



Banking, Insurance & Finance Union v Kenya Post Office Savings Bank Ltd (Employment and Labour Relations Cause E822 of 2021) [2023] KEELRC 1542 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1542 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E822 OF 2021**

**AN MWAURE, J
JUNE 16, 2023**

**BETWEEN
BANKING, INSURANCE & FINANCE UNION CLAIMANT
AND
KENYA POST OFFICE SAVINGS BANK LTD RESPONDENT**

JUDGMENT

1. The claimant union in the statement of claim dated the 4th of October 2021 and filed on the 04/9/2021 says that it has a valid recognition Agreement with the Respondent, the last one having expired on 30th June 2017.
2. The claimant says that it forwarded the Collective Bargaining Agreement (CBA) proposal to the Respondents on 12th February, 2012 for the period 1st July 2017 to 30th June 2021. The same was acknowledged by the Respondent on the 22nd February, 2019. That almost after four (4) months, the Claimants wrote a reminder letter to the Respondents on 10th June 2019 to forward their counter proposals so that the parties could commence negotiations.
3. The claimant states that on the 25/06/2019, it reported the existence of a Trade Dispute to the Cabinet Secretary for Labour and Social Protection. A conciliator was appointed on the 15/07/2019. The parties met but failed to agree following of which the conciliator gave a certificate of unresolved dispute.
4. The claimant prayed for the salaries, wages and allowances as per paragraphs 2.0 to 11. 4 of the statement.

Respondent's Case

5. The Respondent filed the reply to the statement of claim and says that the general economic standing of the Respondent ought to be factored regarding the several issues in dispute. These includes the salary and wages, housing allowance, owner occupier allowance, subsistence allowance, annual leave



allowance, medical (outpatient), car allowance, commuter allowance, hardship allowance and sundry allowance. The Respondent's current financial standing is hampering negotiation and implementation of the Collective Bargaining Agreement.

6. The claim was disposed by way of the witness statements and the submissions.

Claimant's Submissions

7. The claimant submits that the parties have a valid recognition agreement. The parties have negotiated several collective bargaining agreements. The last one being reviewed expired on 30th June 2017. The claimant forwarded the collective bargaining agreement (CBA) proposals for the period of July 2017 to June 2021 to the Respondents on the 12th February 2019. That claimant says that the Respondent has never forwarded a counter proposal to date.
8. The claimant says that on the salary and wages, it agrees with the CPMU report dated 21st October, 2022 as computed compensation at the rate of 32% for four years translating to 8% for each year in respect of the rise in cost of living. The computation of compensation is in line with wages guidelines 2 (a) (i) issued on the 23rd November, 2005. This will only be cushioning employees against the actual changes in the prices of goods and the rise in the costs of living. The claimant prayed that this honourable court award general wage increment of 8% each year for the years 2017 to 2020 effective 1st July 2017.
9. On the housing and owner occupier housing allowance, the claimant prays that the permissible compensation is half the compensatory inflationary rate of 32 % as per the CPMU report dated 21st October, 2022. The computation of compensation is in line with the wages guidelines 2 (a) (ii) issued on the 23rd November, 2005 as attached in the statement of claim. The claimant claims he is entitled to a minimum of 16% for the 4 years or 4% increment each year effective July, 2017 to June, 2021. Based on the market rates, the claimant's demand as per the statement of claim are well reasoned and the court should award the same. The claimant says that save for the salary and wages, all the allowances have not been reviewed for the last 13 years and that the inflationary rate in the last 13 years has eroded the purchasing power of the Kenyan Shilling exponentially.
10. The claimant further submitted that even though the government is a shareholder of the Respondent through the national treasury, it does not receive any direct funding from the government. The Respondent generates its own income and pays its own expenses. The Respondent pays its wages from its own operation incomes and not from the consolidated funds or money provided through parliament. The employees of the Respondent are not state officers or public officers as defined under article 260 of *the Constitution*.
11. The claimant argues that the Respondent and Trade Unions have a constitutional right to engage in collective bargaining agreement under article 41 of *the Constitution* and cannot therefore give itself powers it does not have in dealing with the independent state corporations. The claimant asked court to be persuaded by the following authorities; Petition No. 30 of 2014, Kenya Union of Commercial Food and Allied Workers versus Salaries and Remuneration Commission and 2 others and Petition Number 51 of 2015, Kenya National Union of Nurses versus the Chairperson, Salaries and Remuneration Commission.

Respondent's submissions

12. The Respondent submits that it has followed due process and was and is still willing and ready to negotiate with the claimant to ensure a harmonious relationship is maintained as contemplated by the *Labour Relations Act*. He submits that it is on this premise that the Respondent submitted a counter



proposal proffering the maintenance of the terms of the previous CBA 2013/2017 on grounds that the Respondent's financial position had not significantly improved since the last CBA review.

13. It relies on the case of *Kenya Game Hunting and Safari Workers Union versus Micato Safaris* 2016 eKLR where it was stated that the 'purpose of wage increment is to cushion the worker from inflation by enhancing purchasing power, however, this can only be effectively achieved against a background of improved performance and sustainability of the wage bill. A wage increment whose effect would be to trigger the journey to the collapse of an organisation is harmful to the self-same worker it was intended to benefit.'
14. The Respondent says that the issue of financial capacity is of primary significance in any negotiations between the parties because all payments are made from the internal revenue generated by the Respondent. Therefore, the Respondent cannot commit itself to terms that are not fiscally sustainable.
15. The Respondent further argues that it is a public institution and therefore subject to the guidelines on collective bargaining stipulated by the Salaries and Remuneration Commission wherein all public institutions with recognition agreements are required to seek the advice of the Commission before commencing negotiations. The advice of the SRC is that the financial implication of implementing the basic salaries in the proposed 2017/2021 CBA would range from ksh 22, 858, 212 to 35,068,788/ = . That the auditor general had given a qualified opinion on the Respondent's books of accounts for the period of 2012 to 2013 due to uncertainty of recovery of debts amounting to ksh 1.97 billion and the Respondent's total income has been on declining trend from 2012 to 2015.
16. The respondent says that it is on this ground that the Salaries and Remuneration Commission recommended that the Respondent retain the existing remuneration levels until it can demonstrate ability to pay and sustain any salary increment.

