



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 338 OF 2014

BETWEEN

KENYA FERRY SERVICES LIMITED CLAIMANT

VERSUS

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

Rika J

Court Assistant: Mr. B. Kombe

Mr. Kitur, Company Secretary & Head of Legal Services, Advocate for the Respondent

Mr. Ochieng, Executive Officer of the Respondent for the Respondent

RULING

1. The Claimant Employer has invited the Court to give a Ruling on the direction its Claim should follow. This is thought necessary by the Claimant Employer, because it has received a letter and circulars from the Salaries and Remuneration Commission, advising the Respondent to adhere to the Commission's [Remuneration and Benefits of State and Public Officers] Regulations 2013.
2. The Claimant explains that those Regulations demand that the review of salaries and remuneration, in a Collective Bargaining Agreement involving Public Officers, should be done after every 4 years.
3. The Employer and the Trade Union have a Recognition Agreement, signed on 30th November 2011. Clause 11 [b] of the Recognition Agreement binds the Parties to review the wages, salaries and conditions of service of the Employees, every 2 years.
4. The Parties commenced negotiations for review of terms and conditions of employment of the Employees, in October 2013. Negotiations were based on a 2 year span CBA. Proposals and Counter-proposals hinged on the 2 year period, created under the Recognition Agreement. The Parties were not able to agree on all the CBA subjects. They referred the dispute to the Minister, who instigated the Conciliation Process under the Labour Relations Act 2007. The Conciliation process ended up in a deadlock on the 12th June 2014.

5. The Claimant filed this Claim on 21st August 2014, alleging that the Respondent has incited its Members to industrial action. It apprehended the intended strike would endanger the lives and health of Members of the Public, who rely on this Collective Bargaining Unit, in daily crossing the Likoni Channel by Ferry.

6. The Claimant sought from this Court and obtained an Order, barring the Respondent from instigating or taking part in any strike action pending hearing of the dispute in Court. In the main Claim, the Claimant seeks the following Orders:

- A declaration that the intended strike is unlawful and unprotected;
- A declaration that there shall be no strike at Kenya Ferry Services Limited, which offers essential services;
- Restraint of the Respondent, by itself, its Officials, Agents and/or Members from taking part in, calling, instigating or inciting others to take part in unprotected strike;
- The CBA be concluded in terms of the Counter-proposals made to the Respondent by the Claimant;
- Respondent to bear the costs of the Claim; and
- Any other or further order and or relief that this Court may deem fit to make and/ or grant.

7. The Claimant's Application seeking Directions is dated 31st October 2014, and based on the Affidavit of Mr. Kitur, Advocate for the Claimant, sworn on 31st October 2014, and grounded on Section 3 of the Industrial Court Act 2011, and Rule 16 of the Industrial Court [Procedure] Rules 2010. The Respondent opposes the Application through the Replying Affidavit of Mr. Simon K. Sang, its General Secretary. The Parties' Representatives addressed the Court on 5th November 2014.

8. The Claimant states it informed the Salaries and Remuneration Commission [SRC] that the SRC had not given its input on the CBA intended to be concluded by the Parties. The SRC responded to the Claimant, reiterating the contents of its previous circulars. It emphasized that the Parties were bound by the 4 year cycle in negotiating CBAs, imposed by the SRC. The Claimant was advised to negotiate within the confines of the SRC Regulations. The Claimant submitted that its Employees are Public Officers and subject to the Regulations of the SRC, and that the SRC's role was hazy, until clarified in the ***High Court of Kenya at Nairobi Petition Number 294 of 2013 between KUDHEIHA v. the SRC & the AG***. The decision rejected the existing Advice of the AG, which was that State Corporations were outside the mandate of the SRC. The role of the SRC cannot be wished away.

9. The Claimant seeks the Court to give direction on whether the Ferry Workers are Public Servants, and whether the 2 year or 4 year cycle should be adopted. Once Regulations of SRC were made, they affected the Recognition Agreement. They must be read in the Recognition Agreement. It is possible other Public Bodies could have registered CBAs adopting less than the 4 year cycle, in ignorance of the role of the SRC. The SRC's has now been clarified by the decision of the High Court above. The SRC is not part of the Public Service Employers; its role is to make sure salaries are feasible. The Salaries and Remuneration Commission Act 2011 is not inferior to the Labour Relations Act 2007, and the SRC is a Constitutional Body just like the Court; none is inferior, and all sustain each other. The advice of the SRC would necessitate the amendment of pleadings, and revision of the CBA Proposals and Counter-proposals.

