



**REPUBLIC OF KENYA**

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

**CAUSE NO.396 OF 2015**

**KENYA CHEMICALS & ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**KEL CHEMICALS LIMITED.....RESPONDENT**

**JUDGEMENT**

The issues in dispute:

1. Refusal to sign the CBA as negotiated and signed
2. Opposing change on the effective date of the CBA

1. The parties registered the economic dispute with the Court on 16<sup>th</sup> March, 2015. Upon exchange of pleadings, parties agreed to address the issues herein by way of written submissions.

**Claim**

2. The claimant, Kenya Chemical and Allied Workers Union (Union) is a registered trade union representing workers interests in the chemical and allied industries in Kenya. The Respondent is a chemical manufacturing company based in Thika Sub-county where its business of manufacturing aluminium sulphate, sulphuric acid, fertilisers and other chemicals is situated.

3. Parties herein negotiated a CBA and concluded all items and when the Claimant got a copy of the draft on 18<sup>th</sup> August, 2014 they noted a few items not agreed and on 21<sup>st</sup> August, 2014 sent feedback to the Respondent on such items. The items not agreed relate to;

4. First item was on the Effective date – this was changed to 26<sup>th</sup> August, 2014 instead of the original 1<sup>st</sup> December, 2012 and which date conforms to the 3 years period from 1<sup>st</sup> December, 2009 to 30<sup>th</sup> November, 2012 when the other CBA expired. The change of the effective date was meant to deny the employees the right to arrears from the period when the last CBA expired.

5. The Claimant union reported a dispute with the minister and a conciliator was appointed and in the report of 8<sup>th</sup> January, 2015 there was a recommendation to change effective date to 26<sup>th</sup> August, 2014 which would deny the employees their salary arrears for the period since the last CBA expired. The Respondent wanted to change Clause 34 of the CBA on the change of effective date. Such a clause has been on every other CBA since 2003 and even where negotiates have gone past the effective date, the practice of the parties are to maintain the effective date as 1<sup>st</sup> December of every 3 years cycle.

6. During negotiations parties agreed to maintain the effective date but the Respondent made changes outside of the negotiations.

7. Second item is on imposing change on the effective date – the claimant’s case is that the effective date should be maintained as at 1<sup>st</sup> December 2012 in the negotiated CBA as has been the practice. The change proposed by the Respondent is meant to deny employees their benefits and create a vacuum of 21 months since the last CBA lapsed. The failure to secure a CBA in good time was frustrated by the Respondent when the Claimant called for several meetings but the respondents were not available. Such meetings were called and could not be held due to the absence of the Respondent on;

26<sup>th</sup> June, 2012 Respondent officer was on leave;

31<sup>st</sup> October, 2012 Respondent officer was attending an emergency;

2<sup>nd</sup> November, 2012 Respondent officer was not on duty;

14<sup>th</sup> August, 2013 Respondent officer not available;

21<sup>st</sup> January, 2014 Respondent officer was facing an insecurity situation in his area; and

7<sup>th</sup> May, 2014 Respondent said to be waiting for the claimant’s communication.

8. The Claimant is seeking that the effective date be 1<sup>st</sup> December, 2012 and to run for 3 years; the Respondent caused the delay in making their responses and contrary to clause 33 which requires 6 months for negotiations and which period expired before the Respondent could attend the meetings; and that failure to backdate the effective date to 1<sup>st</sup> December, 2012 will deny the workers their rights to earn better term and this will constitute unfair labour practice.

## **Defence**

9. In defence the respondent’s case is that by a Recognition Agreement dated 4<sup>th</sup> March, 1991 the Respondent gave the Claimant recognition for purposes of negotiating terms and conditions of employment. Both parties have signed several collective agreements (CBA);

CBA for the period of 1<sup>st</sup> December, 1996 to 30<sup>th</sup> November, 1999 signed on 13<sup>th</sup> August, 1998;

CBA for the period of 1<sup>st</sup> December, 2000 to 30<sup>th</sup> November, 2003 signed on 6<sup>th</sup> November, 2002;

CBA for the period of 1<sup>st</sup> December, 2003 to 30<sup>th</sup> November, 2006 signed on 17<sup>th</sup> May, 2007;

CBA for the period of 1<sup>st</sup> December, 2006 to 30<sup>th</sup> November, 2009 signed on 15<sup>th</sup> October, 2009;

CBA for the period of 1<sup>st</sup> December, 2009 to 30<sup>th</sup> November, 2012 signed on 15<sup>th</sup> October, 2009.

