



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 52 OF 2014

**KENYA COUNTY GOVERNMENT WORKERS UNION (previously the
Kenya**

Local Government Workers Union) Uasin Gishu Branch

1ST CLAIMANT

**CHAIRMAN, SECRETARY & TREASURER OF THE KENYA
COUNTY**

**GOVERNMENT WORKERS UNION, UASIN GISHU COUNTY BRANCH
CLAIMANT**

2ND

v

**ELDORET WATER AND SANITATION CO. LTD
RESPONDENT**

JUDGMENT

1. The Kenya County Government Workers Union (previously the Kenya Local Government Workers Union), (the Union) and 2 others instituted legal proceedings against Eldoret Water & Sanitation Co. Ltd (Respondent) on 6 March 2014 seeking
 - a) A declaration that the continued refusal of the respondent to implement the Collective Bargaining Agreement dated 1st September 2012 and registered in court on the 7th February 2013 in Nairobi is unlawful, irregular and illegal.
 - b) An order directing the respondent to comply and implement in full the provisions of the Collective Bargaining Agreement dated 1/9/2012 and registered in court on the 7th February 2013.
 - c) An order directing the respondent to pay all the salary arrears, allowances arrears, and benefit arrears arising out of the implementations of the collective bargaining agreement dated 1st September 2012 and registered in court on the 7th February 2013.
 - d) An order of costs against the respondent.
 - e) Any other and/or just relief this honourable court shall deem fit and proper to grant.
2. The Respondent filed its Response and List of Documents on 24 March 2014.

3. On 3 November 2014, the Union filed a Supplementary List of Documents.
4. The Cause was heard on 13 October 2014, 28 October 2014, 3 November 2014 and 11 November 2014. The Union filed written submissions on 19 November 2014, while the Respondent filed its submissions on 28 November 2014.

Union's case

5. On 5 June 2000, the Municipal Council of Eldoret entered into an agency agreement for the provision of water and sanitation services with the Respondent. The agency agreement provided at clause 9 that the Respondent would absorb all the workers in the Water and Sewerage Department of the Municipal Council of Eldoret and that the absorbed workers were at liberty to join a union of their choice.
6. On 31 July 2002, the Industrial Court registered a Collective Bargaining Agreement between the Association of Local Government Employers and Kenya Local Government Workers Union. Similar Collective Bargaining Agreements were signed by these two parties on 24 November 2005 and on 9 April 2010.
7. On 19 October 2010, after a meeting held on 4 October 2010, the Union and the Respondent signed an agreement confirming that the Respondent would abide by and implement the terms and conditions in the Collective Bargaining Agreement agreed with *the Local Government Sector*.
8. On 1 September 2012, the Association of Local Government Employers entered into another Collective Bargaining Agreement with the Kenya Local Government Workers Union. This agreement was registered by the Court on 7 February 2013, but the Respondent has refused to implement it.
9. The Union submitted that the Respondent is contractually and legally bound to implement this 2012 Collective Bargaining Agreement.
10. It was also submitted that the County Government of Uasin Gishu is a member of the Association of Local Government Employers and further that the Respondent was an agent of the Municipal Council of Eldoret (now the County Government of Uasin Gishu).
11. It was further submitted that the Respondent had previously agreed to implement the prior Collective Bargaining Agreements (see letter dated 12 July 2006 at page 71 and agreement signed on 19 October 2010 at page 129 of Claimant's Bundle).

