Case Number:	Cause 2077 of 2016
Date Delivered:	30 Dec 2016
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Ruling
Judge:	Monica Mbaru
Citation:	Baragwi Farmers Cooperative Society Limited v Banking Insurance And Finance Union [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Cause allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2077 OF 2016

BARAGWI FARMERS COOPERATIVE SOCIETY LIMITED …….... CLAIMANT

VERSUS

BANKING INSURANCE AND FINANCE UNION …….. RESPONDENT

RULING

1. The claimant, Baragwi Farmers' Cooperative Society Limited, through application and Notice of Motion filed on 7th October 2016 are seeking for orders that;

1 Spent.

2 Spent.

3 Pending the hearing and determination of this application the respondent, their officials, agents and/or members be prevented from intimidating, threatening and/or otherwise restricting the claimant's employees from going to work.

4 This court declares the strike notice issued by the respondent as illegal and unlawful industrial action and therefor unprotected.

5 The respondent be condemned to pay the costs of this application.

2. The application is supported by the Affidavit of Norman Gatuguta the chairman of the claimant and on the grounds that, on 3rd October 2016, the claimant received a 14 days strike notice from the respondent. Prior to issuing the strike notice the respondent had not reported any dispute to the Minister as required and under the parties' recognition agreement, the respondent must refer any dispute to the Negotiating Committee and thereafter tot eh minister if there is no agreement.

3. Further grounds in support of the application are that the intended withdrawal of labour, demonstration, picketing and industrial action are in disregard to section 62, 76, and 78 of the LRA. The strike notice allege that parties had attempted to resolve the issue on 8% automatic annual increment without success. Parties have never signed any binding agreement for the automatic annual increment of 8%. The agreement that exist is the pay of a general wage increase of 10% for 3 years of which the claioamtn has diligently implemented.

4. That the respondent is attempting to force the claimant to pay an additional annual increase of 8% increment above the agreed 10% wage increase. The respondent's illegal strike action will result in the disruption of the claimant's normal operations and result in huge losses.

5. The claimant has fully implemented the CBA and given a general wage increase of 10% as agreed thus the industrial action is unnecessary and unreasonable. Where the industrial action is not stopped, members of the public will suffer irreparable injury, loss and damage as a result. An injunction should

issue stopping the industrial action called by the respondent as it is not justified and will be bad for industrial relations. If the strike is not stopped, the success of the suit by the claimant will be rendered nugatory.

6. In his supporting Affidavit, Mr Gatuguta avers that on 3rd October 2013 the respondent, BIFU filed Cause No.111 of 2013 against the claimant over negotiations between the parties about the effective date of the CA and levels of payment due to the workers in terms of overtime, annual leave, housing allowance, provident fund, terminal benefits, salaries and wage, commuter allowance and the effective date of the pay increase. On 17th December 2014, parties filed partial consent in the terms that;

Commuter allowance Kshs.1, 000.00 per month;

House allowance at 18% of basic pay subject to a minimum of KShs.1, 000.00;

General wage increase; 1st year 10%; 2nd year 10%; and 3rd year 10%.

7. On the pending issued judgement was delivered 20th March 2015 to the effect that;

Effective date was 1st January 2015 and the respondent {claimant herein] to pay arrears;

Entry points shall be the minimum wage for all employees deployed in the factories, and those deployed in the head office as per applicable wage order with 1st January 2015 as the due date for 1st year;

By 1st May 2015 parties to conclude and file CBA reflecting the agreed terms as recorded and determined by the court.

8. The issue of wage increase was thus concluded by the parties in the partial consent and settled at 10% for 3 years. Following the court judgement, the claimant sought out the respondent to sign the CBA but the claimant was adamant that an 8% pay increase must be included.

