



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 775 OF 2014
KENYA PLANTATION AND AGRICULTURAL WORKERS' UNION....CLAIMANT
VERSUS
KAKUZI LIMITED.....RESPONDENT

Mr. Meshak Khisa for claimant

Mrs. E. W. Opiyo for respondent

JUDGMENT

1. The suit was filed at Nakuru Employment and Labour Relations Court on 21st March 2014. The issues in dispute were set out in the memorandum of claim as follows;

“Issue in dispute;

(1) Unprocedural offer to pay out all accumulated gratuity benefits up to the end of December 2013 calculated at individual wage rate as at 31st December 2013 and replace it with National Social Security Fund Act, 2013.

(2) Deadlock on twenty seven (27) clause of the 2014 – 2015 CBA.

2. The history of the relationship between the parties is set out in the memorandum of claim. In this respect, the parties have a Recognition Agreement and concluded a Collective Bargaining Agreement for the period 2011 – 2013 that is currently in force and is due for review as from the 31st December 2013.

3. The suit was transferred to Nairobi pursuant to an application by the respondent.

4. The parties held various negotiation meetings and reached an agreement on the payment of gratuity and the following listed clauses;

(a) Job Classification

(b) Overtime

(c) Probation

- (d) Grievance Procedure
- (e) Summary Dismissal
- (f) Annual Leave Travelling
- (g) Allowance
- (h) Shift Allowance
- (i) Tool Allowance
- (j) Gratuity
- (k) Agency Fees
- (l) Maternity Leave
- (m) Leave for Trade Union Matters
- (n) Termination of Service
- (o) Avocado Harvesting
- (p) Essential Services and Implementation and Duration of the Agreement

5. The parties, however, **deadlocked on ten issues;**

- (1) General Wage Increase,
- (2) Hours of Work for Herdsmen
- (3) Medical Treatment and Sick Leave
- (4) Transport to and from Work
- (5) Warning System
- (6) Shift Allowance
- (7) Compassionate Leave
- (8) Redundancy
- (9) Protective Clothing and
- (10) Back Pay

6. Conciliation proceedings were conducted and the Conciliator's Report was issued on 13th June 2014.

Issues for Determination

- (i) Whether the court has jurisdiction, in the absence of any express statutory provision and a Collective Agreement by the parties to set wage increases and allowance for employees?
- (ii) Whether the setting of such terms is a breach of the respondent's constitutional right to free

negotiations contrary to Article 41 (5) of the Constitution.

(iii) Whether breach in (ii.) above amounts to a deprivation of the respondent's right to property under Article 40 (1) of the Constitution.

(iv) If the answers to (i.) – (iii.) above are in the negative what is the appropriate award in the ten deadlocked issues set out above.

Issue i

7. On 14th April 1964, the Trade Disputes Act No. 9 came into force. The Act made provision for the settlement of trade disputes, the establishment of arbitration tribunals and board of inquiry in connection with trade disputes and the establishment of an Industrial Court.

8. Subsequently, Trade Disputes Act, 1965 was passed to consolidate and amend the law relating to the settlement of disputes gradually and a standing (permanent) Industrial Court.

9. Under the law was established voluntary arbitration in non-essential services and compulsory arbitration in essential services. This system was adopted in subsequent legislation including the Labour Relations Act, 2007, Labour Institutions Act, 2007 and Employment Act, 2007 which are operational today. (See *The Kenya Industrial Court, Origin, Development and Practice* by Saeed R. Cocker pages 10 – 21)

Economic Disputes

10. Justice Saeed R. Cocker had this to say on the jurisdiction of the court to make awards;

“Prior to the establishment of the Industrial Court, a pattern had developed whereby collective agreements were subject to annual revision but when the Industrial Court started making awards on trade disputes concerning various items in the collective agreements it started awarding the duration period of eighteen months to begin with; after a few years the duration period increased to two years. This was done most carefully and by offering adequate increase to the workers in order to bring about a period of stable Industrial relations during which the parties could think of other important factors affecting the economy of their particular undertaking. Both the unions and the employers were happy at this move.” (Per Cocker Supra at page 10)

11. Some of the major cases in which the Industrial Court made awards or declined to make any increase on terms and conditions of service in disputed collective agreements include;

(i) Industrial Court Cause No. 89 of 1966 between Kenya Union of Commercial Food and Allied Workers' and Twentieth Century Fox Organisation (East Africa)

(ii) Industrial Court Cause No. 40 of 1967 between Kenya Plantation and Agricultural Workers' Union and Kenya Tea Growers' Association.