10. On 14<sup>th</sup> May, 2012 the Claimant made proposal for review of the CBA and the Respondent made counter-proposal by letter of 3<sup>rd</sup> October, 2012. Various meetings were held and at the last meeting on 5<sup>th</sup> August, 2014 parties agreed on the annual percentage wage increase; that there would be no further negotiations; that a draft CBA be ready by 15<sup>th</sup> August, 2014 and a meeting be held on the next day to execute the same for registration with the court. The Respondent prepared a draft and by letter of 18<sup>th</sup> August, 2014 forwarded to the Claimant for review and approval as the CBA was to be executed on **26<sup>th</sup> August, 2014** – which could have been the effective date in accordance with clause 33 of the draft CBA. The Claimant did not attend at the meeting and no reasons were given.

11. A dispute was reported and conciliator overruled clause 33 of the CBA and urged parties to take the effective date as set out in the draft CBA as at 26<sup>th</sup> August, 2014. The Claimant rejected this recommendation on 2<sup>nd</sup> February, 2015.

12. The defence is also that the Respondent is opposed to proposed amendments to clauses 24 and 33 of the CBA on the grounds that section 59(5) of the LRA provides that the effective date of a CBA shall be the date agreed upon by the parties. In 2002 the Claimant had reported a dispute with the minister on the issue of the effective date and as a result parties agreed to include a new clause to the CBA that;

*In case agreement is not reached on proposed amendments within 6 months of the date of notice and within six meetings then the effective date shall be the date of signing the new CBA agreement.*

13. Parties agreed to this new clause and it was included in the CBA signed in 2003. In this case no agreement was agreed and signed within 6 months and after 6 meetings of discussions. As a result clause 33 of the CBA providing that effective date would be the date of execution came into force.

14. The Claimant did not propose an amendment to the clause on effective date during negotiations and this cannot be changed at the execution stage. The proposed amendment to clause 24 should be dismissed. The proposal that the effective date be backdated will cause a financial burden on the Respondent and it is not viable. This will be an unplanned economic burden.

15. The Respondent did not delay the negotiations and no agreement was reached within the period of 6 months. For this purpose the parties agreed to clause 33 to take care of extended negotiations. The negotiations for the current CBA took longer as the Claimant had various demands. The minutes of the meetings are that the meetings were adjourned as the Claimant representatives were not present and the only time the Respondent adjourned was due to insecurity on 21<sup>st</sup> January, 2014;

19<sup>th</sup> October, 2012 union asked for time to submit their 3 representatives;

18<sup>th</sup> July, 2013 union did not attend;

14<sup>th</sup> August, 2013 union did not attend;

21<sup>st</sup> November, 2013 union representative was unwell.

16. Such delays cannot result in the change to the CBA effective date. The allegation that the parties have always backdated the effective date has no basis and should be dismissed. It is not the practice to backdate all CBA; the CBA signed on 6<sup>th</sup> November, 2002 was to be in force from 1<sup>st</sup> December, 2000 to 30<sup>th</sup> November, 2003 and there was a one year gap and parties agreed to compromise the effective date; the Claimant reported a dispute and following a report of the conciliator, clause 33 was amended; subsequent CBA have worked with clause 33 without any change; and in the negotiations for the CBA for the period of 1<sup>st</sup> December, 2006 to 30<sup>th</sup> November, 2009 there was a delay and to put that into account, a new CBA was negotiated to cover the period up to 30<sup>th</sup> November, 2012.

