



**REPUBLIC OF KENYA**

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

**CAUSE NO. 183 OF 2016**

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

**VERSUS**

**KENYA NATIONAL LIBRARY SERVICE ..... RESPONDENT**

**JUDGEMENT**

1. Issue is dispute – failure and or refusal to fully implement a Collective Bargaining Agreement registered as RCA No. 293 of 2013.

2. The Claimant is a registered trade union while the Respondent is a state corporation established in 1965 by Cap 225 and regulated by State Corporations Act, Cap 446. The parties have a Recognition Agreement pursuant to which several Collective Bargaining Agreements (CBA) have been concluded. The last CBA covered 1<sup>st</sup> July 2010 for 2 years and was registered with the court on 20<sup>th</sup> December 2012 under RCA No.293 of 2013.

3. In the July 2014 payroll, the Respondent partly implemented the CBA by paying salaries, house allowance and new rate for all other allowances; arrears for 2010-2011 on basic salary, house, hardship and bicycle allowances in July 2014 payroll. The Claimant made effort to have the CBA implemented in full to no avail. Such has agitated employees to a point of seeking industrial action against the employer but he Claimant has dissuaded them and brought this to the attention of the Minister. As the delay in full implementation of the CBA is ongoing, the Respondent services are being devolved to county government in line with Article 11(1) and (2) (a) of the constitution. The County government will not shoulder the liabilities of the respondent.

4. Section 59 of the Labour Relations Act, a CBA is binding parties to it and the employment contracts are subject to the CBA terms. The CBA is enforceable and should be implemented upon registration. The CBA between parties herein was never fully implemented leaving the Respondent in arrears totalling to Kshs.66 million for the 2012 to June 2014.

5. The claim is for;

*a. A declaration that the Respondent refused to fully implement CBA registered RCA No.293 of 2013;*

*b. An order directing the Respondent to pay the balance in arrears of Kshs.66 million within 14 days from the date of the order of the court;*

*c. An order directing the Respondent to bear costs of the suit; and*

*d. Any other relief the court may deem appropriate.*

## **Defence**

6. In defence the Respondent case is that the CBA between the parties covered 1<sup>st</sup> July 2010 to 30<sup>th</sup> June 2012 as registered with the court in RCA No.293 of 2013. At the negotiations state 2010 to 2012 both parties noted that guidance would be obtained from the national Treasury for technical guidance and approval from the Salaries and Remuneration Commission (SRC) a body that harmonise financial obligations of state organs in matters of remuneration. This slowed down negotiations and the Claimant reported a dispute that was resolved. The Claimant also advised its members against industrial action as they understood the situation obtaining after registration of the CBA and that the Respondent had to apply for and seek to obtain financial allocation from the national Treasury for purposes of implementing the financial obligations in the CBA.

7. The defence is also that the Respondent submitted the unsigned CBA to the Minister and SRC for concurrent, guidance and advice for implementation. In September 2013 the court directed parties to sign the CBA and present it for confirmation and registration. The Respondent put the implementation of the CBA on hold pursuant to government directive on freeze on pay adjustment as captured by National Treasury Circular No.17/2013 Ref No.ES 1/1 3H(12).

8. The Respondent factored in the 2010-2012 CBA financial implication during the preparation of the 2014/2016 budget that was submitted to the Minister but no funds were available to implement the CBA. Treasury was not able to allocate funds to the Respondent as Parliament had already approved the annual budget. Despite the challenges, the Respondent was able to partially implement the CBA on 1<sup>st</sup> July 2014 as follows;

- a. New salary, house allowance and all other allowances;
- b. Arrears for 2010-2011 on basic salary, house allowance, Hardship and bicycle allowances;
- c. Total arrears paid Kshs.15,953,637.60 and a balance of Kshs.66,347,316.00 is admitted as not paid;
- d. The arrears for 2011-2014 amounting to Kshs.66,347,316.00 has not been paid as the Respondent has not been unable to get funding towards the 2014-2015 recurrent expenditure to facilitate the payment.

9. The defence is also that the Respondent has not refused to fully implement the 2010-2012 CBA but its hands are tied by conditionality put by national Treasury from where it receives funds. Treasury is aware of the Respondent workers plight as funds are waited to implement the CBA to the full. The Claimant has not demonstrated that the Respondent has received the funds and failed to channel these to its members account to meet the CBA. There is good industrial relations between the parties and the Claimant has been patient with the respondent.

10. The Respondent pray that the court should find that the failure to fully implement the CBA registered as RCA No.293 of 2013 is not as a result of refusal by the Respondent to implement, but occasioned by statutory, constitutional and financial constraints and the claim should be dismissed.