(iii) Industrial Court Cause No. 37 of 1969 between Kenya Plantation and Agricultural Workers' Union and Kenya Coffee Growers' Association.

(iv) Industrial Court Cause No. 15 of 1970 between Mombasa Dock Workers' Union and East Africa Cargo Handling Services Ltd.

(v) Industrial Court Cause No. 42 of 1975 between Kenya Sugar Plantation and Agricultural Workers' union and Sugar Industrial Group of Federation of Kenya Employers.

(vi) Industrial Court Cause No. 16 of 1964 between Kenya Chemical Workers' Union and East Africa Diatomite Syndicate Ltd.

12. After the promulgation of 2007 Labour Legislation, the Industrial Court has continued to adjudicate disputed collective agreements and made appropriate reliefs.

13. This trend has continued to date since the unions and the employers continue to file disputes concerning deadlocked collective agreements for adjudication by the court.

14. Example of cases adjudicated upon after the promulgation of the 2010 constitution and the establishment of the Employment and Labour Relations Court in 2012 include:

1. Kenya Chemicals and Allied Workers' Union –v– Leather Life [EPZ] Limited (2014) eKLR
2. Kenya Shoe and Leather Workers' Union –v– Macquin Shoe Limited (2013) eKLR
3. Kenya Plantation and Agricultural Workers' Union –v– Unilever Tea (K) Limited (2015) eKLR
4. Tailors and Textiles Workers' Union –v– Mombasa Apparels [EPZ] Limited (2016) eKLR
5. Kenya Plantation and Agricultural Workers' Union –v– Kenya Tea Growers Association (2016) eKLR
6. Kenya Plantation and Agricultural Workers' Union –v– James Finlay Kenya Ltd (2016) eKLR

15. In the present case, we are faced with an objection on the jurisdiction of the court to make awards in disputed collective agreements.

16. Following the decision of the Court of Appeal in Civil Appeal No. 50 of 1989, **Owners of the Motor Vessel “Lillian S” –v– Caltex Oil (Kenya) Ltd**, Court of Appeal, at Mombasa, Nyarangi, Kwach and Masime JJ A;

“It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.

17. The jurisdictional issue ought to have been raised at the preliminary stage because if the court found that it has no jurisdiction to determine the dispute, then it would have downed its tools forthwith to avoid waste of valuable judicial time.

18. The issue has however been raised in the final submissions by the respondent, employer and it behoves the court to deal with it first, because if indeed, the court has no jurisdiction to adjudicate the dispute, then it will be unnecessary to get on the merits of the dispute itself.

19. The jurisdiction of ELRC Court is spelt out under Section 12 of Employment and Labour Relations Court Act, Cap 234B as revised in 2014 as follows;

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- a. **disputes relating to or arising out of employment between an employer and an employee;**
- b. **disputes between an employer and a trade union;**

- c. **disputes between an employers' organisation and a trade union's organisation;**
- d. **disputes between trade unions;**
- e. **disputes between employer organisations;**
- f. **disputes between an employers' organisation and a trade union;**
- g. **disputes between a trade union and a member thereof;**
- h. **disputes between an employer's organisation or a federation and a member thereof;**
- i. **disputes concerning the registration and election of trade union officials; and**
- j. **disputes relating to the registration and enforcement of collective agreements.**

20. The court therefore notes it has jurisdiction to determine disputes relating to employment and labour relations including disputes between an employer and a trade union.

21. Other legislation that extend jurisdiction to this court include section 87 (c) of the Employment Act which provides;

“[87 (1)] subject to the provisions of this Act whenever –

- a. An employer or employee neglects or refuses to fulfil a contract of service; or**
- b. Any question, difference or dispute arise as to the rights or liabilities of either party;**
or
- b. Touching any misconduct neglect or ill treatment of either party or any injury to the person or property of either parties, under any contract of service,**

The aggrieved party may complain to the Labour Officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than Industrial Court shall determine any complaint or suit referred to in subsection (1)”

22. Of importance in this dispute is subsection (1) (b) regarding any question, difference or dispute arising as to the rights or liabilities of either party because rights and liabilities may relate to terms and conditions of service emanating from a collective agreement or a recognition agreement.

