Kenya Ferry Services Limited v Dock Workers Union [Ferry Branch]
(Cause 338 of 2014) [2015] KEELRC 1656 (KLR) (22 May 2015) (Award)

Kenya Ferry Services Limited v Dock Workers Union (Ferry Branch) [2015] eKLR

Neutral citation: [2015] KEELRC 1656 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 338 OF 2014

J RIKA, J

MAY 22, 2015

BETWEEN

THE KENYA FERRY SERVICES LIMITED ..... CLAIMANT

AND

DOCK WORKERS UNION [FERRY BRANCH] ..... RESPONDENT

AWARD

ISsues In Dispute:

1. The Claimant is a State Corporation, registered under the *Companies Act* Cap 486 the Laws of Kenya. It offers ferry services. It is owned by the Kenya Ports Authority [20% shareholding] and the National Government [80%]. The Respondent is a registered Trade Union, representing the Unionisable Employees working for the Claimant. The Parties have a Recognition Agreement.

2. This dispute arose after the Parties failed to agree on certain items in their Collective Bargaining on 12th June 2014. The issues in disagreement are recorded in the Deadlock Agreement signed by the Parties before their Joint Industrial Council, on the 12th June 2014. These are:-

    a) Basic salary.

    b) House allowance.

    c) Employment of Casual Employees and Outsourcing.

    d) Overtime pay during Public Holidays.

    e) Extraneous allowance.

    f) Leave travel allowance.

g) Duty allowance.

h) Commuter / Transport allowance.

i) Hardship allowance.

3. The Respondent reported the existence of the dispute to the Cabinet Secretary for Labour on 13th June 2014. The issues remained unresolved after Conciliation. On 22nd July 2014 the Respondent issued a Strike Notice, which compelled the Claimant to approach the Court through the Statement of Claim filed on 23rd July 2014, and amended on 21st August 2014. The Claim is supported by the Bundle of Documents filed on 23rd September 2014. The Claimant sought, and was granted by the Court, an Order stopping the strike. In the main Claim, the Claimant seeks the following Orders:-

a) The intended strike is declared unlawful and unprotected.

b) A declaration that there shall be no strike at Kenya Ferry Services Limited which offers essential services.

c) The Respondent and its Members are restrained from engaging in the unprotected strike.

d) The CBA be concluded in line with the proposals made by the Claimant.

e) The Respondent bears the cost of the suit.

f) The Court grants any other suitable relief.

4. The Respondent filed its Response to the Amended Claim on 22nd August 2014. The Respondent's position in a capsule is that its proposals are reasonable, fair and economically sustainable. Secondly, the right to strike is granted by *the Constitution* of Kenya, and cannot be arbitrarily curtailed. The Respondent relies on its Bundle of Documents filed on the 22nd August 2014.

5. Parties agreed before the Court on the 26th February 2015, to have the dispute determined on the strength of their Pleadings, Documents and Submissions. They confirmed the filing of the Submissions on the 23rd March 2015.

Points of Divergence

a) Basic salary: The Claimant proposes an increment of 10% across the board. The Respondent counter-proposes 50% increment across the board.

b) House allowance: The Claimant proposes Kshs. 18,000 for grade FU1; Kshs. 16,000 for grade FU2; Kshs. 14,000 for grade FU3; Kshs. 12,000 for grade FU4; and Kshs. 10,000 for grade FU5. The Respondent counter-proposes Kshs, 28,000, Kshs. 25,000, Kshs. 22,000, Kshs. 20,000 and Kshs. 18,000 for the respective grades.

c) Casual employment and Outsourcing: The Claimant holds these are part of its managerial prerogative. Employees on casual terms will only be absorbed subject to the availability of vacancies and through competitive recruitment. The Respondent demands Outsourcing ceases, and all Employees engaged on permanent and pensionable terms. Employees engaged on contract or casuals doing work of unlimited duration should be absorbed on permanent terms.

d) Overtime pay during Public Holidays: The Claimant proposes Employees working during Public Holidays are compensated double time, while the Respondent counter-proposes overtime compensation at double time plus half.

e) Extraneous allowance: The Claimant offers 30% of the basic salary, while the Respondent seeks 40% of the basic salary.