17. There is a CBA in place currently. The CBA signed on 15<sup>th</sup> October, 2009 at clause 33 it was agreed would remain in force *for a period of three years from the date and thereafter until it is amended by mutual agreement*. The reliefs sought are therefore not due to the Claimant as there is no justification. The proposed amendment to clause 24 in light of the clear provisions of clause 33, the effective date should be the date of execution of the CBA.

## **Submissions**

18. The Claimant submits that the dispute herein was reported to the minister for conciliation pursuant to section 62(1) of the LRA and a report issued on 8<sup>th</sup> January, 2015 where the Claimant was dissatisfied

with the findings and recommendations. During the joint negotiations meetings the parties some items were negotiated and the only dispute remained on the item of effective date of the incoming CBA as the previous one lapsed on 30<sup>th</sup> November, 2012 and the new one ought to come into force on 1<sup>st</sup> December, 2012. The Respondent had changed the effective date to 26<sup>th</sup> August, 2014. The parties have previously negotiated several CBA and such negotiations take long but none has been based on the execution date and the effective date. Clause 33 has never been applied before and the practice has been to maintain the effective dates as the same in all CBAs.

19. The Claimant also submits that they did not fail to attend at the negotiations meeting as submitted by the respondent. In May, 2012 the Claimant sent their draft CBA and proposals to the Respondent in good time and more than 3 months before the on-going CBA could expire. The Respondent took 5 months to reply, 3<sup>rd</sup> October, 2012 making it impossible to conclude the CBA within the application of clause 33 of the CBA. That the Respondent also put off 6 meetings making it impossible to conclude the CBA. The Respondent convened its first meeting on 13<sup>th</sup> March, 2013 after the proposal had been sent to them on 14<sup>th</sup> May, 2012 – a period of 10 months. This delay affected the timelines contemplated under clause 33 of the CBA. On this basis, the Court should find the claim is justified and award as prayed.

20. The Respondent submits that in May, 2012 the parties herein commenced negotiations for a new CBA. The Respondent prepared letter dated 14<sup>th</sup> August, 2014 to the Claimant for review and approval ready for execution on 26<sup>th</sup> August, 2014 but the Claimant declined and reported a dispute to the minister and to the Court objecting to the effective date as 26<sup>th</sup> August, 2014 and insisting it should be 1<sup>st</sup> December, 2012.

21. Section 59(5) of the LRA regulates when a CBA should take effect as the date agreed upon by the parties. Clause 33 of the CBA has addressed the question of effective date and the conciliator relied on these provisions. Clause 33 required that a CBA be negotiated within 6 months or within 6 meetings. Where there was no agreement, the date of execution became the effective date. In this case no CBA was agreed upon in 6 months or within 6 meetings.

22. When parties commenced negotiations for the CBA in May, 2012, 14 meetings were held within a period of 2 years;

19<sup>th</sup> October, 2012;

4<sup>th</sup> February, 2013;

13<sup>th</sup> March, 2013;

4<sup>th</sup> April, 2013;

3<sup>rd</sup> May, 2013;

21<sup>st</sup> June, 2013;

29<sup>th</sup> October, 2013;

12<sup>th</sup> November, 2013;

4<sup>th</sup> December, 2013;

19<sup>th</sup> December, 2013;

10<sup>th</sup> March, 2014;

3<sup>rd</sup> April, 2014;

16<sup>th</sup> June, 2014; and

5<sup>th</sup> August, 2014.

23. There was no agreement in terms of clause 33 and the Claimant did not propose an amendment to clause 33. The meetings held were adjourned due to the non-attendance by the Claimant representatives and the only time the Respondent was absent was during the 21<sup>st</sup> January, 2014 meeting due to reason of insecurity.

