



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CA NO. 248 OF 2014

KENAFRIC INDUSTRIES LIMITED.....EMPLOYER/APPLICANT

VERSUS

BAKERY CONFECTIONARY FOOD

MANUFACTURING AND ALLIED WORKERS UNION....UNION/RESPONDENT

RULING

1. The Collective Bargaining Agreement No. CA 248 of 2014 was objected to by the Employer/Applicant when the CBA came up for registration on 6th November 2014. The CBA relates to the period 2015-2016. It was submitted by Mr. Weru for the Employer that the employer had served a notice to negotiate the CBA and thus sought deferment of the CBA for 45 days. Mr Amalemba for the Union opposed the request and submitted that the CBA was negotiated and duly signed. It was thereafter forwarded to the Ministry whereupon the employer sought to renegotiate. He thus urged the Court to register the CBA. I deferred the registration to await a report by Mr. Okwayo of the CPMU. On 19th November 2014 Mr. Mulwa presented the CPMU report he had prepared dated 11th November 2014. The report pointed out that the Employer had an issue with 16 clauses and it seemed the Employer wanted to negotiate the CBA afresh.

2. In light of the issues emerging I directed parties to file submissions on the matter and the Employer filed submissions on 4th December 2014 while the Union filed submissions on 16th December 2014. I deferred the Ruling to today.

3. In the written submissions filed, the Employer takes issue with the delay in presentation of the CBA within the stipulated time. The Employer seeks to renegotiate some of the clauses in the CBA that had come up for registration. The Employer wished to have the registration of the CBA shelved and the 16 amendments proposed be given a chance at the negotiating table.

4. The Union was of a contrary view. It was submitted that the CBA was voluntarily negotiated and entered into between the parties on 17th December 2012. The CBA was covering the period 1st January 2015 to 31st December 2016. This CBA was negotiated simultaneously with that one for 1st January 2012 to 31st December 2014. The Union forwarded the CBA to the Central Planning Unit Ministry of Labour, Social Security & Services for analysis and the CBA was forwarded to this Court for registration in compliance with the relevant guidelines relating to Collective Agreements. The Union submitted that

the attempt to renegotiate the CBA was premature as the law envisaged such a renegotiation after registration. It was submitted that under Section 59(5) of the Labour Relations Act the Employer was estopped from enforcing or implementing the CBA that is not registered. The Union relied on the case of **Said Ndege v Steel Makers Limited [2014] eKLR** where Radido J. held that the employer had executed the CBA with the intention of being bound by its terms and create legal relationships with the union/employees and not merely as a matter of honour. The Union thus urged the Court to register the Collective Agreement presented to Court.

5. The matter of Collective Bargaining Agreements is one which is steeped in legal provision. There is the Labour Relations Act, the Employment Act and the Industrial Court (Procedure) Rules 2010. The Labour Relations Act 2007 defines collective agreement as follows:-

“collective agreement” means a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers;

6. The Employment Act 2007 defines it as follows:-

“collective agreement” means a registered agreement concerning any terms and conditions of employment made in writing between a trade union and an employer, group of employers or employers’ organization”;

7. The slight variation goes beyond syntax as far as these two definitions go. The Industrial Court (Procedure) Rules 2010 makes provision on collective agreements under Rule 35 as follows:-

35. Collective Agreements.

(1) An employer or an organization of employers that have entered into a collective agreement shall lodge a copy of the agreement with the Minister within fourteen days of its execution.

(2) The Minister shall furnish the Court with a copy of each collective agreement that has been lodged with the Minister pursuant to this Rule, and the Minister may also furnish the Court with such information and comments as the Minister considers necessary.

(3) Where the Minister objects to the registration of a collective agreement, a copy of the agreement furnished to the Court shall be accompanied by a statement of the objection giving reasons for objection.

(4) The Court shall maintain a register of collective agreements that have been accepted by the Court for registration.

(5) A collective agreement shall not take effect until it has been registered by the Court.

