



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.128 OF 2015**

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION.....CLAIMANT

VERSUS

SIRET TEA CO. LTD

KAKUZI LTD (Kaboswa Estate),

EASTERN PRODUCE (K) LTD.....RESPONDENTS

**JUDGMENT**

This matter was brought to court vide a Memorandum of Claim dated 21st April, 2015. The issue in dispute is therein cited as;

*“Wages, Redundancy and Gratuity.”*

The respondent in a Respondent's Memorandum of Defence and Counter-claim dated 15th July, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that the parties hereto have entered negotiations for review of the 2013-2015 Collective Bargaining Agreement (CBA) – Appendix 2 and 3 are the proposals and counter-proposals of the parties. They have now agreed on all also except the three items the dispute of this suit.

- i. Wages
- ii. Redundancy and
- iii. Gratuity

It is the claimant's case that the issues in contention were referred to the minister who in turn appointed a conciliator but again, no agreement or conclusion was made on the three contentious issues. She puts it as follows;

1. Wages- The claimant has proposed to increase wages in the first year by 22% and also 22% in

*the second year applicable on the current employees wages based on economical factors that CPI, productivity and wage differentials and has herewith filed a comprehensive economic paper (see "Appendix 9" attached herewith).*

*2. Redundancy- Redundancy is the loss of employment at no fault of the employee because of this the union prays for 26 days per each completed year of service to cushion employees from the adverse effects brought about by the loss of employment at no fault of their.*

*3. Gratuity- The claimant has proposed to increase 21 days to 26 days service pay in recognition of the continuous and meritorious service rendered to the respondent company by the employee.*

She therefore prays for;

*13. That, wages be increased by 22% for the year 2014 and 22% for the year 2015 with effect from the effective date of the CBA.*

*14. That, redundancy days is be and is hereby reviewed to 26 days pay for each completed year of service.*

*15. That, gratuity days is be and is hereby reviewed to 26 days pay for completed year of service.*

*16. That, costs of suit.*

The respondent denies the claim and the claimant's demand for the orders sought as follows;

*i. The claimant union's demand for a 22% percentage wage increment per annum totaling 44% over 2 years, a provision for gratuity and an increase in the rate of severance pay calculation to 22 days in the 2014-2015 CBA is unreasonable, unjustified and unlawful.*

*ii. The claimant failed, neglected and/or refused to consider the submissions made by the respondents during the 2014-2015 CBA negotiation meetings held between the parties as well as the subsequent conciliation meetings that arose.*

*iii. The respondents are unable to afford the high percentage wage increases and benefits demanded by the claimant union. The respondents are price takers and are unable to predict market prices and consequently their economic fortunes. Further the tea industry has suffered increased production costs and taxes whilst the price of tea has remained low. The introductions of the NSSF rates provided in the NSSF Act will also increase its labour costs.*

*iv. The claimant is not entitled to the orders sought herein.*

The respondent denies the claim and further denies that the claimant is entitled to the orders sought. She further repudiates the respective claims of 22% increase of wages for 2014 and 2015 as unreasonable and supports her offer of 7% for the respective years. This is based on real economic factors as follows;

*i. The annual wage increment since 2009 has been between 10%-12%. The respondents aver that this incremental level is unsustainable and has resulted in increments which have been well above the inflation level. It is the case that since 2009 inflation has totalled 43.7% whilst the agreed wage increments up until and inclusive of 2013 has been 54%. These cumulative increments have placed the respondent at a significant competitive disadvantage. If the labour costs continue to increase, the respondent's business will in the long run be unsustainable and the respondent may be forced to undertake redundancies and mechanize; a position which would lead to more fundamental economic hardships due to creating significant unemployment in the rural economy. Economically, having higher labour costs resulting from substantive wage increases would make the business commercially unviable. The overall wage bill has increased from 39% of the production costs in 2011 (1.2 billion shillings) to 53% in 2013 (1.6 billion shillings)*

ii. In addition, the union has failed to take into account that the general wage increases that have taken place over the years were awarded without due regard to any productivity improvement of the respondents tea yield. The amount a plucker is expected to pluck per day has remained at 33Kg for at least for last 30 years. However the respondents have improved their tea plantations so that the number of bushes per hectare, the yield per bush and lowering the plucking standards has increased and thus a plucker would be able to pluck more tea than they did 30 years ago in far less time. The respondent therefore avers that the issue of productivity which was set at a time before modernisation of the industry should be reviewed appropriately and incorporated henceforth within the 2014/2015 CBA.