23. The obligation of an employer and union to negotiate and conclude a collective agreement as in this case, emanate from the Recognition Agreement between the parties.

24. The parties here concluded a recognition agreement on 6th June 2011 signed by both parties

25. Clause 4.1 thereof provides;

“The company hereby recognises the union for purposes of collective bargaining as provided for in Section 54 (1) of the Labour Relations Act No. 14 of 2007.”

26. The parties have committed and bound themselves to collective bargaining in terms of the Labour Relations Act.

27. The Labour Relations Act, under part vii regulates recognition of trade unions and collective

agreements.

28. Clause 10.1 of the recognition agreement between the parties provide for dispute settlement procedure as follows;

“In the event of either party declaring a dispute, the party declaring the dispute shall notify the other party in writing thereof stating the nature of the dispute, the reasons for the dispute as well as the proposed terms of settlement.”

29. The parties further provided under clauses 10.2.1 and 10.2.2. as follows;

“[10.2.1] Either party may refer a trade dispute for conciliation in terms of item 62 of the Labour Relations act.

[10.2.2] Should the dispute remain unresolved the parties may participate in a strike or a lock out (item 76 of the labour Relations Act).”

30. In this case, the claimant union reported the dispute referred to earlier in this judgment on gratuity payment and deadlock on twenty seven (27) clauses of the 2014 – 2015 CBA. The dispute was not resolved by the Conciliator appointed in terms of Section 62 of the LRA and the Conciliator issued a certificate of unresolved dispute in terms of Section 69 (9) of the LRA.

31. Section 73 (1) of LRA, under part IX – adjudication of disputes provides

“[73 (1)] if a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.”

32. This was a dispute in respect of which a party may call a protected strike or lock-out and since the union had made a demand in respect of an employment matter, then the union was entitled to come to court in terms of Section 73 (2) (a) which reads;

“[73 (2) (a) if a trade dispute –

a. Is one in respect of which a party may call a protected strike or lock-out, the dispute may only be referred to the Industrial Court by an aggrieved party that has made a demand in respect of an employment matter or the recognition of a trade union which has not been acceded to by the other party to the dispute; (emphasis mine)

b. Is in an essential service, Minister may, in addition refer the dispute to the Industrial Court.”

33. Section 73 (1) as read with subsection 2 (a) together with clause 10.2.1 and 10.2.2 of the Recognition Agreement between the parties clearly empower the Industrial Court, now ELRC to hear and determine a dispute in respect of which the aggrieved party, in this case, the union has made a demand in respect of an ‘employment matter’ which has not been acceded to by the other party to the dispute.

34. A demand in respect of an employment matter is a demand on terms and conditions of service in respect of which, the other party is obliged to respond to so as to commence negotiations as provided under clause 9.1. to 9.8 of the Recognition Agreement. Where there is failure to agree, the dispute settlement procedure under the Recognition Agreement and the LRA, kicks in as happened in this case.

Role of Employment and Labour Relations Court

35. ELRC is a specialised court on matters of employment and labour relations and is placed in a special position to resolve disputes both in private and public sector which threaten or are likely to threaten industrial peace in a business entity, a sector(s) or the country as a whole.

36. The Labour Relations Act, provides for voluntary collective bargaining in non-essential sectors and for mandatory collective bargaining in the essential sectors.

37. The court is however empowered under Section 73 of LRA to adjudicate and make awards on employment matters in respect of which demands have been made by one party and not acceded to by the other in respect of a trade dispute “*which a party may call a protected strike or lock-out.*”

38. This primary objective is captured in the pre-amble to the Labour Relations Act No. 14 of 2007 as follows;

“An Act of Parliament to consolidate the law relating to trade unions and trade disputes to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes.” cannot be achieved if this court is denied jurisdiction to intervene in matters specified under Section 73 of LRA. It must be noted that this statutory intervention is an exception and not a general rule.

39. Generally, as was stated in **Ephraim Kubai –v– Kenya Breweries Ltd. [2011] eKLR**, it is not for the court to impose or make terms of contracts for parties.

