**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 199 OF 2011**

**UNION OF NATIONAL RESEARCH AND ALLIED INSTITUTES STAFF OF KENYA (UNRISK).....CLAIMANT/APPLICANT**

**VERSUS**

**KENYA RESEARCH AND DEVELOPMENT INSTITUTE (KIRDI)**
**…….....…… RESPONDENT**

**RULING**

1. The application before me is the Claimant's Notice of Motion application dated 19th November 2015 and filed on 18th December 2015. In the motion, the Claimant names the Respondent as 1st Respondent and ads Dr. Mechah C. Z. Moturi as the 2nd Respondent. In the motion, the applicant seeks the following orders:-
    1. THAT the collective bargaining agreement annexed to the supporting affidavit signed by the Claimant on 2nd April 2012 and marked ZA-7 be registered by the Honourable Court, the signature of the 1st Respondent notwithstanding.
    2. A declaration that the collective bargaining agreement annexed to the supporting affidavit herein signed by the Claimant on 2nd April 2012 and marked as ZA-7 is applicable and enforceable between the parties for the period 1st July 2010 to 30th June 2012, both days inclusive.
    3. A declaration that the Claimant is entitled to initiate the process of negotiation of a new collective bargaining agreement covering the period running from 1st July 2012.
    4. THAT the costs of this application be provided for.

    The application was supported by the grounds on the face of it as well as the supporting affidavit of Zachariah Achacha sworn on 19th November 2015. In short, the motion and the affidavit, were to the effect that an Award was made by the Hon. Mukunya J. on 2nd February 2012 in Cause No. 199 of 2011 between the Union of National Research and Allied Institutes Staff of Kenya (UNRISK) and Kenya Industrial Research and Development Institute (KIRDI). In the Award, the Judge rejected the claims of both the Claimant and the Respondent and instead found that the increments in wages were to be as per the findings of the Central Planning and Monitoring Unit (CPMU) and that these were to cover the period 1st July 2010 and were to expire on 30th June 2012. The parties were to negotiate and conclude a collective agreement as awarded and as earlier agreed to have it processed and registered in Court within 60 days. Each party was to bear their own costs.

2. The Respondent on its part was opposed to the application and filed a replying affidavit sworn on 18th February 2016 by Eng. Joseph Kamau on behalf of the Respondent. The Respondent's affidavit was to the effect that the Claimant Union was responsible for the non-conclusion of the parties Collective Bargaining Agreement by including non-unionisable staff.

3. In order to expedite the matter, parties consented to having the application disposed of by way of written submissions and on the basis of material before Court in terms of Rule 21 of the Industrial (Court) Procedure Rules 2010.

4. The Claimant filed submissions on 1st March 2016 and submitted that the prayers in the notice of motion were merited and the orders therein ought to be granted to avoid continued abuse of the process of the Court by the Respondents jointly and severally. It was submitted that the Claimant had demonstrated that the Respondent had deliberately and intentionally failed to comply with the mandatory orders in a valid decree of this Honourable Court given on 2nd February 2012. It was submitted that the order made it clear that the parties were to conclude a CBA in line with the award of the Court. The Claimant submits that the affidavit of Eng. Joseph Kamau seeks to re-negotiate the terms of the CBA subject of the Award of the Court. The Claimant submitted that the Respondent was unlawfully challenging the decree of the Court. The Claimant cited Section 60(2) of the Labour Relations Act, 2007 in support of its contention that it was the employer to submit a CBA to Court for registration. The Claimant submitted that the Respondent had revealed a pattern of frustrating the conclusion of a collective bargaining agreement since 2012. The Claimant submitted that the employees of the Respondent had operated without a CBA since 2010 after the previous CBA expired. It was submitted that the situation obtaining is unfair labour practice and should be halted by the Court through the grant of the prayers sought. The Claimant submitted that the level of representation was never an issue before the Court and that the Respondent is thus estopped from raising the issue and that the only competent for the Respondent to raise is whether or not the collective bargaining agreement forwarded to it for signature corresponds with the award or decree of the Court. The Claimant submits that the Respondent has not raised such an issue in any forum. The Claimant submitted that the orders sought have not been sought by either the Claimant or the Respondent before and therefore the notice of motion cannot be *res judicata*. The Claimant submits that the minutes attached to the replying affidavit sworn in response by the Respondent where prepared by the Respondent's officers and there is no evidence that the officers of the Claimant alleged to have attended did indeed attend. The Claimant submitted that the Court should disregard the minutes as they were one sided, unreliable and not credible. The Claimant submitted that the Court has the power to grant the orders sought under Section 12 of the Employment and Labour Relations Act, Act no. 20 of 2011 as amended in 2014 and that further, the Court has power to grant execution of the decree in terms of Section 13 of the Employment and Labour Relations Act, Act no. 20 of 2011 as amended in 2014 as read with Order 22 Rule 28(5) of the Civil Procedure Rules. The Claimant submitted that it was necessary that the orders sought are granted to bring to an end continued abuse of the Court process and infringement and abuse of the labour rights of the members of the Claimant by the Respondent. The Claimant urged that the notice of motion dated 19th November 2015 be allowed with costs to the Claimant.

