REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 68 OF 2020

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS CLAIMANT

v

KIBOS SUGAR AND ALLIED INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The Kenya Union of Sugar Plantation & Allied Workers (the Union) sued Kibos Sugar & Allied Industries Ltd (the Respondent) on 16 September 2020, alleging that the Respondent had failed to negotiate a collective bargaining agreement in good faith despite (it) the Union having accepted a proposal of 16% general wage increment.

2. The Union sought orders:

> (1) THAT the Court be pleased to issue orders compelling both parties to sign the final draft negotiated under the chairmanship of the FKE Regional Manager.
>
> (2) THAT this Honourable Court adopt strict two (2) years period for the current and future CBA negotiations to avoid unnecessary battles between the parties.
>
> (3) THAT this Honourable Court be pleased to order spread of 16% agreed during the negotiations in two years beginning 1st August 2018 as was directed by Justice Lady Maureen Onyango in her judgement.
>
> (4) THAT this Honourable Court directs the Respondent to calculate total arrears accrued from 1st August 2019 and pay the arrears within 30 days.

3. Filed with the Statement of Claim was a Motion under a certificate of urgency seeking various interim reliefs.

4. The Motion was determined in a Ruling delivered on 3 February 2021.

5. While delivering the Ruling, the Court also issued directions to have the dispute resolved expeditiously. These included the preparation of a report by the Central Planning and Monitoring Unit of the Ministry of Labour.

6. The report was filed in Court on 7 June 2021.

7. When the parties appeared in Court on 30 June 2021 for further directions, the Union informed the Court that it had received a copy of the report and that it would call witnesses during the hearing on the merits.

8. The Respondent, on its part, indicated that it would call 2 witnesses.

9. The Court, therefore, directed the parties to file and exchange witness statements within agreed timelines ahead of hearing on 22 November 2021.

10. However, the orders were not complied with (instead, the Union filed submissions on 15 July 2021). On the scheduled hearing date, the Union informed the Court that it did not have any witnesses but was ready to proceed (in its submissions, the Union had explained that it did not wish to expose its members/employees to harassment or intimidation by calling them to testify).

11. The Respondent also indicated that it was ready.

12. With the turn of events, the Court allowed the parties to make brief oral submissions.

13. The Court has considered all the material placed before it.

Withdrawal of employees from the Union

14. In its submissions, the Respondent urged the Court to dismiss the Cause because the employees who had joined the Union had since withdrawn their membership.

15. Where an employer has a recognition agreement with a trade union, and it intends to cease any formal relationship with the trade union, it should move the National Labour Board at the first instance to have the recognition revoked.

16. The Respondent did not place before the Court any evidence that the National Labour Board had revoked the recognition it had granted the Union, and therefore, the Cause cannot fail on that ground.

Failure to call a witness/lead evidence

17. The Union did not lead any evidence. The Respondent did not file a Response to the Statement of claim. It also failed to call any witness. It stated that it would rely on a replying affidavit it had filed in response to the Motion by the Union.

18. Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016 envisages the Court hearing and determining a dispute based on pleadings, affidavits, documents and submissions made by the parties.

19. The procedure is left to the discretion of the Court.

20. It is not in dispute that the Union had filed a supporting affidavit to a Motion which had been filed with the Statement of Claim. The Respondent filed a replying affidavit in opposition to the Motion.

21. The Court used the affidavits to determine the Motion, and a Ruling was delivered on 3 February 2021.

22. Apart from the supporting affidavit and the replying affidavit, the parties did not file any further affidavits. They also failed to file and serve witness statements as directed by the Court.

23. The question, therefore, begs whether the Court can rely on the affidavits on record to determine the Cause on the merits.

24. While determining an application, a Court is well advised to caution itself that it is not making a final determination on disputed facts.

25. Disputed facts require to be challenged and tested at cross-examination.

26. In the case at hand, the Union did not present Mr Francis Wangara, who swore the affidavit to testify or to be cross-examined. The Respondent did also not present Mr David Moli Odongo.

27. What then becomes of such untested affidavit evidence considering that the Respondent, through its affidavit, contested the facts in the affidavit of Mr Wangara?

28. There is plenty of case law from elections law on the issue of untested affidavit evidence (see *Nuh Nassir Abdi v Ali Wario & 2 Ors* (2013) eKLR; *Ramadhan Seif Kajembe v Returning Officer Jomvu & 3 Ors* (2013) eKLR and *Justus Gesito Magali v IEBC (2013) eKLR*.

29. In Nairobi Petition No. 6 of 2013, *Josia Taraiya Kipelian ole Kores v Dr David ole Nkedianye & 3 Ors*, the Court stated:

> I now turn to the issue of the Petitioner failing to testify. I find fault with the Petitioner's argument that there is no rule in law or evidence that requires verbal evidence for an affidavit to be deemed credible. In my opinion, an election petition is no ordinary suit, and the facts deponed therein must be interrogated. Such interrogation can only be done by testing the evidence through cross-examination of the deponent. Failure to attend court for the testing of such allegations in such a deposition makes the Affidavit to be just that, mere allegations. It is evidence without any probative value. In my view therefore, it was imperative for the Petitioner to have testified during the hearing of this Petition, given that he was responsible for its institution and had made adverse claims against the Respondents. On the day he was supposed to testify, he sought and found comfort in a trip to South Africa and sought to have his Affidavit admitted without cross-examination. That won't do. The allegations remained just that, bare allegations not proved.