40. The provisions of LRA are designed to direct parties to resort to their own machinery of negotiation and failing a settlement to use the statutory conciliation and arbitration machinery for the voluntary settlement of dispute. Unless they do so, they are prevented from resorting to strike or lock-out. The ELRC is an institution of last resort for the greater good of society and its role in employment and labour relations cannot be overemphasized. A dispute on issues not yet agreed upon by the parties is commonly known as a dispute of interest as opposed to a dispute of right. These are disputes in respect of which strikes may be called, hence Section 73 on court’s intervention.

41. The Court of Appeal in the landmark decision of **TSC –v– Kenya Union of Teachers and 3 others (“The TSC case”)** [2015] eKLR stated;

“In the present case, there was no collective agreement in existence setting the basic salary and allowances of the teachers. The very essence of a collective agreement is that the terms and conditions therein contained are voluntarily agreed upon between the employer and the union If the Labour Court fixes basic salary and allowance to be incorporated in a collective agreement as the Labour Court did in this case, the collective agreement ceases to be a collective agreement as envisaged by the law. I find that there is no express statutory provision of the law which gives jurisdiction to a Labour Court in absence of a collective agreement to set the basic salary and allowance of public officers”

42. The court was urged by the respondent to interpret this finding by the Court of Appeal to mean that the Labour Court has no mandate in absence of any express provision of the law and a collective agreement to determine terms and conditions of employment of both public officers and employees in the private sector. We were referred to the case of **National Bank of Kenya –v– Pipeplastic Sankolit** in which the court of Appeal held

“that court of law cannot re-write a contract between the parties The trial court erred in writing and providing terms for a future contract yet to be concluded by the parties.”

43. The respondent urged the court to find that it has no jurisdiction to hear and determine the present dispute and dismiss the suit with costs.

44. The court distinguishes the findings of the Court of Appeal in these respects;

45. First, the court specifically related the finding to award of basic salary and allowance of public

officers;

46. Secondly, in the present case, we have a recognition agreement between the parties which provides how deadlocked dispute relating to negotiations of terms and conditions of service of unionsable employees are to be resolved;

47. Thirdly, the Court of Appeal did not address the express wording of Section 73 (1), (2) (a) and (b) of LRA and its import which section and its equivalent in the repealed Trade Dispute Act have been relied upon by the Labour Court since its inception in 1964 to date to found jurisdiction of the court to hear and determine terms and conditions of employment that have been demanded by a union or employer and not acceded to by the other party where a party may call a protected strike or lock-out.

48. Fourthly, the decision of the Court of Appeal was largely informed by its finding on the role of the Salaries and Remuneration Commission (SRC) in determination of terms and conditions of service in the public sector. The present dispute is in the private sector and therefore SRC has no role in the dispute.

49. For these reasons the court finds that it has jurisdiction to hear and determine the dispute and any finding by it would not violate Article 41 (5), and Article 40 of the Constitution of Kenya 2010. Equally the role of the court is not limited as submitted by the respondent to upholding of the minimum employment terms as set out under Section 26 (1) of Employment Act.

50. The provisions of Section 15 (5) of the ELRC Act, only allows national wage guidelines to guide the court in exercise of its powers under the Act in respect of disputes in private sector.

51. Similarly Section 15(6) allows SRC to guide the court in determining disputes in public sector.

52. The provisions do not oust the jurisdiction of the court in determination of disputes filed under Section 73 of the Labour Relations Act, 2007.

53. It is important to note that the Labour Relations Act 66 of 1995 as amended in 2002 of South Africa does not have an equivalent provision to Section 73 of the Kenya Labour Relations Act. In this regard, disputes relating to demands which are commonly referred to as disputes of interest as opposed to disputes of right based on existing contractual or statutory terms are not substantively resolved by the Labour Court but are resolved through protected strikes and lock-outs and alternative dispute resolution methods. This distinction is important when relying on court precedents from South Africa Commission for Conciliation, Mediation and Arbitration (CCMA) and the South African Labour Courts and other jurisdictions where labour courts do not make material awards on demanded terms and conditions of service which have not yet crystalized. (Disputes of interest).

Merits

Claimant's Case

54. The memorandum of claim filed on 21st March 2014 sets out the remaining issues in dispute as follows;

Hours of Work for Herdsmen

55. The union proposes to have livestock herdsmen to have working hours reduced from 60 hours per week to 58 hours per week. The Union's claim is based on existing working hours for security guards who work for 57 hours per week.