iii. In addition to the competitive salaries the employees are paid they also enjoy benefits such as free housing, water, medical care, schooling and other social amenities. These benefits are extended to the employee's dependants. This has resulted in a less competitive industry than would otherwise be the case. The personnel required to support all these additional benefits is substantial and has the effect of increasing the respondent's number of employees thereby escalating the labour costs.

iv. The respondent states that the new NSSF Act No.45 of 2013 also proposes to raise both the employee and the employers' contributions. The net effect of these increments is to increase the cost of employment for each employee by 4%. These enhanced NSSF contributions can be considered as constituting a constructive wage increment in its own rights.

v. Further, there has been a drastic decline in tea prices. In particular, the price of tea in 2014 fell to, at or below the costs of production.

The respondent further avers that there is no automatic right to a wage increase under the Employment Act, 2007 and that the offer of 7% is made in good faith considering that the cost price of tea prices are below the costs of production. Further, the court has no jurisdiction to award and impose any wage increase that would be higher than the statutory minimum agricultural wage taking into account that the claimant's wages are substantially higher than the statutory minimum agricultural wage and other agricultural sector employers and again any increase in basic wages will have a knock on effect on other benefits such as gratuity payments, leave, sick off and overtime rates thereby escalating labour costs.

It is the respondent's case that in the alternative, the court ought to take into account factors of affordability, comparability, productivity, cost of living and most importantly long term sustainability in arriving at a scientific basis for its decision.

She proposes and offers award of the contested items as follows;

On redundancy

Current- 18 days

Proposed – 26 days

Offered – 19 days

Employment Act – 15 days

On gratuity

Current- 21 days

Proposed (claimant) - 26 days

NSSF increased from Kshs.200.00 to Kshs. 360.00

It is their further argument and position that continued gratuity would duplicate cost to employers and should be done away with.

*6.3 The respondent's propose that upon the commencement of the new NSSF Act No. 45 of 2013, the provision of gratuity shall cease to exist and consequently the gratuity clause in the CBA shall be voided. However, employees that will have qualified for gratuities at the effective date of the new Act will be paid in accordance to the outgoing CBA 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 any of the respondent companies.*

The respondent contends that the parties have been unable to agree on the three (3) aforementioned issues largely due to the union's unreasonableness and failure to negotiate and amicably settle the matter.

The respondent further makes a counter-claim in the following manner;

*9. The respondent repeats the averments above and claims a wage increase of 7% for 2014 and a wage increase of 7% for 2015 in the 2014 -2015 CBA between (?).*

*10. The respondent also seeks deletion of clause 36 of the CBA 2012-2013.*

She in the penultimate prays as follows;

*10.1 An order that the wage increase for the Collective Bargaining Agreement for the period 2014-2015 be set at a rate of 7% for 2014 and 7% for 2015.*

*10.2 An order that the pluckers' monthly productivity rate be set at 915 Kgs for the Collective Bargaining Agreement for the period 2014-2015 under Appendix "B" in respect of hand pluckers by inserting the phrase "A hand plucker will be paid a monthly salary subject to an employee plucking 915 Kgs per month. Any Kgs in excess of 915Kgs per month will be paid at a rate that is determined by dividing the monthly rate for a general worker by 915Kgs."*

*10.3 An order that clause 31 (g) of the 2012 -2013 CBA relating to redundancy be amended to read that "An employee declared redundant shall be entitled to 19 days' pay for each completed year of service."*

*10.4 An order that clause 36 of the 2012-13 CBA relating to gratuity be henceforth deleted and removed from the Collective Bargaining Agreement for 2014-15. Clause 36 be replaced with the following wording: "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 the CBA of 2012-3 CBA will be paid their accrued gratuity dues in accordance with the terms of clause 32 of the 2012-2013 CBA before the implementation date of the 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"*

This matter came to court variously until the 1st August, 2016 when it was heard *inter partes*.

At the hearing, the claimant chose to rely on the documents on record; these are the Memorandum of Claim dated 21st April, 2015, list of documents dated 6th December, 2015 but which ought to be 1st August, 2015. She only introduced her case.

The respondent opted for calling of evidence and called three witnesses who testified as follows;

DW1- Seth Omondi Gor duly sworn testified that he works for the University of Nairobi as Senior Lecturer at the School of Economics. He holds a Phd on the subject.