24. The matters before Court on the changes to clauses 24 and 33 were not part of the matters set out for negotiations. Such cannot form the basis of change by the court. In **National Bank of Kenya Ltd versus Pipe Plastic Samkolift (K) Ltd & Another (2002) 2 EA** the Court of Appeal held that a Court cannot rewrite a contract between parties as the parties are bound by the terms of their contract unless there is coercion, fraud or undue influence as pleaded and proved. In **Osteria Ice Cream Limited versus Junction Limited (TJL) [2011] eKLR** the Court held that in a contract where there was no provision for extension of the duration of licence, attempts by the Court to extend the period would amount to rewriting the contract. The duty of the Court is to interpret and enforce the terms of contract

### **Determination**

25. The issues in dispute herein are the refusal to sign the CBA as negotiated and agreed and that there is change on the effective date. The Claimant is seeking that the status quo be maintained and the effective date of the CBA is 1<sup>st</sup> December, 2012 for 3 years and that the terms of clause 33 of the outgoing CBA be construed to mean the effective date is 1<sup>st</sup> December, 2012.

26. It is not in dispute that the parties herein have a Recognition Agreement and several CBA have been negotiated and registered with the court;

CBA taking effect on 1<sup>st</sup> December, 1996 was signed on 13<sup>th</sup> August, 1998;

CBA taking effect on 1<sup>st</sup> December, 2000 was signed on 6<sup>th</sup> November, 2002;

CBA taking effect on 1<sup>st</sup> December, 2003 was signed on 17<sup>th</sup> May, 2007;

CBA taking effect on 1<sup>st</sup> December, 2006 was signed on 15<sup>th</sup> October, 2009; and

CBA taking effect on 1<sup>st</sup> December, 2009 was signed on 15<sup>th</sup> October 2009.

27. Section 59 (1) and (5) LRA provides that;

*59. (1) a collective agreement binds for the period of the agreement -*

...

*(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.*

28. With regard to a CBA taking effect, the terms agreed upon by the parties are binding for the period of the CBA term from the date it takes effect. Such date must be agreed upon by the parties. 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.

29. In this case, the last CBA for the period of 1<sup>st</sup> December, 2009 to 30<sup>th</sup> November, 2012 the same came up for review the draft of which has not been agreed and resulting in this suit, in clause 33 the parties agreed as follows;

### 33. EFFECTIVE DATE AND DURATION

*This Agreement shall be effective from 1<sup>st</sup> December, 2009 and shall remain in force for a period of Three years from the date and thereafter until it is amended by mutual agreement between the Company and the Union, provided that the party desiring to amend the agreement shall give three months' notice of their intention and shall set out in detail the amendments or alternations which such party desires. In case Agreement is not reached on proposed amendments within six months of date of notice and within six meetings then the effective date shall be the date of signing of new CBA Agreement.*

30. In my view, this clause at 33 does not only address the question of effective date as set out in the introduction. The clause addresses the aspect of amendments to the CBA which must be by notice of 3 months; negotiations over such amendments within 6 months or in 6 meetings; and the issue of *effective date*.

31. In a scenario where one of the parties is desirous of having a change to the CBA, the same must be communicated by notice of 3 months to the other party and upon such notice, the parties have the chance of 6 months or 6 meetings to negotiate and arrive at an agreement. Where there is no agreement within the 6 months or within the 6 meetings, the agreement may still be sourced and once agreed, the change takes effect from the date of agreement/execution.

32. Clause 33 thus deals largely with the process. Timelines within which a change to the CBA can be addressed and where there are negotiations and no agreement is achieved within 6 months or within 6 months, such to proceed until agreement is achieved and the execution date becomes the effective date.

33. In this case the dispute relates to the time taken to negotiate and which has then affected the effective date. Both parties agree that negotiations commenced in May, 2012 which was 6 months before the subject CBA lapsed. The Claimant asserts that the Respondent was not at several meetings and therefore frustrated the conclusion of the CBA within the 6 months or within the 6 meetings. The Respondent has also accused the Claimant not having representatives at several meeting thus prolonging the duration of time and number of meetings and the respondents only missed in one meeting for a valid reason of insecurity.

34. The respondent's case is that parties had foreseen such an eventuality and agreed on clause 33 of the CBA to address question of effective date that where parties negotiated a new CBA and in 6 months there was no agreement and that upon holding up to 6 meetings there was no agreement, then upon negotiations at which period and number of meetings, the date of execution would be the effective date.