f) Leave travel allowance: The Claimant offers Kshs. 14,750 for FU1 and FU2, Kshs. 14,250 for FU3 and FU4, and Kshs. 13,750 for FU5. The Respondent seeks Kshs. 60,000, Kshs. 55,000, and Kshs. 50,000 for the respective grades.

g) Duty Travel Allowance: Under subsistence, the Claimant offers Kshs. 2,600 to FU1 and FU2, Kshs 2,400 for FU3, FU4 and FU5. The Respondent asks for Kshs. 4,300 for FU1 and FU2, and Kshs. 3,800 for FU3, 4 and 5. Under daily transport the Claimant is ready to pay Kshs. 900 to FU1 and 2 and Kshs. 600 to FU3, 4 and 5. The Respondent Union counter-proposes this item at Kshs. 1,900 for FU1 and FU2, and Kshs. 1,600 for FU3 to FU5. The duty travel allowance for all grades on taxi and overseas appears to have been agreed at Kshs. 1,500 and US dollars 90.

h) Commuter / Transport allowance: The Claimant offers Kshs. 6,000 to FU1, Kshs. 5,500 to FU2 and Kshs. 5,000 to FU3, 4 and 5. The Respondent counter-proposes Kshs. 13,000 for FU1, Kshs. 11,000 for FU2 and Kshs. 9,000 for grades FU3, 4 and 5.

i) Hardship allowance: The Claimant's position is that this should not be introduced as it is already covered under extraneous allowance, adequately compensated at 30% of the basic salary. The Respondent argues this should be introduced in the CBA, under risk allowance, and Employees compensated at Kshs. 3,000 per month.

7. The Claimant submits it operates ferry service which is the only link to the South Coast. Approximately 300,000 Pedestrians and 6,000 Motorists use the ferry daily. It is a service listed as essential, under Schedule 4 of the *Labour Relations Act* 2007.

8. There are a total of 291 Employees working for the Claimant, out of which 181 are Members of the Respondent Union. Parties concluded and registered their first CBA for the period 1st July 2012 to 30th June 2013. In that CBA, the Claimant submits Parties were able to agree on wage increments that improved Employees' purchasing power and conditions of living. The basic salary was raised at 30%; the lowest salary moved from Kshs. 14,000 to Kshs. 18,200 per month; and the highest from Kshs. 46,945 to Kshs. 61,029 per month. House allowance, Transport/ Commuter allowance and Extraneous allowance were all reviewed upwards. Employee welfare improved.

9. The Claimant describes its financial performance as erratic and unpredictable over the past 5 years. The Financial Records [Claimant's appendix 10 and 11] show its expenditure is stable and steadily increasing. Grants from the National Government have not been stable. The amounts received have been far below what was requested. Income has increased from 2009/2010. Vehicular traffic is on marginal rise. Increase in staff costs among others cannot be sustained. The Ministry of Transport has recommended rationalization of costs to reduce the levels of deficit for the year 2013/2014, and harmonization of staff allowances by reducing such allowances, to be in line with the existing Government circulars. The Kenya National Audit Office found there was excess spending attributable to administrative and staff costs. Staff costs account for an average of 41% of the total costs, and consume almost the entire amount collected from ferry operations.

10. The Claimant urges the Court to in addition, consider that competitive pay is arrived at by comparing what the Claimant pays, with that of the other institutions in the same sector. A salary and allowance survey conducted by the Claimant revealed its compensation package to its Employees, was leading. The Claimant has in its proposals considered its need to retain skilled Labour; achieve internal equity;

recognize performance and productivity; the ability to pay the wage demands; and the cost of living indices. The average CPI for the period 2011 to 2013 shows an annual inflation of 5%.

11. The Claimant has offered the Employees what it is able to pay. It reported a deficit of Kshs. 115,927,375 in the 2012/2013 financial period. Staff costs have gone up, and are unsustainable. The Kenya National Audit Office recommended rationalization and outsourcing of non-key functions. The National Treasury has directed Accounting Officers to control expenditure, freeze recruitment, pay adjustments and upgrading. A survey of CBAs registered in the Industrial Court between May and June 2013, shows pay rise contained in those CBAs ranged from 6% to 15%. The offer of 10% is within this range.