Respondent's case

12. The Respondent on its part contended that it was not an agent of the Municipal Council of Eldoret (and I presume the County Government) but is an independent limited liability company capable of suing and being sued and that any agency terminated with the commencement of the Water Act, 2002.
13. The Respondent also contended that it was not a member of the Association of Local Government Employers and is thus not bound by the Collective Bargaining Agreement of 2012, but is instead a member of Water Services Providers Association.
14. The Respondent also asserted that the Collective Bargaining Agreement of 2012 did not apply to it after the Court in Nairobi Cause No. 14 of 2013 and Nairobi Cause No. 213 of 2010 deleted the phrase '*the council's water companies*.'
15. The Respondent denied having a recognition agreement with the Union and submitted that the Union had declined to sign a recognition agreement with it despite several requests.
16. The Respondent submitted that it is the recognition agreement which creates privity of contract between an employer and a union and that pursuant to section 54 of the Labour Relations Act, it must be in writing. The Respondent cited the case of *Communication Workers Union v Safaricom Ltd* (2014) eKLR for this submission. It further submitted that the Union was only registered in 2013.
17. In similar vein, the Respondent submitted that there was no collective bargaining agreement entered into between itself and the Union and that the 2012 Collective Bargaining Agreement was between parties who were not parties to the present suit.
18. The Respondent also maintained that its employees enjoyed superior terms and conditions of service to those provided for in the 2012 Collective Bargaining Agreement.

19. The Court has considered the pleadings, documents, testimony and submissions tendered by the parties and identified the issues for determination as, *whether the Respondent is/was an agent of the County Government of Uasin Gishu and whether the Collective Bargaining Agreement signed on 1 September 2012 and registered in Court on 7 February 2013 between the Association of Local Government Employers and the Kenya Local Government Workers Union is binding and applicable as between the parties herein.*

Evaluation

Whether Respondent an agent of the County Government of Uasin Gishu

20. The Union contended that the Respondent was an agent of the Municipal Council of Eldoret and by extension the County Government of Uasin Gishu.

21. Rika J had occasion to deal with this question in Nairobi Cause No. 213 of 2010, *Kenya Local Government Workers Union v Water Services Providers Association* and observed that

though water companies are wholly owned by the local authorities; though they remain under boards of directors that include local authorities representatives; and, though they retain principal-agent, parent-subsidiary relationship, they do not have any functional integration with the local authorities. They are managed separately. They are no longer departments of the local authorities... the transferred staff are no longer managed in any way by the local authorities....

22. I wholly endorse the conclusion by Rika J and find that the Respondent was not an agent of the Municipality or the County Government for purposes of industrial relations or employment. It is a body with its own juristic personality.

23. In my view the real issue in dispute is not one of agency but legal succession of juristic persons arising from the radical structural changes brought about by statutory intervention and the Constitution, 2010. I will discuss the question generally under the next issue.

Whether Respondent bound by the Collective Bargaining Agreements between Association of Local Government Employers and the Union

24. This question can be disposed of shortly. It is a question of fact and law. It is more a question of legal succession.

25. The Union and the Respondent have not signed a recognition agreement. At least no such recognition agreement was produced in Court. A recognition agreement is a prerequisite before a Union and an employer or association of employers can enter into Collective Bargaining Agreements.

26. The Union commenced these proceedings as Kenya County Government Workers Union previously the Kenya Local Government Workers Union.

27. This would suggest that the Union was the successor of the Kenya Local Government Workers Union or that the Kenya Local Government Workers Union changed its name to Kenya County Government Workers Union.

28. The Court would assume that the Kenya Local Government Workers Union validly and legally changed its name to Kenya County Government Workers Union and thus the rights and obligations entered into by Kenya Local Government Workers Union survived or devolved to Kenya County Government Workers Union.

29. Similarly, the Court would assume that the Kenya Local Government Workers Union had a recognition agreement with the Association of Local Government Employers, though such agreement was not produced.

30. The Association of Local Government Employers was/is an association of local authorities recognised for purposes of industrial relations under the repealed Trade Unions Act and current Labour Relations Act.

31. The local authorities became defunct after the 2013 general elections. A new constitutional and statutory framework was put in place. It is therefore necessary to examine what rights and

- obligations of the local authorities were saved or survived.
32. It is in the public domain that there were several governance and structural changes brought about after the promulgation of the Constitution 2010. Local authorities were done away with and Counties established instead to succeed them. Various statutes provide for the transition.
33. The transitional provisions in the County Government Act and Transition to Developed Government Act are of no assistance and none of the parties sought to rely on any of them.
34. But there is an interesting provision in the Urban Areas and Cities Act. Section 58 provides

Existing Contracts, etc

Any act, matter or thing lawfully done by any local authority before the commencement of this Act and any contract, arrangement, agreement, settlement, trust bequest, transfer, division, distribution or succession affecting any service delivery, trade of any form, sale or dealings on land or any other matter affecting assets, liabilities or property belonging to a local authority whether moveable, immovable or intellectual property shall, unless and until affected by the operation of this Act, continue in force and be vested in a body established by law.

