act, and thus had undertaken a lawful and legitimate process in filing the same;

*(3) If an employer or employers' organisation fails to submit the collective agreement to the Industrial Court [Employment and Labour Relations Court] as specified in subsection (1), the trade Union may submit it.*

23. Both files have since been consolidated and I find no loss or damage to either party.

24. On the registration of the CBA now challenged by the Respondent herein; section 59(4) sets out the process to be undertaken by the parties while section 60 gives the modalities for registration of the same so as to give the CBA the legal effect or the legal force for its implementation.

25. Section 59(4) and (5) requires that;

*(4) A collective agreement shall be in writing and shall be signed by?*

*(a) the chief executive officer of any employer, the chief executive or national secretary of an employers' organisation that is a party to the agreement or a representative designated by that person; and*

*(b) the general secretary of any trade Union that is a party to the agreement or a representative designated by the general secretary.*

*(5) A collective agreement becomes enforceable and shall be implemented upon registration by the National Labour Court and shall be effective from the date agreed upon by the parties. [emphasis added].*

26. Therefore, a CBA must be a written document signed by the authorised officer for the employer and the General Secretary of the trade Union that enjoy recognition with the employer. However, such written and signed CBA is not enforceable by either party until compliance with section 60 of the Labour Relations Act. There must be registration of the written and signed CBA with the Court in terms of section 59(5) of the Act.

27. section 60 of the Labour Relations Act therefore gives the modalities for the registration of a CBA and requires that;

*60. (1) Every collective agreement shall be submitted to the Industrial Court [Employment and Labour Relations Court] for registration within fourteen days of its conclusion.*

*(2) The employer or employer's organisation which is party to an agreement to be registered under this section shall submit the agreement to the Industrial Court [Employment and Labour Relations Court] for registration.*

*(3) If an employer or employers' organisation fails to submit the collective agreement to the*

*Industrial Court [Employment and Labour Relations Court] as specified in subsection (1), the trade Union may submit it.*

*(4) The Industrial Court [Employment and Labour Relations Court] may request the parties to a collective agreement to supply further information or make oral or written representations to it for the purposes of this section.*

*(5) The Industrial Court [Employment and Labour Relations Court] may register an agreement -*

*(a) in the form it was submitted by the parties; or*

*(b) with any amendment or modification agreed to by the parties.*

*(6) The industrial Court [Employment and Labour Relations Court] shall not register a collective agreement that –*

*(a) conflicts with this Act or any other law; or*

*(b) does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister.*

*(7) The Industrial Court [Employment and Labour Relations Court] –*

*(a) may register a collective agreement within fourteen days of receiving it;*

*(b) may refuse to register a collective agreement unless all parties to the agreement have had an opportunity to make oral representations to the Court; and*

*(c) shall give reasons for refusing to register any collective agreement.*

28. A CBA is therefore an agreement binding in law and once the CBA is written and signed by the parties to it and in terms of section 59(4) of the Labour Relations Act, the following must follow;

- the CBA must be presented before the Court in 14 days for registration;
- the employer is required to present the CBA with the Court for registration;
- where the employer fails to make a submission for registration, the Union *may* submit the same for purposes of registration;
- the Court can require the parties to the CBA to make oral or written submissions on the CBA where further information is required by the court;
- the Court may then proceed and register the CBA or return it to the parties where it is found not to comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister;
- the Court may not register a CBA where section 60(7)(b) applies;

***(b) may refuse to register a collective agreement unless all parties to the agreement have had an opportunity to make oral representations to the Court;***

29. Parties to the CBA in terms of section 59(4) of the Labour Relations Act read together with section 60((7)(b) above have a chance to make oral or written submissions/presentations to the Court before the CBA is registered. As such, it is Union General Secretary and the employer representative who must appear at the point of making representatives to the Court for the registration of the CBA.

30. It has since been confirmed by Ms Kamau from FKE that she attended to this matter on 27<sup>th</sup> February, 2017 out of courtesy to a client the FKE has represented before and not arising from specific instructions from the respondent. Indeed this position is confirmed by Dr Kangure in his affidavit that the notice of 24<sup>th</sup> February, 2017 was received by the Respondent to attend Court and not to any other party save for the Applicant union.