12. The Claimant concludes that considering all these factors, its proposal adequately compensates the Employees, and should be adopted as the Award of the Court. The Dock Workers' Union should permanently be restrained from instigating a strike.

13. The Respondent answers that the Claimant is a Company Limited by shares; it is not a State Corporation. It has made attempts at transforming itself into a State Corporation through the Kenya Ferries Corporation Bill, but there is no evidence it has succeeded. It is purely a Business Enterprise.

14. The Claimant offers ferry services. It charges vehicular traffic for the service, while the cost of the human traffic is taken care of by the National Government. There is a Memorandum of Agreement on this structure, concluded between the Claimant and the National Government. The ferry services have become a function of the devolved Government, and the Memorandum of Understanding with the National Government can no longer hold. The Respondent urges the Court to direct, that the Claimant charges for all services offered. People, as well as vehicles using the facility should pay for the service. The users of the other entries to the Island of Mombasa through Makupa Causeway and Nyali Bridge are not granted such concessions. There is a ferry service between Lwanda K'Otieno and Mbita Point in Nyanza Region, and Pedestrians are charged for the service. The Respondent submits this is discriminatory. The opulent South Coast has been favoured. Neighbouring Republic of Tanzania similarly charges all persons using ferry services.

15. In light of the diminished or discontinued grants to the Claimant from the National Government, the burden must shift to the Users of the ferry services. 300,000 persons and 6,000 vehicles use the facility daily. They cross the channel for economic purposes. They can afford to meet the cost of their transportation. The Claimant will be able to service, maintain, acquire, and modernize ferries. It will be able to remunerate its Workers adequately.

16. With regard to the specific issues raised by the Claimant, the Respondent submits the Audit Report dated 23rd January 2014 reveals Management has been reporting a decline in the number of vehicles using the ferry. The Annual Budget Review however showed progressive trends, a position confirmed by the Claimant in its Submissions. The Claimant misled the Auditor in declaring a deficit. At least 5 Audited Reports should have been supplied by the Claimant to the Respondent. The Claimant doctored the figures to create an artificial deficit.

17. The Claimant is outsourcing core roles of the business to shadowy Companies. Funds have been diverted in these arrangements. One Company collects revenue, and owes the Claimant millions of Kshs. Another Company has been outsourced for advertisements and similarly owes the Claimant millions of Kshs. The Company contracted to collect revenue employs about 13 Employees, and is paid 1 million Kshs. per month by the Claimant. Under normal circumstances, the gross monthly salaries of the Claimant's full time Employees could have been under Kshs. 500,000.

18. The Respondent argues that the Court should consider the environment and nature of the business; the cost of living; productivity; real wages and comparability; company's policy; ability to pay; and wage differential.

19. The Claimant runs a unique business in the market. The skills of its Employees cannot easily be off-loaded to other businesses. The Employees can only compete internally, and their terms and conditions of employment cannot be compared with Employees from the other sectors. The environment, in which the Ferry Workers operate, is unique. It is a high risk environment as shown in the Ferry Accident of 1994, where Passengers' and Crew's lives were lost. The Claimant operates 3 shifts in a day.

20. The 4th Schedule to the *Labour Relations Act* which lists ferry services as an essential service, does not bar Ferry Workers from enjoyment of the right to strike. The right is enshrined in Article 41 of *the Constitution*. The 4th Schedule to the *Labour Relations Act* must be read consistently with *the Constitution*, as required under the Sixth Schedule Clause 7 of *the Constitution*. The only Employees whose right to strike is limited under *the Constitution* are those working for the Defence Forces and the National Police Service. The law did not intend that Ferry Workers are denied the right to strike, on the basis of the inclusion of ferry services in the list of essential services. The Court should not permanently restrain the Employees from exercise of a constitutional right.