56. The respondent states that the demand has no legal basis and if acceded to would result in recruitment of additional two herdsmen at the cost of Kshs.189,910/=. The respondent proposes to retain the current CBA clause as it is compliant with Section 27 (2) of the Employment Act.

57. That respondent accords all employees one rest day in every 7 day period as required by the Employment Act. Whereas the outgoing CBA provided for 58 working hours over six days, a normal working week in agricultural sector is 60 hours spread over six days. Any work above 10 hours a day constitutes overtime. The demand by the union to reduce working hours for herdsmen from 60 hours spread over 6 days to 58 hours spread over 6 days is discriminatory because security men to whom they hand over work 57 hours spread over six days. The court finds this demand reasonable and in accordance with equity awards accordingly.

Warning System

58. The union proposes an additional clause to read as follows;

“The employer reserve the right to warn an employee for justifiable reasons and the provisions of Section 41 of the Employment Act, 2007 shall apply” The employer submits that the present clause in the CBA is both procedurally and substantively fair and it is in line with the applicable provisions of the Employment Act. There is therefore no legitimate reason to include the proposed clause.

59. The proposed clause by the union is misconceived as Section 41 of the Employment Act, 2007 does not relate to warnings at all. The proposal is dismissed.

Shift Allowance

60. The union proposes payment of shift allowance in the sum of Kshs.25,000/= per shift. The respondent proposes to retain Kshs.20,000/= per shift. The claimant has offered no justification for the increase in the memorandum of claim. The proposal is dismissed for want of justification.

Compassionate Leave

61. The union proposes 5 days compassionate leave per event. The respondent offers to retain the 4 days as in the current CBA. Regulation 11 of the Regulations of Wages (General) Order provides for compassionate leave but this is deductible from the employee’s annual entitlement. This being the case, there is no prejudice to be suffered by the respondent if the union prefers its members to enjoy one more day of compassionate leave. This item often varies from one employer or sector to another. The court upholds the proposal of 5 days compassionate leave.

Redundancy

62. The union proposes an increase of severance pay upon declaration of redundancy from 17 days in the present CBA to 22 days for each completed year of service. Such a proposal should be based on comparisons with employers in similar industry and firms.

63. Respondent contents if this is acceded to, it would commit itself to ‘Kshs.1,334,181/=’ additional cost per annum should all employees become redundant which is not likely.

64. The law provides for a minimum of 15 days’ pay for every completed year of service. Mr. F. K Ng’ang’a from CPMU , who testified as an expert in this matter and provided a report on behalf of the Chief Economist, Ministry of Labour did not provide comparisons from similar establishments nor did the parties provide any comparisons.

65. The court finds no justification for the proposal and the same is dismissed.

Protective Equipment

66. The union proposes to retain the current clause in the CBA, with additional clause to read;

1. All employees shall be issued with adequate personal protective equipment.

2. All employees with washable protective equipment shall be issued with one standard bar of soap per month.

67. The respondent opposes the additional clauses stating that the current protective clothing policy was drafted following a risk analysis.

68. The claimant provided no justification for the demand in the memorandum of claim and in its written submissions. Mr. Ng'ang'a from CPMU submitted that the Department of Occupational Health and Safety Service of the Ministry of Labour is best placed to make an assessment report and make recommendations to the parties on the way forward on this issue for their consideration in the next CBA.

69. The court accepts the advice from CPMU and does not make any award in this respect.

Transport to and from Work

70. The parties have agreed on the principle that transport should be provided to and from work for employees residing on the property who reside more than 7 km from their place of work. What is in dispute is the method of measurement of 7 km. Union does not want it to be based on radius but to be measured from the place of residence by using the shortest road accessed by vehicle to the point of workplace which is the point where the master roll is administered or where the employee is practically assigned to work.

71. The respondent is agreeable to this method from the written submissions and the court awards the demand by the union as set out in the memorandum of claim.

Back Payment

72. The union proposes that the clause on back payment in the current CBA is obsolete and of no consequence since the parties have agreed on the effective date in the new CBA to be in January 2014.

73. If the proposal by the union is adopted it would mean all monetary and material provisions/improvements realised in the new CBA be implemented as from 1st January 2014.

74. The respondent proposes retention of the clause on back pay with the implementation on wage increase only being effective as from the effective date of the CBA while all other matters agreed upon and those determined by the court be effective as from the date the signed CBA is registered in court.