10. The Respondent answers that the Claim herein, was filed by the Claimant, and it is not clear if the Claimant, by its application for directions, seeks to withdraw the Claim. There is a Recognition Agreement, giving a 2 year cycle for negotiation of CBAs between the Parties. The SRC wrote to the Claimant in response to the Claimant's own letter to the SRC. The Claimant had not brought its letter to the SRC before the Court. The Claimant deliberately left out its letter from its bundle of documents availed to the Court.

11. The Respondent did not participate in the making of the SRC Regulations. SRC is part and parcel of Public Service Employers during CBA negotiations. Its role is to give advisory opinion to the Employers during CBA negotiation.

12. There was a deadlock as submitted by the Respondent, and certificate of disagreement issued. This issued under the Labour Relations Act. The provisions of the Labour Relations Act cannot be subservient to Regulations made under another Act of Parliament. Once disagreement is registered, SRC becomes part of the dispute. The process at the shop floor level has been overtaken by events.

13. Ferry Workers are offering essential services. The CBA ought to have been negotiated last year. The Recognition Agreement has termination and modification clauses, which have not been resorted to by the Parties. The Claimant is not ready to negotiate the CBA. The Court has no obligation to give any directions in the matter. If the Claimant wishes to withdraw the Claim, it is up to the Claimant to do so.

14. Article 41 gives Trade Unions the right to collectively bargain and negotiate. SRC cannot negotiate wages. The SRC is about salaries. Wages are pegged on the hours. SRC cannot know about wages. The Claimant is a limited liability company. If the Government comes in this company, it does so commercially. The Claimant seeks to oust the jurisdiction of the Court and the Ministry of Labour in favour of the SRC. The substantive law governing Collective Bargaining is the Labour Relations Act. The Respondent asks the Court to find that Parties cannot revert back to negotiations on the belated advice of the SRC.

The Court Finds:

15. This Claim was filed by the Claimant, after negotiations and conciliation over the CBA broke down. The Parties have been through the interventions of their Joint Industrial Council and the Conciliator. They came to Court as a last resort.

16. The Claimant has obtained an Order from this Court barring the Respondent and its Members, from exercising their right of industrial action. At the same time, the Claimant has after filing this Claim, received instructions from the SRC, advising the Claimant to renegotiate the CBA, based on the 4 year cycle.

17. The history of this dispute suggests to this Court that Claimant is delaying the dispute it initiated, to avoid concluding the process of collective bargaining. The Ferry Workers are prevented from accessing the full benefit of their freedom of association and the right to collectively bargain; negotiations and conciliation have broken down; the CBA ought to have been concluded last year; these Workers cannot go on strike, because the Court has told them not to, pending the Court's determination of the dispute; and the Claimant brought these Workers to Court, but now says it has been advised to renegotiate, essentially taking back the Workers to the starting point. The call by the Claimant upon the Court to issue directions, if the Court understood the Claimant properly, was a call to have the Claim withdrawn, or indefinitely postponed, as the Claimant and its Advisor prepare for a fresh round of collective bargaining and negotiation.

18. The Claimant amended its Statement of Claim on 21st August 2014, about 3 months ago. Under paragraph 10 [c], the Claimant states its Counter-proposals took into consideration the circulars from the SRC. It is not proper that the Claimant now seeks to prolong this dispute on the ground of fresh communication between the Claimant and the SRC. What transpires between the SRC and the Claimant, is essentially an internal issue between two Parties on the same side of the collective bargaining forum, and should not derail or delay the process. The Parties recognize the Ferry Workers offer essential services, and disputes involving their terms and conditions of services, should be resolved expeditiously, in accordance with the Labour Relations Act.

19. There is no doubt these Workers render public service. Going by the decision in ***High Court at Nairobi in Petition No. 294 of 2013 between KUDHEIHA v. SRC***, and ***Industrial Court at Nairobi Cause between NUWASE v. Mathira Water and Sanitation Company, SRC and Others, [2013] e-KLR***, these Workers are characterized as Public Officers. Their Employer has an obligation to take the advice of the SRC, in engaging the Respondent in collective bargaining. The Claimant pleads it considered the advice of the SRC in making its Counter-proposals. If there was advice that was not given before coming to Court, or was given but not considered by the Employer, such default of advice cannot result in the

Court directing restart of the process. It should not prejudice the Respondent and its restive Members, and compromise their right of a fair hearing.