21. The Respondent submits the Claimant has not explained its offer of 10% pay increase. It has not shown how it arrived at the figure. In a communication between the Claimant's Human Resources Office and the Finance Office, the offer was 20%. This was approved by the Claimant's Board in its 122nd meeting. The Respondent urges the Court to allow the Claimant Union to charge Pedestrians using the ferry a minimal fee of Kshs. 20, pending the decision of the National and County Government on the operation of the ferry services. The counter-proposals by the Respondent are realistic and achievable. The Court is prayed to adjust the salaries to close the wage differential; allow the Claimant to collect revenue from Pedestrians; and direct the Parties to start negotiations for the CBA for June 2015 to June 2017.

22. There are broadly two issues raised by this dispute: what proposals in the CBA should have the endorsement or amendment of the Court; and whether the Respondent and its Members working for the Claimant, should be permanently restrained from engaging in strike action.

The Court Finds:-

23. Parties agree they have a Recognition Agreement, and have concluded a CBA. Negotiation and collective bargaining on the second CBA, has resulted in stalemate. The disputed items are contained in the DEADLOCK AGREEMENT discussed at paragraph 6 of this Award.

24. It is similarly agreed the Claimant is registered as a Limited Liability Company, with the majority shareholding taken up by the National Government, and minority shareholding belonging to the Kenya Ports Authority, the latter itself a State Corporation. Basically the Claimant is a State Corporation.

25. The submission by the Respondent Union that the Claimant is a Limited Liability Company, running its own Business, and not a State Corporation is incorrect. It secondly is irrelevant in wage determination whether an Employer is a State Corporation or a Private Limited Liability Company. The factors, upon which the wage determination is made, largely remain unaffected by the legal or business form, adopted by the Employer.

26. The *State Corporations Act* Cap 466 the Laws of Kenya, defines a State Corporation to be:

    a) A Corporation established under Section 3 of the Act [creation through Presidential Decree].

b) A body established before or after commencement of the Act, by or under an Act of Parliament, excluding the Permanent Secretary Treasury, Local Authorities, Cooperative Societies, and Building Societies etc.

c) It also excludes a Company incorporated under the *Companies Act*, Cap 486 the Laws of Kenya, which is not wholly owned or controlled by the Government , or by State Corporation

27. The Claimant is registered under the *Companies Act*, it is wholly owned by the Government in partnership with a State Corporation, and is wholly controlled by the Government. The State is allowed by the law to discharge public service, or engage in business through various legal and business formations. A limited Liability Company is one such vehicle as discussed by this Court in Industrial Court at Nairobi, Petition Number 35 of 2012 between George S. Onyango v. Board of Directors, Numerical Machining Complex Limited, [2013] e-KLR. The essential characteristic is that such an entity is involved in services provided by the State; services to the Public; services on behalf of the Public; services providing public goods; or services accountable to the Public- see Industrial Court at Nairobi, National Union of Water & Sewerage Employees .v Mathira Water & Sanitation Company and 2 ors [2013] e-KLR.

28. Justice Saeed Cockar is quoted by Writers Dharam Ghai and Charles Hollen in Discussion Paper Number 3, Institute for Development Studies, University College Nairobi, titled ' The Industrial Court in Kenya: An Economic Analysis,' explaining the factors to consider in wage determination as follows:

> '' The Court has to consider various factors before wage increase is granted. An increase in the cost of living is only one such factor. One of the other important factors which cannot be overlooked is that the Worker should be able to get something more than compensation for the loss of money value, in order to move towards the ultimate objective of a higher standard of living. But this can be granted only if under competitive conditions, an Industry can be shown to be capable of paying a full living wage. This has further got to be consistent with the growth of the Country and its Development Plan.''

These sentiments were made in Industrial Court at Nairobi Cause Number 89 of 1966. Unfortunately the Authors of the Discussion Paper did not provide the names of the Parties, and attempts by this Court to have these details from the archives of the Industrial Court yielded no result.

29. The decision is an old one, but presents the basis upon which, the Industrial Court has considered wage increment over the years. There have been issued wage guidelines by Treasury before and after the above decision. These guidelines have tended to reflect the same factors developed by the Awards of the Industrial Court.