31. On 27<sup>th</sup> February, 2017 present in Court before the Judge were Kosgey Kolil who avers in his affidavit dated 7<sup>th</sup> March, 2017 he is the *Deputy General Secretary* of the Kenya Electrical Trades and Allied Workers Union; present was also Ms Kamau who has confirmed she is with FKE and had no instruction to attend for the respondent; and also present was Benson Okwayo from CPMU.

32. Such attendance is problematic in several ways. First, the required attendance under the Labour Relations Act is to ensure the integrity of the CBA as a binding document enforceable between the parties to it as written, signed and submitted with the court. Up and until the court has effected registration of the CBA, the General Secretary of the Union or the employer representative can make submissions so required on the submitted CBA for the court to direct as to whether more information is required or on the basis of material before the Court, the CBA can be registered. In this case the employer representative was absent. Secondly, section 59(4) read together with section 60(7) (b) requires parties to the CBA to make presentations before the court. In this case the Union Secretary General, the party contemplated under section 59(4) was not the one in attendance. No written authority has been assigned to the attendance in Court in terms of section 2 of the Labour Relations Act as to the Secretary General who *shall* represent the Union in Court matters such as this one. And thirdly, the attendance of Ms Kamau for the Respondent has since been confirmed as having been unprocedural. It was not with the authority of the Respondent and it was simply out of courtesy and nothing more. Such courtesies are a matter of general practice in Court between advocates but in this regard, the applicable law gives mandatory provisions as to who *shall* be in attendance.

33. As such, the presentations made in Court on 27<sup>th</sup> February, 2017 cannot find any validity on the part of either party. On the face of the contestations made herein, the mandatory provisions of the law, I find there was no compliance by both parties. The order for registration of the CBA was flawed and an order of the Court so obtained cannot find justification in whatever form. It is invalid. Had the Court been appraised of these facts at the time, the order for the registration and issuance of the Certificate under RCA No.62 of 2017 ought not to have issued.

34. On the question with regard to the role of the SRC and I add the Minister, I start with the Minister. the Rules of the Court Requires at Rule 36 that;

*36. (1) An employer, organization of employers or trade Union that has entered into a collective agreement shall lodge a copy of the agreement with the Cabinet Secretary within fourteen days of its execution.*

*(2) The Cabinet Secretary shall furnish the Court with a copy of each collective agreement that has been lodged pursuant to paragraph (1) and may also furnish the Court with such information and comments as the Cabinet Secretary considers necessary.*

*(3) Where the Cabinet Secretary objects to the registration of a collective agreement, a copy of the agreement shall be furnished to the Court accompanied by a statement giving reasons for objection.*

*(4) The Court shall maintain a register of collective agreements that have been accepted by it for registration.*

*(5) A collective agreement shall not take effect until it has been registered by the Court.*

35. The Court only receives a CBA upon the Minister has notice of it and where necessary made all the

necessary legal and constitutional verifications required to registration of the same. The Minister must also look at the CBA to ensure its compliance with the applicable directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister. Where the Minister has objections, such presentations must be submitted with the court.

36. I take it this was the purpose for which Mr Benson Okwayo for the CPMU (Central Planning and Monitoring Unit) of the Minister was in Court on 27<sup>th</sup> February, 2017. He did not make any objections to the CBA registration. That attendance in itself is important. Pursuant to section 59(6) the Court has to give considerations to the directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister. The department of CPMU is one arm of government that play these critical roles very well. Such a unit must receive all CBA under the Court Rules 14 days after the parties to the CBA have signed it. Such is to ensure its assessment and compliance with applicable directives or guidelines concerning wages, salary levels and other conditions of employment applicable at any given time under the Ministry. Rule 37 requires that;

*37. (1) In any economic dispute involving a collective agreement or any other issue where the Court considers it fit, the Court may order the Central Planning and Monitoring Unit to file a report within thirty days of service of the pleadings in any suit or such other time as the Court considers necessary.*

*(2) In any dispute involving state or public officers, the Salaries and Remuneration Commission shall file a report in Court within thirty days of service of the pleadings in any suit or such other time as the Court considers necessary.*

37. With the confirmation of Mr Okwayo in Court on 27<sup>th</sup> February, 2017 that the CBA was ready for registration, such hurdle had been addressed. The CBA was ready for registration as of such date.