Determination

17. The court has considered the respective parties' pleadings and submissions of the parties in this case. The court notes that the Respondent does not dispute that there are supposed to be salaries' adjustments. Rather, it says that it is currently not able to pay as its' current financial status cannot allow it to do so. The court notes that the Respondent was quite candid in its position that it shall be unable to afford the increments.
18. The claimant claims he has a valid recognition agreement. The last one however they submit expired on 30th June 2017. A CBA was sent to the respondent for their review in July 2019 but respondent never responded. They affirm that their prayers for 8% salary increment each year is as provided on 1st November 2005.
19. The court concedes that the union has a constitutional right to engage in collective bargaining agreement under article 41 of *the constitution*. They also aver that salaries and remuneration commission that gave out its report dated 29th August 2022 cannot give itself authority it does not have while dealing with independent organizations.
20. It is interesting the respective parties had no objection to the provision of the SRC report and both accepted this was an economic dispute. Yet now the claimant is poking holes on the said report.



21. The collective bargaining agreement is meant to be signed mutually by the respective parties. The case of *Teachers Service Commission vs Kenya Union of Teachers (KNUT) & 3 Others* (2015) eKLR the court held:

“It is my considered view that collective bargaining agreement is neither compulsory nor automatic. It is the source of voluntarily negotiated term and conditions of service for employees. Collective bargaining is a platform upon which trade unions can build to provide more advantageous terms and conditions of service to their members. *The Constitution* in article 41 (5) recognizes the right to engage in collective bargaining. The right is founded on the concept of social dialogue, freedom of contract and autonomy of parties on collective bargaining. Article 41 (5) recognizes that collective bargaining is the preferred method of determining terms and conditions of employment. The article emphasizes the ability of the employer and trade unions to operate as partners rather than adversaries.”

22. The respondent argues their economic position has not changed since the last CBA review and that the same was exacerbated by Covid 19 pandemic.

23. The court finds this is a case of great complexity. Both the respondent and the claimant seem stuck and yet the court has not even any submissions or the respondent’s audited accounts to prove their allegation that they are financially stuck since 2017. At the same time the court cannot grant prayers in abstract for review of wages without proof that the respondent would be able to sustain such increment.

24. The report by SRC is of use to the court for information but court must confess the SRC report did not in any way persuade itself to reach its determination. The court is persuaded to make this decision because as well pronounced by the court in the case of *Kenya Game Hunting & Safari Workers Union v Micato safaris* [2016] eKLR that:

“The purpose of wage increment is to cushion workers from inflation by enhancing purchasing power however this can only be effectively achieved against a background of improved performance and sustainability of the wage bill. A wage increment whose effect would be to their journey to collapse of an organization is harmful to the self-same worker it was intended to benefit.”

25. The court is sympathetic towards the claimant’s members as well as the respondent’s position and failure to review their terms. Again court will not watch to see any party taken advantage by any other party. The claimant has since 2017 attempted to resolve the issue of negotiating for the revision of the collective bargaining agreement with the respondent but with no co-operation by the respondent.

26. The claimant even reported the matter to the Minister who appointed a conciliator but the discussion with conciliator did not yield any results and hence the case was filed in court. The respondent simply returned a report that its financial situation had not changed substantially since that last CBA had expired. There was no more information given or audited accounts produced. The respondent sat pretty and made no effort to meet the claimants anywhere. The respondent is like has had an attitude of indifference. The claimants have been patient for many years and it is not fair that the respondent made no efforts to negotiate for the revised CBA. He asks for chance to start again but surely from 2017 to date? That does not ring genuine.



27. A case almost similar to this particular one is *Kenya Hotels & Allied Works Union vs Nyanza Club* case 118 of 2017. Where court noted:

“in the present case the respondents made every effort to derail the negotiations and to allow a proper economic analysis to allow effective negotiation and determination of the issue in dispute by obeying the conciliator and the CPMU the expert and failing to give the relevant information especially the audited accounts and other relevant information regarding its capacity, staff component and costs” He further went to say: “The court in its determination of economic disputes is heavily guided by the information presented by the parties and the expert opinion as directed by section 15 of the Employment and *Labour Relations Act* cap 234 Laws of Kenya.”

28. The court being well guided by the pleadings and the respective submission finds the claimant has established its case and will grant its prayers for increment of its dues on the under listed prayers.

1. Salary and wages
2. Housing allowance
3. Owner occupier allowance
4. Subsistence allowance
5. Annual leave allowance
6. Medical (outpatient)
7. Car allowance
8. Commuter allowance
9. Hardship allowance
10. Sundry (Extraneous) allowance)

28. However the court order the parties to finalise on the revised collective bargaining agreement within 60 days and agree on the perimeters of the revisions of the above prayers or as will be otherwise agreed.

28. Mention on 18/9/2023 to give a report on the revised CBA and to make final orders.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JUNE, 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court



to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA NGIBUINI MWAURE

JUDGE