30. This Court is of the view that similar principles apply in cases of a civil nature like the one under adjudication.

31. The Union attempted to offer an explanation why it opted not to call a witness or lead evidence. It was that there was a likelihood of the witnesses being employees of the Respondent would be victimised.

32. The Court does not find the explanation convincing as it is the Union officials who participated in the negotiations with the Respondent which would have been competent to testify.

33. These included the Secretary-General, Deputy Secretary-General, and other branch officials. It cannot be that these officials were all employees of the Respondent susceptible to victimization for testifying in Court.

Merits of the Cause

34. The Court will, however, address its mind to the merits of the Cause despite the failure to call evidence because on 3 February 2021, as is the practice with economic disputes, it directed the Central Planning and Economic Unit to prepare a report as envisaged by section 15(5) and 20 of the Employment and Labour Relations Court Act and Rule 37 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

35. The report was filed in Court on 7 June 2021 after interviews with the Union and the Respondent.

36. The parties have a recognition agreement under which they entered into a collective bargaining agreement on 25 April 2016. The agreement was to run from 1 August 2015 to 31 July 2017.

37. When the agreement expired, the parties entered into fresh negotiations for a new collective bargaining agreement.

38. Negotiation meetings were held on 6 December 2018, 18 December 2018, 24 January 2019, 6 February 2019, 27 February 2019 and 8 November 2019, but the parties were deadlocked on the question of general wage increase and effective date of the collective bargaining agreement.

39. The Respondent had during the meeting of 8 November 2019, proposed a general wage increase of 16% spread over 3-years effective from the date of signing the collective bargaining agreement, while the Union had suggested a 20% general wage increase spread over 3-years with an effective date of 1 August 2018.

40. On 17 December 2019, the Union formally notified the Respondent that it would accept the offer of a 16% general wage increase spread over 3-years (6% from 1 August 2018 to 31 July 2019; 5% from 1 August 2019 to 31 July 2020 and 5% from 1 August 2020 to 31 July 2021).

41. The Respondent did not respond to the climb down by the Union, and on 29 January 2020, the Union issued a strike notice.

42. A Memorandum of Disagreement was signed on 31 January 2020, and on 4 August 2020, the Conciliator recommended that the parties move to Court.

43. The Respondent did not file any affidavit to rebut the case of the Union that it had accepted the 16% general wage increase spread over 3-years.

44. The Central Planning and Monitoring Unit report evaluated the impact of 20%, 16% and 15% general wage increase on the financial position of the Respondent, and it is apparent from the report that the 15% general wage increment would have the most negligible adverse impact on the continued operations of the Respondent.

45. Both the Union and the Respondent informed the Court on 22 November 2021 that they agreed or would rely on the report from the Central Planning and Monitoring Unit.

46. Therefore, the Court would enter judgment in terms of the report from the Central Planning and Monitoring Unit.

Duration of the collective bargaining agreement

47. The Union urged that the collective bargaining agreement should run for 2-yesrs while the Respondent proposed 3-years.

48. The practice and tradition has been that collective bargaining agreements within the private sector run for 2-years while within the public sector, it has been 4-years.

49. Based on tradition and practice within the private sector and considering that the parties did not agree on the term of the agreement, the Court finds that the term of the agreement should be 2-years.

Effective date

50. On the question of the effective date, it is in the public domain that, as a matter of practice and tradition within the industrial relations sphere, collective bargaining agreements become effective on the date the prior agreement expires.

51. However, on 20 April 2020, a Memorandum of Understanding was signed between the tripartite social partners agreeing to the suspension of negotiations for collective bargaining agreements or implementation of concluded collective bargaining agreements during the COVID-19 pandemic.

52. The parties did not inform the Court whether the Memorandum had been reviewed, and the Court will therefore order that the collective bargaining agreement become effective within 1 January 2022.

Conclusion and Orders

53. From the foregoing, the Court orders:

(i) The Union and the Respondent to sign a 2-year collective bargaining agreement on or before 1 May 2022 but effective 1 January 2022, incorporating an award of 10% general wage increment spread over 2-years as follows:

(a) 5% effective 1 January 2022.

(b) 5% effective 1 January 2023.

54. No order on costs considering the social partnership between the parties.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 9TH DAY OF MARCH 2022.

RADIDO STEPHEN, MCIArb

JUDGE

Appearances

For Union Mr Gombe, Branch Secretary

For Respondent Mr Onsongo instructed by Onsongo & Co. Advocates

Court Assistant Chrispo Aura