DW1 further testified that he has prepared reports on this matter and these are dated 25th February, 2015 and 25th March, 2015 which he adopts as evidence in this cause. It was his further testimony that in assessing wages one looks at the factors of changes in inflation, productivity, ability to pay and trend in the sector on industry.

The witness again testified that the rationale of looking at inflation from month to month is to afford sufficient time to establish the trend. The unions formulae at page 112 of the claim is inaccurate as inflation cannot be estimated for purposes of determining wages as here, one needs to establish the trend in the cost of living. It would also be necessary to do this on a month to month basis for twelve months. The claimant's formulae is based on a monthly inflation which is not good.

The witness testified that at page 16 of his economic paper of 26th March, 2016 indicate a 43.7% increase in inflation from 2009 to 2013 whereas wages increased by 54%. The workers were therefore adequately compensated against increment in the cost of living.

It was the witness's further testimony that the operations of the respondent are labour intensive and that percentage of labour costs vis-à-vis production as follows;

2013-2014 – Labour costs 55%

2011- 39%

2014 – 41%

He testified that the respondent is disadvantaged by virtue of being a price taker and can only take prices as dictated by the market continues increase in wages would have the respondent collapse in six years unless there were corresponding increase in productivity to cater for eventual losses.

In cross-examination the witness admitted knowledge of the respondent's offer of an increment of 7% and 8% respectively for 2014 and 2015 but denied that this had any relationship to his report. His report was done earlier and is based on ability to pay. His evidence therefore demonstrates a situation of inability to sustain any further wage increase by the respondent.

DW2, Dr. Kiprono Bor testified that he is an expert in Agricultural Economics. His testimony is that due to scientific improvements in tea husbandry the tea yielding plucking of 33Kgs per day had been rendered irrelevant and uneconomical. It was his evidence that this should be reviewed so that pluckers would be required to have an increase daily plucking rates as this had been enabled by the respondent. He recommended an increase to 42-45 Kgs a day the absence of which the employer was losing by 10Kgs per day.

DW3, Bernard Kiprotich Kipkoech testified that he had been involved in CBA negotiations with the claimant. It was his further testimony that the issues involved here are disability to pay due to increased production costs. He also testified that the workers benefit from free housing, water, medical and subsidized food prices besides offer of gardens. The challenges of the respondent comprise of high electricity cost, price taking, levies and direct and indirect taxes. He also testified that this stalemate was as a consequence of the claimant's lack of co-operation.

The claimant's as earlier stated did not call any witnesses but chose to rely on their pleadings.

The respondent in their written submissions dated 7th November, 2016 reiterates their case and pray that their defence be sustained.

This matter comes out in a series of other similar matters heard and determined by this court in recent times. These are **Kenya Plantation & Agricultural Workers Union V Unilever Tea (K) Limited (2016) eKLR**, **Kenya Plantation and Agricultural Workers Union V James Finlay Kenya Limited (Finlay Flowers) (2016) eKLR**, and **Kenya Plantation and Agricultural Workers Union V Kenya**

**Tea Growers Association (KTGA) (2016) eKLR.** I call it a series because the issues raised by the parties are alike and so are the parties and their sectors of economic operation. These matters touch on the economies of large scale tea and flower production and trade. Again, the same counsel are shared and manage the prosecution of all these causes. It is no wonder that the submissions of the respondents in the present suit are just a replication in substance of submissions presented in the earlier suits as above cited.

The parties in this case also rely on almost similar pleadings and evidence. The expert evidence relied on by the respondents is the same and largely propels around the evidence and economic propulsions and theorems of DW1 – Dr. Seth Omondi Gor. It is therefore not necessary to delve into the analysis of the evidence and rationale of this matter, the same having been largely explored in the above cited authorities. This is because this would not add value to these proceedings and would at the end of the day amount to nought. I therefore wholly adopt the reasoning in the above cited authorities and again come out with a case in favour of claimant. On the same footing and rationale, the respondents counter-claim is dismissed for want of legal basis and sense.

I am therefore inclined to allow the claim and order relief as follows;

i. Wages

- Unionisable Staff: 2014-15%
- Unionisable Staff: 2015-15%

ii. Redundancy: 20 days salary for every completed year of service.

iii. Gratuity: 21 days salary for every completed year of service.

iv. The respondent be and is hereby ordered to implement the terms of this judgment within thirty (30) days.

v. That each party shall bear its own cost of the claim.

**Delivered, dated and signed this 14th day of November 2016.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Khisa for the Claimant Union.
2. Mrs. Opiyo instructed by Kaplan & Stratton for the Respondent.