30. Section 12 [5] of the Industrial Court Act recognizes the wage guidelines, but does not place an obligation on the Court in applying the wage guidelines in its determination. This law is poorly worded, joining discretion and obligation. It states the Court may be bound. When is the Court bound, and when is it not bound, under this law? Section 60 [6] [b] of the *Labour Relations Act* however is unambiguous, the Industrial Court shall not register a Collective Bargaining Agreement that does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister. As seen above however, the Awards of the Industrial Court have endorsed the same standards sought to be achieved by the wage guidelines.

31. The emergence of the Salaries and Remuneration Commission under *the Constitution* of Kenya has brought with it fresh complexities. The Commission's role is to set the remuneration standards for

Public Officers. It is not clear if this Body should now assume the role of the Finance Cabinet Secretary in issuing wage guidelines with regard to Public Officers.

32. Dharam Ghai and Charles Hollen in the Discussion Paper state:

> ''From a study of its decisions, at least in the early years- till end of 1966- it would appear the Court has interpreted its role as consisting essentially of facilitating the process of bargainingand making awards which would be acceptable to both Parties. Given this objective, it would clearly have been inconvenient to have been tied down to rigid wage criteria of wage determination''

33. The position has not changed. The Court is the bridge that brings together capital and labour. It retains the discretion in wage determination and has the constitutional mandate to make judicial determinations responsibly, reasonably and independently.

34. The Court has over the years appreciated that questions of wage levels, as discussed by Ghai and Hollen, have an importance transcending the interests of the bargaining Parties. The interest of the public must be safeguarded. Levels of wages and conditions of service of Employees have implication for the distribution and growth of the national income.

35. The Claimant has demonstrated through the Reports prepared by the Kenya National Audit Office and the Ministry of Transport that it sustained a deficit of Kshs. 115,927,375 in the 2012/ 2013 year. This information was not discounted by the Respondent. Beyond alleging the information to be doctored, the Respondent gave no financial documents to contradict what is contained in the Reports.

36. Furthermore it is submitted by the Respondent that the Claimant should be allowed to charge Pedestrians using the ferry. The Government has not allocated the Claimant funds in terms of the Memorandum of Understanding under which the business is operated. By charging the Pedestrians, the Claimant would have met the shortfall. This would, according to the Respondent, enable the Claimant remunerate her Workers adequately. The Court understands this submission to be an acknowledgment by the Respondent that the Claimant, presently does not have the ability to pay what is demanded by the Respondent.

37. The principal criteria in wage determination as discussed above, is the ability of the Employer to pay. The Court is not in a position to direct the Claimant to charge Pedestrians using the ferry service. This is not a judicial function. It is a policy decision to be made by the Government of Kenya. Even if the Court had a role in that policy decision, it would not direct that Kenyans, majority of them Workers, who pay taxes, are charged for using the ferry, just to keep the ferry Workers happy. The Pedestrians using Nyali Bridge and Makupa Causeway are not charged for using these public utilities to access the Island of Mombasa. They pay taxes. The Court is satisfied from the Submissions made by both Parties, and the Documents on record, that the Claimant does not have the financial ability to meet the wage increments sought by the Respondent.

38. Besides this inability to pay, the Claimant made reasonable adjustment to the wage levels of its Employees in the last CBA. Basic salaries and allowances were reviewed favourably in the CBA of 1st July 2012 to 30th June 2013. The lowest basic salary moved from Kshs. 14,000 to Kshs. 18,200, the highest from Kshs. 46,945 to Kshs. 61,029. The last increments were effectuated on 1st July 2013.

39. The CPI for the period 2011 to 2013 shows an average annual inflation of 5%. Whereas the Employees should be compensated for the loss of money value, it is important such compensation does not result in an unsustainable wage bill. The National Audit Office has advised the Claimant to review staff costs. An unreasonably high wage increment, as demanded by the Respondent would make it impossible

for the Claimant to achieve greater efficiency and productivity, as well as threaten the job security of the very Employees. Wage determination, it must be remembered, transcends the interest of the two Parties. The interest of the public must be safeguarded.

40. The Treasury Circulars calling on the Claimant to undertake expenditure control measures; the wage market surveys done by the Claimant; and CBAs filed at the Industrial Court around the same time the Parties deadlocked, all persuade the Court to adopt a cautious approach in reviewing the items submitted for its adjudication.