5. The Respondent in submissions filed on 11th March 2016 stated that the attempt to join the director of the Respondent to these proceedings was done in bad faith and intended to embarrass the Respondent as the director named was not in office at the material time. The Respondent submitted that the Claimant/Applicant seemed desirous of executing the Court decree through short cuts by citing the Respondent and the director for non-cooperation in the completion of the parties CBA when the Claimant is aware that it was responsible for the inclusion of non-unionisable staff contrary to discussions and understanding. The Respondent submitted that from the deposition of Zacharia Achacha in paragraph 5 of the supporting affidavit, the issue in dispute seems to be that the Claimant prepared a new version of the CBA and that the Respondent did not agree to its terms nor sign and/or register the said CBA. The Respondent submitted that the Claimant was seeking orders in respect of a collective bargaining agreement that has neither been concluded nor signed by parties to the said agreement. The Respondent submitted that the Court is

mandated to register a validly negotiated and concluded agreement in compliance with the requirements of Section 59 and 60 of the Labour Relations Act 2007. The Respondent submits that the Court may not be in a legal position to issue the declarations sought as there is no duly signed CBA capable of being enforced. The Respondent submits that the prayers sought cannot be granted as the pre-court procedures regarding negotiations of CBA as provided for under Sections 57 and 58 of the Labour Relations Act have not been complied with. The Respondent submitted that if the draft agreement authored by the Claimant Union is executed in the current format, the Respondent's employees will suffer underpayment. The Respondent did not dispute that the employees cannot enjoy the terms of the collective bargaining agreement in dispute as these terms were inferior to the current terms being enjoyed by the employees of the Respondent. The Respondent submitted that the Claimant seeks to challenge the authenticity of the meetings held yet it participated in the convention of the meetings and ongoings at the said meetings. The Respondent submitted that the Claimant has not laid out a basis for the grant of the orders sought against the Respondent and the director. The Respondent submitted that the application is misconceived and misplaced and is only fit for dismissal with costs to the Respondent.

6. The dispute before me is the conclusion and registration of a CBA. The Labour Relations Act 2007 sets out the steps in the process. Sections 59 and 60 provide as follows:-

*59.(1) A collective agreement binds for the period of the agreement –*

*(a) the parties to the agreement;*

*(b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or*

*(c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.*

*(2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer association.*

*(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.*

*(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 Industrial Court and shall be effective from the date agreed upon by the parties.*

*60. (1)Every collective agreement shall be submitted to the Industrial 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 for registration.*

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

*Industrial Court as specified in subsection (1), the trade union may submit it.*

*(4) The Industrial 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 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 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 –*

*(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 Industrial Court; and*

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

7. The steps that have to be taken by the parties before me are to sit and negotiate a Collective Bargaining Agreement. It has never been nor can it be the responsibility of the Court to set the terms of the Collective Bargaining Agreement. The Collective Bargaining Agreement for 2012 ought to have been concluded ages ago. It is notable that the parties have been engaged in litigation since 2012 and have expended large sums of money to undertake this as well as energy and focus. This is misguided. I will order as follows to save them from further litigation. Parties should present within 30 days a validly negotiated Collective Bargaining Agreement to cover the period 2012-2014. The law is clear as to who the Collective Bargaining Agreement covers. Should parties fail to agree on any term or issue they should approach the relevant Ministry and obtain conciliation before coming to Court. In industrial relations, the Court is the final arbiter yet parties seem to revel in Court battles that do not resolve the issues they need resolved. The joinder of the director in this application was misplaced and not merited at all. In the application before me no proper application for joinder was made and therefore it was wrong to include him in the suit. There were no orders sought to this end and therefore I strike out his name from these proceedings. A warning is issued to the Claimant that next time, the striking out will come with additional consequences such as costs and damages for such unlawful joinder.

8. In the final analysis I order as follows:-

1. The parties to negotiate and conclude the Collective Bargaining Agreement for 2012-2014 within 30 days
2. In case of disagreement matter to be referred to the Minister in charge of labour
3. Each party will bear their own costs.

Orders accordingly.

**Dated and delivered at Nairobi this 12th day of May 2016**

**Nzioki wa Makau**

**JUDGE**