20. Once there was disagreement in the collective bargaining and negotiations, and the dispute was brought to this Court, it ceased to be a collective bargaining and negotiation process; it became litigation, determinable under the Labour Relations Act 2007, the Industrial Court Act 2011, and the Industrial Court [Procedure] Rules 2010. The Parties however can, at their own level, and voluntarily, still continue to negotiate, even as the Court exercises its mandate. The SRC could only come in as a Witness, or an Interested Party. Litigation is not negotiation or collective bargaining, where the Court is asked to halt its work, and allow that back and forth which is a necessary characteristic of negotiation and collective bargaining. Litigation shall end in an Award, which basically means the CBA shall be in the form of a judicial command, imposed on the Parties, and binding on the Parties.

21. The Parties have a Recognition Agreement concluded in 2011, with a clause on review of the Ferry Workers' terms and conditions of employment, based on the 2 year cycle. The Recognition Agreement has not been terminated; none of the Parties have ceased to be bound by the Recognition Agreement; and there is no modification by mutual agreement. Recognition Agreements are concluded pursuant to Section 54 of the Labour Relations Act 2007. The terms upon which recognition is granted are stated in the Recognition Agreement, and business conducted between the Parties in accordance with the Recognition Agreement. This is a requirement of the Labour Relations Act. The Court cannot read other clauses into the Agreement, outside the purview of the Labour Relations Act.

22. Modification, termination, or revocation of the Recognition Agreement can only be done in terms of the Recognition Agreement, and as provided for under Section 54 of the Labour Relations Act. The Court does not see the basis for the Claimant's submission that the Regulations made under the SRC Act, should be read into the Recognition Agreement. The Labor Relations Act 2007, is the primary Legislation governing collective bargaining, in both the private and public sectors, and cannot be amended through subsidiary legislation originating from another Act of Parliament. Relevant provisions of the Labour Relations Act 2007 remain in place.

23. Trade Unions are not bound by the advice of the SRC. The SRC is properly a mechanism created to advise Public Service Employers, in their engagement with the Trade Unions. It also determines the salary levels and other terms for senior, non-unionisable Public Officers. It cannot advise both Parties. That would cease to be a process of collective bargaining. The Centre for Trade Unions could give advice to its affiliates in the individual affiliates' negotiation processes. Such advice does not compromise the position of the Employers involved in negotiations with the affiliates. A Federation of Employers may also advise individual Employers in collective bargaining and negotiation, without compromising the position of the involved Trade Union. The failure by an Employer to take advice from the SRC ought not to prejudice the Employees' right of collective bargaining; it ought not to result in acts of bad faith in resolving the deadlock; and certainly not delay settlement of the dispute that is properly before the Court.

24. The Court appreciates that the Government is reeling from the burden of a huge wage bill. The SRC is a constitutional mechanism for keeping in check this bill. It is a necessary mechanism. In countries where economies have collapsed due to poor public finance management, such as was the case in Greece recently, CBAs concluded by Public Bodies and Trade Unions in such economies are frequently vacated as a means of aiding economic recovery. It is important that the Government at National and County Levels are not bound to pay salaries and wages which cannot be sustained. It makes no sense to have a CBA in place, which cannot be implemented, or which is vitiated as soon as there is an economic crisis. The Employees on the other hand, have their rights and freedoms as enshrined principally under Article 41 of the Constitution. These must remain meaningful and enforceable. Trade Unionists and Employers have economists who understand the need to factor in all economic indicators in their negotiations. Public Bodies are represented at the collective bargaining platform by their own well- trained economists. These Professionals do not just pluck figures out of the blues. By the time the dispute presents itself in Court, there is adequate ventilation and calibration of the labour economics. The Court, when there is no voluntary settlement, makes Awards upon careful evaluation of economic data generated by the Government, and also takes into account wage guidelines. The Central Planning Unit has acted as the

economic secretariat of the Industrial Court. CBAs imposed on Parties by the Industrial Court are Court decisions, appealable under our Judicial System. It cannot be said that there are no safeguards against rogue collective bargaining processes and outcomes. The SRC is a welcome additional safeguard, entrenched in the Constitution under Article 230. It must not however be taken as a replacement for the Institution of Collective Bargaining in the Public Sector. The Court has an obligation to promote and protect labour rights and freedoms and ensure Labour Laws remain relevant to the Employees.

25. Nothing could create more industrial unrest than for Employees to be told they cannot freely, collectively negotiate and bargain; they cannot strike or engage in other forms of industrial action to advance their position; and cannot have the Court make an independent, impartial and expeditious determination, on a matter relating to their terms and conditions of service. The Court comes in as an impartial and independent dispute settlement mechanism, not a mechanism for advancing the position of either Party. IT IS ORDERED:

[a] The Claimant shall proceed with its Claim as drawn, amended and filed.

[b] In the alternative, the Claim should be withdrawn and subsisting interlocutory orders lifted.

Dated and delivered at Mombasa this 15th day of December 2014

James Rika

Judge