35. The problem then arises, where within the 6 months one party fails to agree on proposed CBA so as to have the period go over and beyond to avoid and have clause 33 apply or that a party ensures that within the 6 meetings held they are stuck on their position so as to avoid and ensure clause 33 take effect, would this then be found to be a fair labour practice?

36. In this regard, I note The CBA effective for the period of 1<sup>st</sup> December, 2006 to 30<sup>th</sup> November, 2009 was executed on 15<sup>th</sup> October, 2009 a period of 15 days before the same lapsed. Did this mean the effective date was per clause 33 or 1<sup>st</sup> December, 2006? Absolutely not. In my assessment of the issues herein, this CBA took its full course without any change to the effective date in accordance with the practice of the parties. This is a long period of 3 years less 15 days.

37. The current contest relates to the CBA covering the period of 1<sup>st</sup> December, 2012 to 30<sup>th</sup> November, 2015. Such period has come and gone. The negotiations commenced in good time as initiated by the Claimant union. The Respondent took time to Respondent and only did so two months before the lapse of the CBA. This was time outside the clause 33 that the Respondent has been keen to apply and rely upon in insisting that the effective date is the date of execution as no CBA was agreed upon within 6 months or in 6 meetings. Where the Respondent had negotiated and or replied to the Claimant immediately notice was issued on 14<sup>th</sup> May, 2012 the 6 month period would have given the parties sufficient time to negotiate and agree on major parts of the CBA. The period now subsisting and the failure to register an agreed CBA can directly be related and associated to the inaction by the Respondent to give feedback and responses in good time. To thus be allowed to enjoy the full course of clause 33 of the CBA without taking these factors into account would be to allow the Respondent to engage in an unfair labour practice.

38. On the notice issued to the Respondent by the Claimant on 14<sup>th</sup> May, 2012 there were detailed proposals on the changes to the CBA. Part of the 15 items the Claimant set out for change was item No.14 on *effective date and duration* that;

*To be effective from 1<sup>st</sup> December 2012 and to run for 2 years.*

39. Respondent responded on 3<sup>rd</sup> October, 2012 with counter-proposals. With regard to Item 14 as proposed the Respondent proposed that;

*Effective date and duration*

*Effective ate to be per existing clause. Duration for 4 years.*

40. In this regard, both parties acknowledge that clause 33 is not just on the effective date. It has more. The effective date and term of the CBA.

41. From the pleadings I note the following;

On 14<sup>th</sup> May, 2012 the Claimant issued notice to the Respondent with detailed proposals in terms of clause 33 of the CBA; this was 6 months before the CBA in force lapsed;

The Claimant sets out that on various dates they made efforts to convene meetings but the Respondent was not available. On 26<sup>th</sup> June, 2012 the Respondent officer was on leave; on 31<sup>st</sup> October, 2012 the Respondent officer was attending an emergency.

42. What is apparent, from the date of notice by the Claimant on 14<sup>th</sup> May, 2012 the Respondent replied with the counter-proposals on 3<sup>rd</sup> October, 2012 a period of 4 full months had lapsed. There only remained 2 months to the contemplated 6 months set out under clause 33. Where the 6 months did not work, the first meeting between the parties was held on 19<sup>th</sup> October, 2012.

43. In the 1<sup>st</sup> meeting on 19<sup>th</sup> October, 2012 the negotiations could not commence as the Claimant required time to agree on their 3 representatives;

The 2<sup>nd</sup> meeting scheduled for 2<sup>nd</sup> November, 2012 meeting put off because Respondent manager was not available and had to resume duty;

On the 3<sup>rd</sup> meeting on 4<sup>th</sup> February, 2013 both parties agreed there was lack of quorum;

On the 4<sup>th</sup> meeting on 13<sup>th</sup> March, 2013 several items were negotiated and there was progress to the agenda items;

On the 5<sup>th</sup> meeting on 4<sup>th</sup> April, 2013 an agenda item was discussed with progress; and

On the 6<sup>th</sup> meeting on 3<sup>rd</sup> May, 2013 various agendas negotiated and there was progress.