9. Mr Gatumuta also avers that on 18th August 2016 the respondent wrote to claimant's employees accusing the claimant of failing to implement the 8% wage increment and wrongly inciting them against the management. The respondent also accused the claimant of stopping the 8% annual increment despite knowing well that such an 8% annual increment has never been agreed upon by the parties and the agreed increase of 10% has been implemented in full. To follow and issue strike notice is to go contrary to the agreed terms and judgement of the court on wage increase.

10. In reply, the respondent filed **Replying Affidavit of Mwaura Ngage** and avers that at the Executive Recruitment officer of the respondent he has authority to reply herein. That strike notice on 3rd October 2016 relates to the implementation of judgement and orders of the court on 20th March 2015, 22nd march 2016 and 26th May 2016 in Cause No.111 of 2013 (Nyeri) and between the parties herein. The claimant has deliberately concealed this fact from the court when obtaining ex part orders. The claimant should have moved the court at Nyeri instead of opening new proceedings and this is in abuse of court process.

11. The parties have a pre-existing CBA of 30th August 2012 signed between the claimant and the respondent's predecessor, KUCFAW. The CBA signed on 15th February 202 between the claimant and KUCFAW and Kirinyaga District Co-operative Union Limited on behalf of the claimant, minimum wage and annual increment were agreed at 8% and general wages at 6% covering the period of 1st October 1999 to 1st October 2000. The claimant implemented the 8% annual increment as from 1st October 1999 for 15 years until 2013 when this was abruptly stopped.

12. The respondent proposed CBA review and the claimant offered to retain the 8% automatic annual increment or yearly increment and the respondent counter-proposed to reduce it to 3% to a sliding salary of up to 18 years. Before a conciliator, parties agreed to retain 8% annual increments at every October of each year and a certificate of conciliation was issued to this effect on 12th July 2013.

13. The remaining unresolved issues were subjected to court process in Cause No.111 of 2013 on 3rd October 2013. The issue of general wage increase was one of the issues forwarded to court for determination. The issue of general wage increase and automatic annual increments are distinct even though both apply to the basic wage – annual increment compensates for seniority in terms of years of service and curtails salary overlaps while general wage increases are based on inflation/cost of living/consumer price indices and productivity.

14. On 20th March 2015, court delivered judgement and directed parties to sign a CBA on agreed terms as recorded and determined in the judgement. At this point, the annual increment has been agreed to be retained at 8% during conciliation and was therefore not in dispute and a subject for determination by the court. The claimant implement this increment in October 2013 but failed to do so in 2014. The claimant also refused to sign the CBA with the agreed annual increment. The respondent by Notice of Motion dated 2nd December 2015 applied seeking to compel the claimant to sign the CBA with the 8% automatic annual increment and on 22nd March 2016 the court issued an orders to the effect that all issues had been resolved including the one on *annual agreement.*

15. Despite the court orders, the claimant refused to sign the CBA. The respondent applied to have the order of 22nd March 2016 to correct the word *agreement* and place *increment* and which was done on 26th May 2016.

16. As such, the respondent has complied with the provisions of section 62, 76, and 78of the LRA and the strike is justified and lawful. The respondent canto report a new dispute. The orders sought should be declined with costs.

Determination

17. Essentially this is a matter that should have been filed in Nyeri, Employment and Labour Relations Court as most of the substantive issues herein have already been addressed before that court. I however note that the Court has original and exclusive jurisdiction over all employment and labour relations matters, for justice and proper administration of the law, I will address the preliminary issue before this court and then forward the file to the appropriate court for the parties to address the substantive issues remaining.

18. The main issue challenged by the claimant herein is the strike notice of 3rd October 2016 by the respondent with regard to the demand of 8% automatic Annual increment that is said not to be part of any known agreement, part of the partial consent of 17th December 2014 or the judgement of the court on 20th March 2015. On the other part, the respondent's case is that before parties proceeded before the court they attended before a conciliator and the question of 8% automatic annual increment was resolved and what was before court for resolution was the general annual increment. That the two, automatic annual increment and general wage increment are distinct and separate matters and as the claimant has failed to implement the automatic annual increment, they have issued the industrial action notice to implement the court judgement.