8. The Labour Relations Act 2007 and the Employment Act 2007 were both passed on the same date but the latter took effect after the former as the date of commencement of the Employment Act 2007 was in 2008. The Industrial Court (Procedure) Rules 2010 somewhat complicated matters. In the Labour Relations Act 2007, the collective agreement is defined as a written agreement between the parties. Under the Employment Act 2007, the collective agreement envisaged under the Act is a registered one. Under the Industrial Court (Procedure) Rules the onus is placed on the Minister to present it for registration. Under the Labour Relations Act which is an act of Parliament enacted to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratisation of trade unions and employers organisations or federations, to promote sound labour

relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes; the collective bargaining agreement has to be presented within 14 days. Section 59(5) provides as follows:-

59. (5) A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.

9. In Section 60, there is ample provision on the steps to be taken by the Industrial Court in the registration process. Section 60 provides as follows:-

60. (1) Every collective agreement shall be submitted to the Industrial Court for registration within fourteen days of its conclusion.

(2) The employer or employer's organisation which is party to an agreement to be registered under this section shall submit the agreement to the Industrial Court for registration.

(3) If an employer or employers' organisation fails to submit the collective agreement to the Industrial Court as specified in subsection (1), the trade union may submit it.

(4) The Industrial Court may request the parties to a collective agreement to supply further information or make oral or written representations to it for the purposes of this section.

(5) The Industrial Court may register an agreement-

(a) in the form it was submitted by the parties; or "

(b) with any amendment or modification agreed to by the parties. "

(6) The Industrial Court shall not register a collective agreement that -

(a) conflicts with this Act or any other law; or

(b) does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister.

(7) The Industrial Court –

(a) may register a collective agreement within fourteen days of receiving it;

(b) may refuse to register a collective agreement unless all parties to the agreement have had an opportunity to make oral representations to the Industrial Court; and

(c) shall give reasons for refusing to register any collective agreement.

10. In the case of **Ndege v Steel Makers** (supra) cited by the Union Radido J. was right in pointing out the deficiencies in the definitions and the apparent conflict in the laws. In my view, the intention of Parliament cannot be clearer than the words of statute. The Industrial Court (Procedure) Rules 2010 attempted to vary the law in place being Section 60 of the Labour Relations Act 2007. Rule 35 is an attempt by a person or persons with delegated authority to rewrite the law. I find that this Section is

contra statute and I refer this Ruling to the Rules Committee of the Industrial Court which is reviewing the Rules of this Court to enable them prepare a suitable amendment to the Rules to reflect the intention of Parliament. That said, I do hold that the substantive law on collective bargaining agreements is contained in Section 60. Indeed this is the Section cited by the Minister as he presents the collective bargaining agreements to Court for registration. I am of the firm view that the collective bargaining agreement attains legal enforceability upon registration by this Court. Prior to that it is an intention of parties and can be referred to but can only attain the status of legally binding and enforceable upon registration by this Court.

11. I would not wish to pass this opportunity to comment on the delay in presenting the CBA. The parties to the agreement in dispute entered into the agreement in 2012 yet the agreement is presented in 2014. In my view this is contrary to statute and thus in breach of the law. In the premises I will defer the registration of the CBA for 45 days to allow parties renegotiate the CBA and present the CBA for registration in short shrift. The law provides that there will be no vacuum and the existing CBA will hold for now and shall continue to have the full force of the law pending the resolution of the dispute within 45 days.

12. This dispute has demonstrated that the best time to register the CBA is shortly after its conclusion as a party to the agreement may over time begin to entertain a different idea or encounter different circumstances. There was nothing to bar the Union or Employer from presenting the agreement for registration in 2012 or 2013 for the period 1st January 2015 to 31st December 2016. As a result of the 2 year delay the Employer has had a change of mind in regard to some of the issues initially agreed.

13. In view of the deferment I have given above, each party will inevitably bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this **24th** day of **December** 2014

Nzioki wa Makau

JUDGE



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