75. Mr. Ng'ng'a from CPMU advised that in respect of back payments, the wages guideline only recognise General Wage Increases and House Allowance. In the present case, all workers are provided with reasonable housing at the respondent's expense hence only arrears in respect of basic wages are tenable.

76. The court accepts the submissions by the respondent as supported by Mr. Ng'ang'a of CPMU and rejects the proposal by the union. The clause on back pay be retained as is therefore.

Gratuity

77. The union proposes an increment of gratuity from 18 days to 22 days' pay per each completed year of service for employees who have completed five years.

78. The union also proposes an additional clause that entitles employees who have served for more than five (5) years and are unable to continue with employment due to ill health or sickness or death to 22 days gratuity for every completed year of service.

79. The respondent has made a counter proposal to include a new sub-clause under clause 9.7 (9) of the current CBA arising from the introduction of the new NSSF regulations to this effect.

“Upon the implementation of the NSSF Act 45 of 2013, there shall henceforth be no payment of gratuity provided that the employees who will have qualified for gratuity under CBA of 2012 – 2013 will be paid their accrued gratuity dues in accordance with the terms of clause 28 of the 2012 – 2013 CBA before the implementation date of NSSF Act 45 of 2013 at the basic rates that the employees were earning at the time of cessation of the gratuity clause and the entitlements thereof will be payable at the point of retirement from employment or at the point of exit from the member company”

80. The court observes that in terms of Section 59(3) of the Labour Relations Act,

“The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.”

81. It follows that the gratuity clause in the 2012 – 2013 collective agreement is already incorporated in the contracts of employment of individual unionsable employees of Kakuzi and cannot be withdrawn except by agreement of the parties.

82. Secondly, the proposal by the respondent is predicated on yet to be implemented provisions of NSSF Act. 45 of 2013 and NSSF Regulations 2013, Regulation 22.

83. The parties ought to revisit the matter once the Act, and Regulations thereto have been implemented.

84. The union on the other hand did not provide a tangible justification for the increase of gratuity from 18 days for each completed year of service to 22 days. Mr. Ng’ang’a for CPMU did not give any insight on the matter either. The proposal is rejected.

85. The court however finds it justifiable for an employee who has served for more than five years and is unable to continue with employment due to ill health or death to also get gratuity. This proposal is granted therefore.

Wage Increase

86. The union proposes a general wage increase of 20% from 1st January 2014 and 20% from 1st January 2015.

87. The claimant union did not offer any justification in the memorandum of claim but did so in the written submissions basing on the following considerations;

1. Erosion of purchasing power due to change in Consumer Price Index (CPI)
2. Productivity
3. Ability to pay

88. The union submits that the inflationary figure for the period 2012 – 2013 and not 2014 – 2015 be relied upon given Wage Guideline No. 2 (a) (i) of 2005 as the factor endeavours to restore workers basic consumer goods and services which have been eroded by inflation over the lifespan of the ‘outgoing’ CBA so as to compensate workers adequately for the incoming CBA (2014 – 2015) as per paragraph 1.0 and Table 3 of the CPMU report filed in court on 22nd May 2015.

89. On productivity, the union submits that Dr. Awiti, the witness for the respondent confirmed that during the period under review, the company’s productivity increased to 5.66% and or 6% as illustrated in his report at page 66 Table 4.

90. The respondent had already given the workers a salary advance of 5% for 2014 and another 5% for 2015. This was confirmed by Mr. Andrew Kiragu, RW2, who testified on behalf of the respondent. The union prays that this salary advance be not taken into account in awarding a wage increase to the workers.

91. The union submits that inflation rate for the period under review is 9%; compensation in respect of productivity is 6% and compensation for wage differentials is 10% totalling to 25%.

92. The union urges the court to therefore accept the modest proposal of 20% for the 1st year and 20% for the 2nd year. The union relies in this respect on the CPMU report paragraph G.1.3.

Response

93. The respondent offers wage increase of 10% for 2014 and 5% for 2015 with respect to wage differentials. The respondent submits that inflationary figures and productivity figure given by the claimants and CPMU are incorrect and not supported by any congruent data.

94. CPMU proposes an aggregate wage increase of 24.66%.

95. The respondent submits that CPMU conceded that the productivity level of Kakuzi had declined for the period under review and gave a total of 7.66 during the two year period under review.

