



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISC. NUMBER 13 OF 2016

BANKING, INSURANCE & FINANCE UNION (K).....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

RULING

1. By a Motion dated 9th February 2016 the applicant sought the following orders among others:-
 - (a) That the Court be pleased to issue temporary orders stopping the Respondent from issuing the new Appointment letters until the trade dispute which has been reported to the Cabinet Secretary by the Applicants is settled by the conciliator and or this Honourable Court.
 - (b) That the Court be pleased to issue orders compelling the respondents to revoke all new appointment letter already issued to their employees until this Application is heard and determined inter-partes.
2. When the matter came up ex parte on 10th February, 2016, the Court granted prayer 2 of the Motion pending interpartes hearing.
3. On 25th February, 2016 the Court after receiving representations by the parties directed that they could attempt consultations with a view to amicably resolving the dispute. Further on 5th April, 2016 the Court directed that the applicant do point out the alleged fourteen clauses in the letters of appointment which it found offensive and reasons therefor and the respondent makes comments thereon and if possible thereafter reach an amicable settlement. This apparently did not find favour with the parties. Instead the parties opted to file submissions on the application itself.
4. Mr. Kubai for the applicants on his part submitted that terms on the letters of appointment cannot be altered or varied. They remain lifelong relationship document of reference between the employee and the employer. However in the event that there is need for variation, Mr. Kubai submitted that section 10(5) of the Employment Act required that the amendment be done after consultations between the employer and the employee. This requirement according to counsel was mandatory and was given constitutional strength under article 259(11) of the Constitution.
5. According to Counsel, despite the commitment to the employees that they would transfer KCB Bank Kenya Ltd with existing terms and conditions of employment; the respondent reneged on that commitment by issuing new letters of employment to all employees including unionisable employees

which introduced new clauses and amended some of the existing clauses and in total the new letters of employment had 26 clauses almost double the existing letters. In total 14 paragraphs are extraneous and contentious and have no place in the letters of employment but to the parties Collective Bargaining Agreement as they touched on negotiable items. Mr. Kubai further submitted that although section 10(5) of the Employment Act permits changes after consultations, with the employee in this case this was not necessary since the same were issues that are directly taken care of in the Collective Bargaining Agreement. In this respect the consultation if were to take place would be between the employer and each individual employees or their agent which was the union.

6. Mr. Kubai further submitted that since conciliation on the issues in dispute concluded and the conciliation report recommended the parties to consult on issues of the amendments to the letters of employment and the Court further encouraged further consultation between the parties, the applicant was surprised by the respondent's defence of the changes without consultations and pray that the application be dismissed.

7. Mr. Kiche for the respondent on their part submitted the Respondent's Group Human Resource Director on several occasions held consultative meetings with the Central Staff Committee (CSC) who were given every opportunity to query issues regarding the terms of the draft letter of employment. The Central Staff Committee suggested various amendments to the draft letters which were incorporated by the respondent to the satisfaction of the Central Staff Committee. According to Counsel, the Central Staff Committee serves as the representative of Respondent's employees in the Union. It is a creature of the recognition agreement between the Kenya Bankers Association and the applicant. Central Staff Committee was a consultative body with the authority to enter into negotiations with the Respondent on terms and Conditions of the employment of the Respondent's employees.

8. According to Counsel, there was therefore proper consultation on the amendments to the existing letters of employment. This was evidenced by the number of consultative meetings held between the respondent and Central Staff Committee members particulars of which well set out and evidence attached to the Replying Affidavit of Paul Russo filed on 2nd March, 2016.

9. Regarding section 10(5), the respondent submitted that the section does not mandate it to consult the claimant in respect to any changes to letters of employment or contracts of employment. Further, the additional clauses were not in any way prejudicial to the employees. They would not in any way lead to economic strangulation of the affected employees, create any form of job insecurity and deprive the employees of any of its rights guaranteed by the law. Mr. Kiche further submitted that the Collective Bargaining Agreement and the previous contracts of employment had not estopped it from introducing additional clauses in the letter of employment.

10. Trade Unions exist for purposes of agitating and bargaining for better terms and conditions for their members. The negotiations are usually carried pursuant to a recognition agreement. Section 2 of the Labour Relations Act define a recognition agreement as an agreement in writing between a trade union and employer regulating the recognition of the trade union as the representative of the interest of unionisable employees employed by the employer.

11. Pursuant to the recognition agreement, unions and employer usually negotiate Collective Bargaining Agreements. A Collective Bargaining Agreement is defined by the same section 3 of the Labour Relations Act as a written agreement concerning any terms and conditions of employment made between a trade union and an employer.

12. The applicant in this matter has a recognition agreement with the respondent. It also has an existing Collective Bargaining Agreement with the same. Their concern is that certain changes are about to be made by the respondent in their member's letters of employment which they are worried could be prejudicial to their members. They demand to be involved before the letters are implemented. This is within their right as a collective representative of their members in the respondent's employment. The Central Staff Committee though may have the mandate to negotiate on behalf of the respondent's employees, their bargaining power may not be as probing and free of any potential backroom pressure.

The applicant as union is better placed to negotiate this matter on behalf of its members.

13. I have reviewed the point of contention in this application and I am convinced as I was before that the point of variance between the applicant could be perceptible and out of suspicion that some could be overlooked if the applicant is not consulted on behalf of its members. As a union it has over the years registered and concluded Collective Bargaining Agreements on behalf of its members. Collective Bargaining Agreements are all about terms and conditions of employment which is essentially the content of the disputed letters of appointment. The applicant would not be asking too much to ask that they be consulted before the implementation of the said letters of employment.

14. In the circumstances the Court allows the application and directs that the points of contention be submitted to the Cabinet Secretary concerned for conciliation prior to implementation. The Court in the circumstances stays these proceedings pending the outcome of the conciliation by the Cabinet Secretary. Ministry of Labour. Either party be at liberty to apply thereafter.

15. It is so ordered.

Dated at Nairobi this 9th day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 9th day of September 2016

In the presence of:-

.....for the Claimant

and

.....for the Respondent.

Abuodha Jorum Nelson

Judge