44. The negotiations went on to various dates the last such meeting being on 5<sup>th</sup> August, 2014 when it was confirmed that all items had been agreed and no other item(s) would be introduced for negotiations. Errors were to be corrected for the Claimant union to confirm and execution of the CBA to be effected on 26<sup>th</sup> August, 2012.

45. Based on the analysis above, effectively the Claimant had commenced the required process of changing the CBA in good time. There were no agreements by December, 2012 so as to have a new CBA in terms of clause 33. This is largely due to the fact that the Respondent officers were not available for the two meetings proposed by the Claimant within these 6 months and the counter-proposal made only came over 4 months later on 3<sup>rd</sup> October, 2013.

46. On the 6 contemplated meetings under clause 33 of the CBA first meeting was adjourned at the instance of the claimant, the 2<sup>nd</sup> meeting adjourned at the instance of the Respondent and the 3<sup>rd</sup> meeting adjourned by mutual agreement. After this date, a period of over 6 months and only 3 meetings scheduled, parties were able to achieve progress.

47. The Respondent has made reference to various authorities in support of submissions. I have taken these case references into account and particularly the submissions that a Court should not rewrite a contract for the parties. However, commercial contracts are unlike Employment and labour relations agreements. A CBA or an employment contract is specifically addressed in law as one that requires the Court to look at fair labour relations unlike commercial interests in a contract formulated under the Law of Contract. The fundamental difference between the work of the Court and any other division of the High Court is that this occurs governed by a different set of principle objectives, statutes and the foundational basis being article 41 of the Constitution which specifically address this Court to look at *fair labour practices*.

48. Therefore in a case where an employer has stalled negotiations so as to have them go on and on to avoid meeting and arriving at consensus and thus avoid execution of a CBA, such is an unfair labour practice. Where the Claimant union moved with speed, aware that the CBA in force was lapsing in 6 months and before such lapse and before the set out 3 months was able to issue notice to the Respondent and set out the changes proposed and the Respondent only waited for such time as was convenient to them to Respondent and then enjoy the timelines outside what was contemplated and therefore avoid meeting the changes and attendant costs to the CBA, such I find to be an unfair labour practice. To base the non-execution of the CBA on the fact that there was no agreement in 6 months or that there were 6 meetings and there was no agreement when the Claimant union had done all what was necessary to ensure there was a new CBA in force in good time, the Court would be setting up a dangerous precedent where a party is allowed to stall negotiations and then be a beneficiary of the same. Such would be to reward injustice and ultimately encourage unfair labour practices within the realm of industrial relations. The cited cases though from the Court of Appeal do not aid the respondent's Case. In **Gatombu M'buutu Karatho versus Christopher Muriithi Kubai, Civil Appeal No.78 of 2006 (Meru)**, the case was before the High Court and related to a commercial contract on purchase of property and the case is fundamentally different from a matter filed before this Court with regard to the application of the Labour Relations Act and the context of a CBA. Similarly in **Hassan Zubedi versus Patrick Mwangangi Kibaiya & another [2014] eKLR**; the suit related to sale of two apartments and hence commercial transactions outside the application of the Labour Relations Act. More fundamentally the Court of Appeal in **National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd and another (2002) 2 EA** the same related to commercial contract and matters which arose before the coming into force of constitution, 2010 and the provisions under article 41 and the enactment of Labour Relations Act, 2007 and the rights therein with regard to the application of and registration of CBA.

**In this case therefore, the effective date with regard to the CBA between the parties and noting the lapse of CBA ending 30<sup>th</sup> November, 2012 should be 1<sup>st</sup> December, 2012. The terms of the new CBA should follow Clause 33 at 3 years. Where any party has any challenge to the process (es) set out**

**under clause 33 or 24 of the CBA, such should be negotiated in future CBA.**

**Delivered, dated and signed in open court at Nairobi this 3<sup>rd</sup> day of March, 2017.**

**M. MBARU**

**JUDGE**

In the presence of:

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