41. Section 37 of the *Employment Act* 2007 calls on Employers to engage on regular basis, Employees who have worked continuously on aggregate for a number of days not less than 1 month. There is no reason why the Claimant should reserve its right to engage Casual Employees or Contract Employees. The law is for de-casualization. Public Bodies must take the lead in de-casualization of labour. The existing Employees working on these irregular terms should be absorbed into regular terms.

42. Outsourcing as submitted by the Claimant is a management prerogative. It would be wrong for the Court to place a blanket caveat on the Claimant's right to outsource. The Respondent can always challenge individual outsourcing contracts made by the Claimant when there is reason to do so. A blanket caveat would limit the Claimant's discretion, even when such discretion is exercised reasonably.

43. The introduction of hardship allowance in the CBA has not been justified by the Respondent. Hardship allowance is given to Employees who are subjected to work environment which would render them liable to bodily harm. It is not the same thing as extraneous duty allowance, which is made in consideration for additional responsibilities. It is true the ferry Workers operate in an environment which exposes them to bodily harm. The Respondent ably demonstrated the veracity of this submission by reference to the Mtongwe Ferry Disaster where Employees and other Kenyans crossing the channel drowned some years back. Such risk of bodily harm is still present today. The Employees would ordinarily merit hardship allowance. The Court has however concluded that the Claimant is not in a financially healthy position, to be able to shoulder additional allowances. Furthermore the risk of bodily harm is mitigated by the presence of the group personal accident insurance cover, taken by the Employer for the benefit of its Employees. Hardship allowance, while ordinarily would be merited, is not an item that should be introduced in the current CBA.

44. The Court Awards:

    a) Basic Salary at 17.5% across the Board.

    b) House allowance: FU1 at Kshs. 19,000; FU2 at Kshs. 17,000; FU3 at Kshs. 15,000; FU4 at Kshs. 13,000; and FU5 at Kshs. 11,000.

    c) Existing Employees engaged on casual or contract terms doing work of unlimited duration, shall be absorbed on permanent and pensionable terms.

    d) The status quo on outsourcing shall be maintained.

    e) Compensation for work done during gazetted Public Holidays shall be double time [n x 2] as proposed by the Claimant.

    f) Extraneous allowance at 35% of the basic salary.

    g) Leave travel allowance: FU1 and 2 at Kshs. 14,750; FU3 and 4 at Kshs. 14,250; and FU5 at Kshs. 13,750.

h) Duty travel allowance: Subsistence- for FU1 and 2 at Kshs. 3,000; FU3, 4 and 5 at Kshs. 2,700. Daily transport for FU1 and 2 at Kshs. 1,000 and FU3, 4 and 5 at Kshs. 700. Taxi and overseas rates at Kshs. 1,500 and US Dollars 90 for all grades as proposed by the Parties.

i) Transport / Commuter allowance for FU1 at Kshs. 7,000; FU2 at Kshs. 6,500; and FU3, 4 and 5 at Kshs. 5,500.

j) There shall be no hardship allowance introduced in the CBA.

45. The last question is on the right to strike. The Court has been asked by the Claimant to permanently restrain the Respondent and its Members from engaging in strike action.

46. The right to strike is a fundamental element in stable collective bargaining. Employees promote and protect their economic and social interest, and resolve labour disputes, through strike action. As is argued on the issue of wage determination however, the right to strike transcends the interests of the involved Employer and Employee. Strike action, particularly in essential services sectors, have ramifications for the Public and the National Economy. The right to strike is therefore balanced against the fundamental rights of others. It is argued that the right of non-strikers, that is to say Employees who may feel they should continue to work during the strike, must be protected. Similarly the fundamental right of the Public to essential services must be protected.