96. The respondent questions the analysis by the CPMU to the effect that though the productivity indices dropped since none of them fell below 1.00, the productivity levels were positive for unionsable workers.

97. CPMU concluded that productivity gain stood at 2.84 in the year 2012 and 2.82 in the year 2013 or a total of 5.66 during the two year period.

98. Dr. Awiti, for the respondent however questioned the CPMU's productivity figure of 5.66% and states that the same was inaccurate. Since an increase in profit did not necessarily reflect an increase productivity since there are other factors at play in the assessment of productivity.

99. Dr. Awiti fully explained the figure of 1.00 index is not an absolute number but denotes the value of the base year for the period being considered which in this case would be 2011. According to Dr. Awiti, productivity for 2011 was 5.65 which is equivalent to 1.00. Both experts have agreed that productivity index for 2012 and 2013 stood at 3.84 and 3.82 respectively.

100. According to the respondent therefore, productivity for the period under consideration recorded a decline of 1.82 from 5.65 in 2011 to 3.82 in 2013. Respondent therefore disputes Mr. Ng'ang'a's assertion that productivity of Kakuzi was positive for the period under consideration.

101. With regard to CPI as a factor, the respondent notes that CPMU indicates a figure of 8.9% spread out for 2 years. The respondent faults CPMU for stating housing, water and electricity benefits provided by the respondent should not be taken into account in assessing the basket of goods consumed by the workers. The respondent submits these are fridge benefits that ought to be taken into account.

102. The position was supported by Dr. Joseph Awiti (RW1) and Mr. Andrew Kiragu (RW2). Dr. Awiti, is a lecturer at the University of Nairobi, with a PHD in Economics. He testified that the entire basket of goods and services consumed by the workers should be taken into account in assessment of CPI. Each consumable is to be weighted as per its importance.

103. Dr. Awiti testified that inflation in December 2013 was 7.5% per KNBS data. Dr. Awiti testified that CPMU's method of arriving at 8.9% was incorrect and that the formula was not provided for by KNBS. Dr. Awiti further testified that there were two methods of computing inflation, viz the monthly basic and month on month (yearly) basis. He stated the preferred method was month on month inflation. He said monthly figures are not very useful because they tend to reflect seasonal influences.

104. Dr. Awiti testified, the benefits given to the employees by Kakuzi reduced the costs by less than 35% when the cost of living goes up and ought to be taken into account. Dr. Awiti was categorical therefore that one has to reduce the CPI entitlement by 35% because if this was not done there would be double payment.

105. Dr. Awiti further testified that CPMU's method of arriving at cumulative wage increase of 25% by adding the indices of inflation, productivity and wage differentials is incorrect. He stated that the danger of adding them up is that considered independently, the change in them would amount to 100% or more. It was accordingly his view that the proper method would be to average the valuables since they are part of a whole and not stand alone indices.

106. RW2, Andrew Kiragu confirmed in his testimony that the employees enjoyed housing, free education (the infrastructure), dispensary, recreational facilities, etc. He stated that these benefits increase the overall labour costs. He testified that labour at Kakuzi accounted for 40% of the overall production costs. He testified also that Kakuzi has been undergoing major operational changes and challenges which make it unable to increase the wage as demanded by the union. That Kakuzi is currently paying competitive wage well above industry average. If these unsustainable increase continue in the long run Kakuzi may be forced to undertake redundancy. This could also eventually drive the respondent out of business if entertained.

107. This is tied to the issue of ability to pay as demonstrated in the audited financial statements produced in court for the years 2013 to 2014. The figure show a sustained decrease in profit from a figure of 644,397 million to a figure of 160,205 million in 2014. This is due to challenges occasioned from transition of Kakuzi from production of sisal to coffee and finally to avocados and macadamia. The new products are yet to realize confidence in the European markets while macadamia takes 7 years to mature. Harvest will start in 2015. Furthermore, Kakuzi cannot increase the price of its products to cater for an increased wage bill since it is a price taker and operates on prices set by third parties.

108. The court has taken into consideration the pleadings by the parties, the testimony and reports of CPMU and that by Dr. Awiti and has carefully analysed the common and competing testimony by Mr. Ng'ang'a of CPMU and Dr. Awiti for the respondent.

109. The court accepts that it is utmost important to take into account the testimony by the experts and other witnesses including documentary evidence presented to it in arriving at its decision.