35. The parties did not address me on which this body established by law is and in any case the Union did not provide any evidence or suggest that the Respondent or in any case that the County Government of Uasin Gishu was a member of the Association of Local Government Employers or that it was a successor of the Municipal Council of Eldoret. This was an issue of fact and law. The factual bit was not proved and the succession bit was not addressed in arguments.
36. Indeed the Respondent advanced an argument that it was a distinct and separate legal entity from the Municipal Council (read the County Government).
37. Both the Constitution and the statutory intervention have fundamentally altered the structure and functions of governance in Kenya. New entities and juristic personalities have been established.
38. Some of these entities and bodies inherited staff from entities which have been dissolved by operation of law.
39. The Respondent herein inherited staff from the Water and Sewerage department of the Municipal Council of Eldoret. At the time there was a binding collective bargaining agreement between the Association of Local Government Employers of which the municipality was a member and the Kenya Local Government Workers Union.
40. Because the inherited employees were already entitled to enjoy the benefits agreed between their union and the employer, the Respondent could not employ them at less favourable terms and conditions of service.
41. In 2013, local authorities were dissolved. To my mind, the Association of Local Government Employers also became defunct and any collective bargaining agreements would run their term but any new collective bargaining agreements had to be entered into afresh by the new employers.
42. The Union therefore needed to enter into new recognition agreements with the new entities created by law or new employers.
43. The Union tried to take solace in the fact that the Respondent has been remitting monthly union dues to it and that the Respondent had committed to implementing the 2012 Collective Bargaining Agreement.
44. Deduction of union dues from an employee's wages and recognition are distinct legal issues. Deduction is based on the philosophy that an employee should freely be able to dispose of his wages and associate with other employees for purposes of collective bargaining/organisation and this has been given statutory underpinning in both the Constitution, the Employment Act, 2007 and the Labour Relations Act.
45. The Union also made extensive submissions over the Memorandum of Agreement of 4 October 2010 in which the Respondent agreed to implement the 2010 Collective Bargaining Agreement.
46. But what the Union missed is that Collective Bargaining Agreements are of a limited duration and that in 2010, the structural changes brought about by the Constitution 2010 were majorly not in place. The local authorities survived until the 2013 General Elections.
47. According to me, the Memorandum of Agreement of 4 October 2010 could only subsist and bind the Respondent during the currency of its 2 year life. The Union cannot rely on it in respect to the

- 2012 Collective Bargaining Agreement which was registered in 2013.
48. I dare say that the right of collective organisation/bargaining is a right of a union and not its employee members individually.
49. I believe I have stated enough and it is time now to conclude this discussion.
50. My finding and which is buttressed by the unappealed decision of Rika J in Nairobi Cause No. 213 of 2010 and Nderi J in Nairobi Cause No. 14 of 2013 is that the Respondent is not a party and cannot be bound by the 2012 Collective Bargaining Agreement.
51. The Respondent has demonstrated that it has been imploring the Union to execute a recognition agreement with it but the Union has been reluctant. The Union did not attempt to explain this reluctance.
52. The present Cause would have not been necessary had the Union taken the path of seeking recognition. As it is, the Union asserted had achieved more than simple majority membership and in light of the changed statutory and constitutional framework recognition should be granted as a precursor to the realization of bargaining/organizational rights.

Conclusion and Orders

53. From the above discussion, the Court comes to the conclusion that the present Cause should be dismissed with no order as to costs on the basis of the anticipated social partnership between the parties.

Delivered, dated and signed in Nakuru on this 13th day of February 2015.

Radido Stephen

Judge

Appearances