47. The search for this balance is seen in laws such as Section 81 of the *Labour Relations Act* 2007, which under the 4th Schedule lists ferry services as an essential service. Essential service is defined in the Act to mean service the interruption of which would probably endanger the life of a Person, or the health of the population or any part of the population. Subsection 3 states there shall be no strike in essential service. Disputes arising in this sector are to be adjudicated by the Court. This position has been explained by the Industrial Court of Kenya in several of its recent interventions during strikes affecting the public sector, such in Industrial Court at Nairobi, Petition Number 23 of 2013 between Teachers Service Commission v Kenya National Teachers Union

48. Generally, the right to strike is recognized under Article 41 [2] [d] of *the Constitution*. The right to engage in collective bargaining is recognized under Article 41 [5]. The Industrial Court has ruled that the limitation of the right to strike under Section 81[3] of the *Labour Relations Act* is justifiable under Article 24 [1] of *the Constitution* of Kenya.

49. This Court thinks in determining whether the limitation imposed on the right to strike is a reasonable limitation, there is need to look at the right to strike as part of the collective bargaining process. Employees principally resort to strike action to unlock an impasse in the collective bargaining and negotiation process. Unless the strike action is called for other reasons, rather than the furtherance of collective bargaining, the Court should be slow in upholding limitation. The right to strike is a bedfellow of the right to bargain collectively. The nature of the right to strike is fundamental to the whole institution of collective bargaining. These are two inseparable fundamental rights involved, and which are recognized by the ILO under Convention 87 and 98, as the staple of stable labour relations. If the Court simply looks at the service as essential, and declares the strike illegal, it will have misperceived the nature of the right of strike, and freedom of association, and the right to collectively bargain, contrary to Article 24 [1].

50. The only specific rights or fundamental freedoms which by legislation may be limited are those relating to persons serving in the Kenya Defence Forces or the National Police Service, under Article 24 [5]. The Claimant would have to persuade the Court that to justify limitation the requirements of Article 24 [1] have been met. It is insufficient to cite Section 81 [3] and Schedule 4 of the *Labour Relations Act* 2007, to argue the case for permanent injunction restraining the Employees from engaging in strike. It

is questionable if the list of essential services, prepared by the Minister and the National Labour Board, meets the requirements of Article 24 of *the Constitution* of Kenya. Recent practice particularly among the Health Workers has been to engage in unprotected strikes. It has not helped that health service is an essential service. Perhaps the feeling is that there is no sufficient consultation when the list of essential services is prepared.

51. Are there no other less restrictive means to achieve the purpose sought to be achieved by an order declaring that there shall be no strike at the ferry? The ferry service is deemed essential by the Minister and the Labour Board who are charged with listing essential services, probably because it is the only way a majority of people, goods and services move between Mombasa Island and the South Coast. In case of fire, security, health emergencies across the channel interruption of ferry services would perhaps endanger the life and health of persons or the population. Would this be the case if in the future there are alternative means of linking the Island and the South Coast? It is possible what is declared an essential service today, is removed from the list of essential services tomorrow. Perspectives change, and physical infrastructure is changing. It would not be sensible to place a permanent restraint on the right to strike and by extension the right to bargain collectively.

52. There are traditionally less restrictive means in controlling strike actions. Focus should be on mitigating the impact of the strike when it does occur, rather than attempts at forestalling. The Employer and the Employee can negotiate and agree on a Minimum Service Agreement within the CBA. This can be incorporated in the CBA. It should detail minimum number of Employees required to continue working during the strike, expressed as a percentage of the current workforce; the type of services which must continue during the strike; minimum service levels during the strike; and undertaking by the Employer not to engage replacement labour during the strike. These are mechanisms open to the Parties, which can be incorporated in the CBA. It would ensure the rights of both Parties and the Public are not entirely compromised during the standoff.

53. Ultimately, the Court should not tip the balance of power too far in favour of either Party. The right to strike need not be outlawed, even in essential services. The Parties should have mature collective bargaining structures that define the parameters within which respective rights can be exercised without bringing down the whole enterprise. Industrial Relations are based on mature self-regulation. *The Constitution* is for mature self-regulation. The Social Partners need to know they cannot run Industrial Relations through Court Injunctions.

54. The prayer for a permanent injunction restraining the Respondent Union and its Members from engaging in strike action is rejected. Parties may instead negotiate and include in their CBA A Minimum Service Agreement, to regulate any future strike action at the Claimant facility.

55. In sum, Orders granted in terms set out in paragraph *44* and *54* of this Award.

56. No order on the costs

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MAY 2015

JAMES RIKA

JUDGE