110. It is not in dispute that in determining the reasonable wage increase for the period under review, the court will have regard to the factors of CPI, productivity, ability to pay and sustainability, wage differentials and competitiveness of Kenya's products.

111. Consideration of the evidence adduced by the parties on these factors has led the court to the following conclusions; -

112. The period under consideration for purposes of establishing CPI is 2011 – 2013 which was covered by the outgoing CBA. The court is guided by the Wage Guideline 2005 in the factors to be considered;

113. The court takes into consideration the entire basket of consumables by the employees of Kakuzi including the benefits provided to the employees and concludes that the cost was reduced by these benefits by about 35% when the cost of living goes up accordingly.

114. The court also adopts the month on month (yearly) method of computing inflation and not month on month basis.

115. The court further accepts that the method of adding the indices of inflation, productivity and wage differentials was incorrect and the proper method would be to average the variables since they are part of a whole and not stand alone.

116. The court also finds that the profitability of Kakuzi has been declining from 2011 to 2014, due to the various factors outlined herein before. That has had a negative effect on Kakuzi's ability to pay.

117. In the final analysis the court accepts that Kakuzi offers better terms than most of its peers and competitors in the sector.

118. That it is important to consider sustainability of the enterprise and also protect the jobs of the existing employees against possible redundancy in future if wages were to be increased at unreasonable rate.

119. The court accepts that employees expect to be cushioned against inflation and also an improvement in their terms and conditions of service.

120. Considering all the factors, the court finds that inflation average for the period under review was 7.5%; that the productivity for the period under review declined from 5.65 in 2011 to 3.83 in 2013 and the wage differentials for the period under review was 10%.

121. The court also takes into account the evidence by CPMU that Delmonte which is in the agricultural sector as Kakuzi and is comparable to Kakuzi in its size and operations gave their unionsable staff an increase of 17% between 1st July 2013 and 30th June 2015. CPMU recommended that Kakuzi ought to give approximately 10% to their workers.

122. The court has also taken into consideration that Kakuzi voluntarily offered and paid 5% salary increment for the year 2014 and 5% for the year 2015. Considering that the respondent has made an offer of 10% wage increase for the year 2014 and 5% for the year 2015, the court awards the unionsable employees of the claimant union 12% wage increase for the year 2014 and 8% wage increase for the year 2015.

Medical Treatment and Sick Leave

123. Union demands an increase of sick off days on full pay from 35 days to 50 days and 35 sick offs days on half pay to 55 sick off days per annum. The current provision in the CBA is over and above those provided under Section 30 of the Employment Act, 2007 which provides for seven sick off days with full pay and seven sick off days with half pay.

124. There is no justification to increase the number of sick off days on full pay and half pay. The current CBA provides reasonable consideration to employees who fall sick. Consideration being given to the production costs placed on the respondent by provision of excessive sick leave payments. The proposal by the union is refused.

125. In the final analysis, the award of the court in respect of the outstanding CBA items is as follow;

(i) Hours of Work:

Hours of work for herdsmen are reduced from 60 hours to 58 hours spread over six days week

(ii) General Wage:

General wage increase is awarded at 12% from 1st Janaury 2014 and 8% from 1st Janaury 2015. The award will take into account the payment already made to the employees during the pendency of the suit.

(iii) Warning System:

Warning system is to remain as per present CBA.

(iv) Shift Allowance:

Shift allowance is to remain as per present CBA

(v) Compassionate Leave:

Compassionate leave is increased from 4 days to 5 days per event

(vi) Medical and Sick Leave:

Medical treatment and sick leave clause is retained as is in the current CBA.

(vii) Redundancy:

The redundancy clause is retained as is in the current CBA

(viii) Protective Equipment:

The clause on protective equipment is retained as is in the current CBA. The parties to conduct a risk analysis to determine what Personal Protective Equipment should be issued to the workers.

(ix) Transport to and from work:

The proposal by the union to measure 7 kms from the place of residence using the shortest road accessed by vehicle to the point of workplace where the master roll is administered is granted by the court.

(x) Back Payment:

The clause on back payment in the current CBA is retained.

(xi) Gratuity:

The clause on gratuity is retained as is except to add that employees who have served for five years and are unable to continue with employment due to ill health or death are entitled to gratuity also.

126. The award is to be implemented within 30 days of the judgment.

Dated and delivered at Nairobi this 21st Day of April 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE