



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 218 OF 2016

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

KANGIRI FARMERS CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 14th July, 2017)

JUDGMENT

The claimant trade union filed the memorandum of claim on 05.10.2016 alleging the wrongful implementation of clause 28(a), (on minimum wages) of the collective bargaining agreement effective 01.10.2014; and failure to implement clause 29 (on service increment) of the collective bargaining agreement effective 01.10.2014. The claimant prayed for judgment against the respondent for:

- a. The respondent to implement clauses 28(a) and 29 of the collective agreement per calculations in appendix HN 7a & b.
- b. The respondent to pay in full all the arrears therein accrued following the wrongful implementation as per appendix HN 17 (i,ii,iv)
- c. Costs of the suit in favour of the claimant.

The parties concluded a recognition agreement which took effect on 17.07.2012. After negotiation, conciliation and litigation, the parties concluded a collective bargaining agreement signed on 26.08.2015. Clause 28 (A) provides for minimum basic wages or entry point. Clause 28(B) provides for general wage increase for all employees to earn 12% for 1st year and then 12% for 2nd year and provides further that employees whose salaries are below the minimum entry point as shown under the clause shall be lifted to their respective scales plus a wage increase as indicated therein. Clause 29 on service increment states thus, **“Employees who are under the payroll of the co-operative shall receive a service increment of Kshs. 200 per completed year of service.”**

The respondent filed a response to the memorandum of claim on 10.11.2016. The respondent prayed that the suit be dismissed with costs.

The **1st issue** for determination is whether the present suit is **res judicata** in view of the judgment in the previous suit between the same parties being ELRC cause 122 of 2013 at Nyeri.

Res-Judicata is an affirmative defense barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction or series of transactions and that could

have been, but was not raised in the first suit (See Black's Law Dictionary, 9th Edition). The three essential elements are:

- a. an earlier decision on the issue;
- b. a final judgment on the merits; and
- c. the involvement of the same parties, or parties in privity with the original parties.

The doctrine of *res judicata* aims at ensuring that litigation comes to an end. An issue that has been conclusively decided upon by a competent judicial authority must not find itself before the same or other competent judicial authority for reconsideration.

The previous suit being ELRC cause 122 of 2013 at Nyeri between the same parties was a referral to the court after a conciliation process under which parties had disagreements on some of the clauses in the collective agreement. The issue in dispute in that previous suit was about disputed provisions of the collective agreement. The present suit is about implementation of clauses 28 and 29 of that collective agreement. The court returns that the present cause of action is different from the one in the previous suit and with due diligence, there was no chance that the present cause of action could have been entertained and determined in that previous suit. Accordingly, though the suit is between the same parties, like they were in the previous suit, there is a fresh cause of action and the court returns that the present suit is not barred by reason of *res judicata*.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The parties agreed that the main issue for determination is whether the minimum wages in clause 28(A) reflected the minimum pay in the General Wage Order of 2015 and how the increment in clause 28(B) would therefore apply. The court finds that the answer is provided for in the collective agreement. Clause 28(B) provides for general wage increase for all employees to earn 12% for 1st year and then 12% for 2nd year and provides further that employees whose salaries are below the minimum entry point as shown under the clause shall be lifted to their respective scales plus a wage increase as indicated therein. Thus, the court returns that for each employee, at start of 1st year, the 12% is applied to the minimum wage stated in clause 28(A) and if stated salary was below the minimum wage provided in the General Wage Order of 2015, then 12% is applied to the minimum wage as stated in the Order (the lifting of the employee to the minimum statutory wage). The 12 % increase would therefore apply as against the minimum statutory wage or per agreed or stated minimum wage (if it was above the minimum statutory wage). Under clause 29, an employee who had served for a complete year, as at start of the 1st year, will further be entitled to plus Kshs. 200 pay increase

The court returns that following the end of the 1st year and at commencement of the 2nd year, each employee will get 12 % general wage increase, and if the employee as at incremental date has served the respondent for a complete year, the employee will further earn plus Kshs.200 wage increment being a service increment per completed year of service per clause 29 of the collective agreement.

The court finds that the parties will implement the collective agreement accordingly. Each party to file and serve in 7 days the computation on implementation of clauses 28 and 29 of the collective agreement together with any arrears as may be appropriate with a view of recording the same accordingly. The formulas are as follows:

- a. For 1st year, stated minimum salary or minimum statutory wage (whichever is higher) times 112% plus Kshs. 200 (for those who had served more than a year) to make monthly pay for each of the 12 months in 1st year (call that monthly pay X).
- b. For 2nd year, X times 112% plus Kshs.200 (for those who had served for more than a year) to make monthly pay for each of the 12 months in the 2nd year (call that monthly pay Y).

In furtherance of good industrial relations between the parties, each party will bear own costs of the suit.

In conclusion, judgment is hereby entered for the parties for:

- a) The parties to file and serve in 7 days the schedule of amounts payable to the employees affected under the CBA and as per the formulas set out in this judgment with a view of recording the same in court, together with any outstanding arrears, on a convenient mention date.
- b) Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 14th July, 2017**.

BYRAM ONGAYA

JUDGE