On the role of the SRC, Rule 37 as set out above requires that in a dispute involving *state or public officers* the SRC should file a report with the Court within 30 days of service of the pleadings in any suit or within a time that the Court considers necessary. Are the Respondent employees *state or public officers* and the subjects under the consideration of SRC in terms of article 230 of the constitution?

38. The powers and functions of SRC are spelt in Article 230(4) namely, to;

***“(a) Set and regularly review the remuneration and benefits of all public officers; and***

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

39. The respondent’s case is that paragraph 5 of Dr Kangure Replying Affidavit of 14<sup>th</sup> March, 2017;

*5. ... pursuant to various laws the respondent/ employer is a state corporation, public entity and public body and as such all its employees are public officers...*

*6. although the respondent/ employer is incorporated pursuant to the Companies Act (Cap 486 now repealed) the Government of the Republic of Kenya has a substantial share in the company.*

40. With the above affirmation by the respondent, the Court of Appeal in addressing as to whether the government as a shareholder ought to have been consulted by a Limited liability company registered under the Companies Act in **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** held that;

*To the contrary, as the trial Court observed, the appellant is a public company registered under the Companies Act Chapter 486, and listed on the Stock Exchanges of Kenya, Uganda and Tanzania. The Kenya Government is a minority shareholder holding a 29.8 % shareholding in the company. The balance of the shares are held between KLM a Dutch airline holding 26.73% of the shares,*

and other local and foreign investors who hold, 43.47% of the shares.

...

*Kenya Airways is not a State Corporation. It is a private liability company incorporated under the Companies Act and listed on the Nairobi Stock Exchange as well as those of Uganda and Tanzania. Although the Government of Kenya is its shareholder, it holds only 29.8% of shares in it. KLM holds 26.73%, the International Finance Corporation, a private sector arm of the World Bank, holds 9.56%, and the rest of the shares are held by the private investors.*

41. The CR.12 issued to the Respondent as annexure “JO2” to the affidavit of Dr Kangure confirm that the Respondent is a Limited Liability Company with its directors. The government may remain the main shareholder and put measures and polies to secure its stake, but the foundational framework of the Respondent it that if a Limited Liability Company under the Companies Act.

42. The Respondent cannot therefore hide behind the shroud of the SRC to refuse, fail or neglect to have the CBA negotiated, signed and now placed before the Court for registration. To do so in light of the facts that the Respondent is a registered company under the Companies Act and thus regulated under the legal regime governing limited liability companies, even where the government has a substantial share therein, the foundational standing of the Respondent is clear. The incorporation of the Respondent under the Companies Act gives it the requisite mandate to negotiate and enter into lawful and thus binding agreements such as with the union/application without reference to any third party.

43. I find, the procedure adopted by the Applicant Union in filing Misc. Appl.. No.38 of 2017 would have best served the purpose but that process has since been abandoned in the application filed herein and dated 7<sup>th</sup> March, 2017. Where the Respondent failed to submit the CBA with the Court for registration, nothing stopped the Applicant Union from filing such an application.

44. With the finding that the CBA registered on 27<sup>th</sup> February, 2017 is invalid due to the procedural flaws, the registration and Certificate issued under RCA No.62 of 2017 is hereby cancelled. That does not invalidate the negotiated, written, signed CBA presented with the Minister for registration by the court.

**Noting the motions herein and the fact of the Applicant Union having abandoned Misc. Appl. No.38 of 2017 and on the findings herein; and for the completeness of the process; to ensure the integrity of the Collective Bargaining Agreement written, signed and submitted before the court to which notice dated 24<sup>th</sup> February, 2017 was issued; parties shall attend before Court to confirm the CBA signed on 27<sup>th</sup> January, 2017 within the next seven (7) days. Such date shall be allocated at the Registry. Each party shall bear own costs. With the registration of the CBA, the effective is addressed.**

Dated and delivered in open court this 6<sup>th</sup> day of February, 2017

**M. MBARU**

**JUDGE**

In the presence of:

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