



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 235 OF 2009**

**KENYA UNION OF DOMESTIC HOTEL, EDUCATIONAL INSTITUTIONS, HOSPITALS  
AND ALLIED WORKERS (KUDHEIHA) ..... CLAIMANT**

**VERSUS**

**CATERING & TOURISM DEVELOPMENT LEVY TRUSTEES ..... RESPONDENT**

Mr. Ojienda for the Applicant/Respondent

Mr. Enoda for the Respondent /Claimant

**RULING**

1. The matter before Court is a review application brought under **Section 16** of the Industrial Act, 2011 and Rule 32 of the Industrial Procedure Rules 2010 dated 1<sup>st</sup> April 2013 and filed on 4<sup>th</sup> April 2013.
2. The Application seeks the following orders interalia:
  - “2 That the Ruling of this Honourable Court made on the 21<sup>st</sup> March 2013 dismissing the notice of preliminary objection application dated 16<sup>th</sup> September 2009 together with all other consequential orders be reviewed, varied and / or set aside.”
3. That this Honourable Court do issue an order terminating the entire proceedings in this cause in view of the Ruling in **HCC Misc. 697 of 2009.**
3. The Application is based on two grounds as follows;
  - a. There is discovery of new and important evidence which, after the exercise of due diligence, was not within the Applicant’s knowledge and could not be produced at the time when the order on preliminary objection was made and argued.
  - b. The new evidence is very fundamental as it renders the entire proceedings in the cause a nullity.
  - c. The application is further supported by an Affidavit of **Mr. Seth Ojienda** Advocate in the conduct of the matter to the effect that a ruling of the High Court in HCC 697 of 2009 was made on 16<sup>th</sup> May 2011 after this matter herein was argued on 27<sup>th</sup> January 2011 and a ruling made by the Industrial Court on 21<sup>st</sup> March 2013.
4. That the Applicant could therefore not have had knowledge of the ruling which was delivered after

the fact.

For that reason, the ruling of the Industrial Court made on 21<sup>st</sup> March 2013, be set aside because in view of the ruling in HCCC Misc. 697 of 2009, the entire proceedings in this cause has been rendered a nullity.

5. The Applicant does not indicate whether it had disclosed the pendency of HCCC No. 697 of 2009 at the High Court, when it filed a notice of preliminary objection to this suit on 16<sup>th</sup> September 2009, and during the arguments on 27<sup>th</sup> January 2011, for the Court to take that into consideration in its ruling which dismissed the preliminary objection and directed the main suit to be proceeded on.

### **Replying Affidavit**

5. The Interested Party in this matter, KUDHEIHA filed a replying affidavit of **Albert Njeru** the Secretary General, dated 4<sup>th</sup> November 2013, on 6<sup>th</sup> November 2013 and the gravamen of the opposition is as follows;

- i. The preliminary objection dismissed in the ruling of 21<sup>st</sup> March 2013 was based on the same grounds as the current application and therefore the matter is *resjudicata*.
- ii. That HCCC Misc. 697 of 2009 was filed during the pendency of this case, and the Applicant surreptitiously failed to disclose this fact to this Court, nor was the pendency of the Industrial Court matter disclosed to the High Court.
- iii. That in any event the Judicial Review Application in HCCC MISC. 697 of 2009 was not served on all parties who had an interest in the matter hence the difficulties experienced by the Applicant are of their own making and this application should be dismissed for that reason alone.

6. The effect of the non-disclosure by the Applicant is that we now have two rulings by two different courts of competent jurisdiction that are contradictory and the Applicant should not be permitted to derive any benefit from its non-disclosure and forum shopping.

7. That the Claimant /Respondent only became aware of the HCCC Misc. 697 of 2009 on 4<sup>th</sup> April 2013, when the Applicant made this application for review.

8. That the conduct by the Applicant amounts to sharp practice and the Court should penalize the Applicant by dismissing this Application with costs to the Claimant / Respondent.

### **Analysis**

9. The Court has considered the pleadings and the submissions by the parties herein and has come to the following conclusion of fact;

(a) That the applicant filed Judicial Review Application, HCCC Misc. Application 697 of 2009 during the pendency of this matter and did not disclose this fact to the Industrial Court in its Notice of preliminary objection dated 16<sup>th</sup> September 2009 and during the arguments of the matter in January 2011.

(b) That the parties in the JR Application HCCC Misc. 697 of 2009 are different from the ones in this case.

(b) That in any event, the decision of the High Court in HCCC MISC. 697 of 2009, does not bind the Industrial Court as presently constituted.

(d) That the Applicant has not disclosed any valid ground for review of terms of Rule 32 of the Industrial Court procedure Rules 2010. This is especially so because the pendency of the JR HCCC MISC. 697 OF 2009 was in the knowledge of the Applicant at the time the Industrial Court Application was heard and it did not deem it fit to disclose its existence to the Court.

Furthermore, the Industrial Court's decision is not in breach of any written law nor has the Court discerned any apparent mistake or error on the face of the ruling of the Court.

10. The ruling in the case of **Margaret Soars Vs. Jane Afico, HCCC 660 of 2005**, is apposite on the matter of none disclosure as is the case herein.

11. A party who fails to disclose a material fact to the Court cannot seek to later on benefit from the same but instead should be penalized by the Court by denial of the relief sought.

12. Furthermore the Court stated:

**“in order to justify the grant of an application for review on the ground of discovery of new and important matter of evidence, the applicant must go further and prove that despite the exercise of due diligence, the said evidence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.”**

13. In this matter, the applicant ought to have sought stay of the matter which was filed later pending the decision of the other Court, if it was the applicant's view that the issues for determination were the same and capable of disposal in the latter case or vice versa.

14. The Court with the jurisdiction over this matter since the inception of the Industrial Court as presently constituted is the Industrial Court and not the High Court.

15. See the Decision of **Majanja J. in United States International University (USIU) Vs. The Attorney General and another.**

16. Based on the foregoing analysis, the Application for review is dismissed and costs will be in the cause.

**Dated and Delivered at Nairobi this 16<sup>th</sup> day of May, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**