19. Both parties agree that of the matters before court in Cause No.111 of 2013, Nyeri there was a partial agreement which resolved the issues of;

Commuter allowance;

House allowance; and

General wage increase.

20. That following the parties' submissions and judgement of 20th March 2015, the court made a decision with regard to;

Effective date;

Entry points;

By 1st May 2015 parties to conclude and file CBA reflecting the agreed terms *as recorded and determined by the court.*

21. The respondent's case is that the issue of *8% automatic annual increment* was not part of matters before the court for determination as this was resolved before the conciliator and this was a matter that had been part of the previous CBA between the parties. The respondent annexed attachment "3C" as evidence of matters agreed upon and the matters in dispute. Annexure "3A" is the Conciliator's letter on the trade dispute reported to the Minister. On matters of wage increment I note the following items;

Item 34. Merit increment;

Item 40. Increment dates

22. These were part of the resolved issues.

23. With regard to unresolved issues I note the following;

1) Overtime

2) Annual leave

3) Housing allowance

4) Provident fund

5) Terminal benefits

6) Salaries and wages

7) Effective date

8) Commuter leave.

24. I take it that as at the time the parties herein went before the Conciliator and drew issues, this was a chance to review the existing CBA between the parties and particularly the CBA where the predecessor to BIFU, the Kenya Union of Commercial Food and Allied Workers (KUCFAU) had entered into with the claimant. In that review, when the matter was reported to the Minister, the Conciliator was able to note

the issues that were agreed upon and the issues in dispute. Looking at the issues set out above, and all matters before the Conciliator, the question of *8% automatic annual increment* was an issue at all. This therefore was not a matter made part of the partial consent or part of the court judgement.

25. The court made the following order;

The parties shall, by 01.05.2015, conclude and register in the court a collective agreement reflecting agreed terms as recorded and determined by the court in this judgement.

26. The CBA to be thus registered was to refer to the *agreed terms as recorded* and as *determined by the court* in its judgement under Cause No.111 of 2013. To go outside the judgement and draw a different CBA with terms outside the Judgement would be to introduce extraneous matters not subject of the judgement.

27. Therefore, where the issue of *wage increase* was resolved by the court in Cause No.111 of 2013 in the judgment of 20th March 2015 and putting into account the partial consent of 17th December 2014, where the respondent was keen to make changes to the same, such can only arise in future CBA negotiations. The CBA taking effect on 1st January 2015, for its entire term, parties are bound by the partial consent and judgement of the court on the same. Unless the terms of the partial consent are not clear or were obtained through illegal means or the judgment of the court is challenged, there can only be an application for review on good cause or an appeal thereof against the judgement. To make changes to the terms of the CBA on which terms parties have already partially recorded consent and the pending issue arbitrated over by the court, is to sneak in new provisions not envisaged by the parties in the partial consent and not part of the court judgement on 20th March 2015.

28. For the respondent to call industrial action over matters extraneous and outside what is agreed upon and not part of the subject judgement is to engage in an action that is not justified and such industrial action lacks the protection of the law. The orders sought by the claimant herein are justified.

The application dated 7th October 2016 is hereby allowed;

1. Pending the hearing and determination of the Claim, respondent, their officials, agents and/or members are hereby prevented from intimidating, threatening and/or otherwise restricting the claimant's employees from going to work;

2. The strike notice issued by the respondent and dated 3rd October 2016 is hereby suspended and shall not be implemented until the final determination of the main suit;

3. Costs in the cause; and

4. The file shall be forwarded to the Court in Nyeri, where the cause of action arose and the court seized with the main issues herein between the parties and taking into account Judgement in Cause No.111 of 2013 delivered by the court at Nyeri.

Delivered in open court at Nairobi this 5th December, 2016.

M. MBARU

JUDGE

In the presence of:

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