## **Submissions**

11. Both parties filed their submissions and reiterated their pleading. The Claimant submit that upon registration of the CBA subject of proceedings herein RCA No.293 of 2013, the Respondent through its line ministry was not able to obtain funds for the 2013/2014 financial years and implementation of the CBA was put on hold until revised budget for 2014/2015. In the subsequent budgets, the Respondent has not submitted any document or budget submitted to include the CBA arrears. The implantation of the CBA for July 2010 to June 2012 had been planned to be paid as follows;

Financial year 2010/11 Kshs.15, 953,637.60;

Financial year 2011/12 Kshs.25, 597,339.02;

Financial year 2012/13 Kshs.20, 374,988.60; and

Financial year 2013/14 Kshs.20, 374,988.60.

12. Only one instalment was paid for the financial year 2010/11. The balance of kshs.66, 347,316.10 remains unpaid. This amount is admitted as unpaid by the Respondent and with the Respondent functions being part of what will be devolved, the national treasury will no longer budget for the dues.

13. The Respondent submit that while the parties were negotiating the CBA 2010/2012 the technical guidance and approval of treasury and SRC was sought. SRC give guidance on the ability of an entity to implement financial agreement and the national treasury must make the fiscal allocation to the entity in the relevant financial year so as to meet its obligations including the implementation of the CBA. The Respondent has not refused to implement the CBA as no funds have been allocated through the various financial years. The national treasury also issued Circular No. 17/2013 Ref. No.ES 1/13H (12) that froze pay adjustment which constrained the Respondent in its efforts to implement the CBA. The Respondent has however made effort to partially implement the CBA and a balance of Kshs.66, 347,316.00 is outstanding.

### **Determination**

14. Section 57(1) of the Labour Relations Act requires in mandatory terms, among other things, that an employer that has recognised a trade union should conclude a CBA with the recognised union setting out the terms and conditions of service for all unionisable employees covered by the recognition agreement as held by the Court of Appeal **Teachers Service Commission versus Kenya National Union of Teachers & Others [2015] eKLR**. Once there is such a CBA, section 59 makes it binding all parties to the agreement; and should be incorporated in the contract of employment of every individual employee covered by it and is enforceable and should be implemented upon registration with the court. The CBA must be submitted to the Court pursuant to the provisions of section 60 of the Labour Relations Act to the court to assess the CBA compliance with the law and the constitution. The purpose of section 60 is therefore crucial here as before registration of the CBA, the court must be certified that it is not in conflict with any other law or if it does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister responsible for labour matters. See also **Moses O Sigu versus Royal Garments Industries EPZ Limited, Cause No.83 of 2014** and the court also in **KUCFAW versus Corn Products Kenya Limited, Cause No.1302 of 2012** held that;

*Upon its registration with the court, a CBA becomes a binding agreement for its duration and based on its legal force, it is enforceable. Before parties to it can rely on any other document, the CBA becomes the primary document of reference.*

15. It is common cause here that the Respondent admit that the claimant's claim is correct save that they are not unwilling to pay the CBA arrears for 2010-2012 period due to financial dependence upon the line ministry and the national treasury. Such non-payment of arrears are admitted at Kshs.66, 347,316.10. The Respondent has made efforts to pay dues owing to the Claimant but due to the national treasury not allocating funds over the years, they are unable to make further payments.

16. However, a legal and fundamental step of the CBA has taken effect. Sections 57(1) and 59(5) of the Labour Relations Act have taken effect. The Court has since registered the CBA vide RCA No.293 of 2013 giving the CBA its legal force for enforcement. The CBA 2010-2012 is binding on both parties and failure to implement any of its part, the wrongly party has a remedy of seeking specific performance as this is an enforceable contract in law.

17. Where the Respondent is unable to pay due to acts of a third party such as the national treasury, the

line ministry or as the case may be, upon the suit by the claimant, nothing prevented the Respondent from joining any such party/parties herein so as for them to bear responsibility of the owing dues. Therefore, by the admission of knowledge of the owing dues, the claim is hereby confirmed.

**Judgement is entered for the Claimant against the Respondent for specific performance of the terms of the 2010-2012 CBA;**

**a. The Respondent shall fully implement the CBA 2010-2012 and pay the outstanding amounts kshs.66, 347,316.10; and**

**b. Noting the good labour relations existing between the parties the Respondent has ninety (90) days to fully implement the CBA of 2010-2012.**

**Orders accordingly.**

Dated and delivered in open court at Nairobi this 19<sup>th</sup> day of July 2016.

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Lilian Njenga

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