Kenya Private Universities Workers Union v Catholic University of Eastern Africa (Cause E388 of 2023) [2024] KEELRC 1810 (KLR) (8 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1810 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E388 OF 2023

BOM MANANI, J

JULY 8, 2024

BETWEEN

KENYA PRIVATE UNIVERSITIES WORKERS UNION ..... CLAIMANT

AND

CATHOLIC UNIVERSITY OF EASTERN AFRICA ..... RESPONDENT

RULING

Background

1. Through a Memorandum of Claim dated 15th May 2023, the Claimant instituted proceedings before this court seeking the following orders:-

    a. That the court finds the decision by the Respondent refusing to negotiate and sign a Collective Bargaining Agreement (CBA) between the parties as unfair and in bad faith.

    b. That the court adopts the draft CBA which the Claimant had forwarded to the Respondent as the CBA between the parties and orders them to it sign forthwith.

    c. That the court issues any other remedy it deems fit.

    d. That costs of the case be met by the Respondent.

2. The claim was accompanied by an application for interim reliefs. In the application, the Claimant sought, inter alia, for orders to compel the Respondent to produce its audited accounts for 2021 and 2022 and its current wage bill and staff lists for both unionizable and management members of staff. The Claimant also sought prohibitory orders against the Respondent to bar the latter from victimizing the Claimant's members on account of their union membership.

3. The Respondent entered appearance in the cause, filed Grounds of Opposition and a replying affidavit by one Immaculate Muthoni in response to the application. In the grounds, it (the Respondent) contended that the suit and application were an abuse of the court process.

4. The Respondent contended that the suit was sub judice since the issues raised in the matter were pending resolution in several other cases between them. In addition, it averred that the instant suit was premature since the Claimant had not exhausted the dispute resolution procedures under the *Labour Relations Act*.

5. Further, the Respondent denied that it had a Recognition Agreement with the Claimant to warrant entering into the process of collective bargaining with it. It contended that the purported Recognition Agreement which the Claimant was relying on to push for the parties to commence collective bargaining was obtained illegally and was the subject of ongoing litigation in ELRC Cause No 4 of 2019 before the same court. The Respondent also pointed out that the parties had another suit filed vide ELRC Cause No 219 of 2019 which revolved around the same issue of recognition.

6. The court looked at the two matters to determine what they were about. In ELRC Cause No 4 of 2019 filed by the Respondent, the issues for resolution were flagged as follows:-

    a. Whether the purported recognition agreement dated the 30th of November 2017 was obtained illegally as the Respondent never and does not meet the threshold for recognition as set under the *Labour Relations Act*.

    b. Whether the sudden strike called by the Respondent through the media on or about the 5th of January 2019 and the Respondent's intended paralysis of the Claimant University activities is illegal/improper and malicious.

7. In ELRC Cause No 239 of 2019, the Claimant sued the University for refusal to remit union dues. In a preliminary objection filed in the cause, the University contended that there was no valid recognition agreement between the two.

8. The record therefore shows that the question whether the parties to this action have a valid recognition agreement was live in the two matters. It is also apparent that at the time the Claimant was filing the instant suit, ELRC Cause No 4 of 2019 and ELRC Cause No 239 of 2019 were still pending resolution in court. However, it is clear from the Respondent's replying affidavit in the instant suit dated 23rd February 2024 that the two suits (which were consolidated for purposes of trial) were eventually determined by a decision of the court dated 23rd February 2024.

9. After hearing the parties on the application dated 15th May 2023 in the instant suit, the court arrived at the conclusion that the case was an abuse of the court process. As a result, it struck out the matter with costs to the Respondent.

10. The basis for the court's finding was that:-

    a. The dispute between the parties related to whether the Respondent could be compelled to negotiate a CBA with the Claimant in view of the apparent dispute between them regarding whether they have a valid Recognition Agreement.

    b. The law obligates employers to enter into CBA negotiations with trade unions only if the two have a valid subsisting Recognition Agreement.

c. The question whether the Claimant and Respondent had a valid Recognition Agreement was the subject of ongoing litigation in ELRC Cause No 4 of 2019 and ELRC Cause No 239 of 2019.

d. As such, the Claimant could not legitimately insist on the Respondent entering into a CBA with it until the issue regarding whether the two had a valid Recognition Agreement had been settled by the court in the pending suits.

e. Consequently, the Claimant's suit which sought to compel the Respondent to sign the draft CBA that had been forwarded to it was untenable in law and therefore an abuse of the court process.

11. The Claimant has now filed the application dated 5th February 2024 seeking to review the court's decision. The application is expressed to have been brought under rule 33 of the *Employment and Labour Relations Court (Procedure) Rules* (ELRC Rules).

12. In the application, the Claimant avers that there is an error apparent on the face of the record. It (the Claimant) argues that the court ought not to have held that there was a contest regarding the validity of the Recognition Agreement between the parties since the matter had already been addressed and resolved through ELRC Cause No 805 of 2017 and there had been no appeal from that decision. The Claimant further avers that the purported controversy regarding the validity of the impugned Recognition Agreement is a non-issue since the instrument was signed by the Respondent's Legal Officer, Vice Chancellor and Human Recourse Officer and the purported renunciation of the instrument has not been the subject of criminal investigations.

13. The Claimant asks the court to vacate its orders striking out the suit. Instead, it (the Claimant) prays for an order reinstating and staying the instant suit pending the hearing and determination of ELRC Cause 4 of 2019 and ELRC Cause 239 of 2019.

14. In opposition to the application, the Respondent contends that the motion does not meet the threshold for an application for review under rule 33 of the *ELRC Rules*. The Respondent argues that the Claimant has not pointed to any error that is apparent on the face of the record.

15. According to the Respondent, what the Claimant is trying to do is to prosecute an appeal against the court's decision through the backdoor. The Respondent argues that the matters which the Claimant raises are fit for appeal and not an application for review.

16. It contends that the fact that the court has misapplied the law is not a reason to seek review of its decision. Rather, it should be a ground for appeal.

Analysis

17. I have considered the contrasting arguments on the application by the parties. It is correct as the Claimant contends that the impugned decision is amenable to either an appeal or review in terms of rule 33 of the *ELRC Rules*. However, if the route of review is preferred, then the threshold set by the aforesaid rule must be met.

18. The record shows that immediately after the impugned ruling was delivered, the Claimant lodged a Notice of Appeal against it. The Notice is dated 20th December 2023. Subsequently, the Claimant filed the application for review dated 5th February 2024.

19. When the matter came up for directions, the court asked whether it was appropriate for the Claimant to pursue an appeal and review concurrently. In reaction, the Claimant filed a notice withdrawing the Notice of Appeal. This was done on 29th February 2024.

20. The issue that appears grey is whether a party who has lodged a Notice of Appeal against a court decision can file an application for review of the same decision more so before withdrawing the Notice of Appeal. Case law on the matter is not settled (see*HA v LB* [2022] eKLR).

21. Be that as it may, I am prepared to go with the view that the mere filing of a Notice of Appeal does not signify the actual filing of an appeal for the purposes of an application for review. Therefore, a party who has elected to file an appeal against a court decision may elect to withdraw the notice signifying this intention and file the motion for review.

22. Having said thus, the critical question in this matter is whether the instant application meets the threshold for an application for review. Although the Claimant has asserted that the reason for moving the court for review is the presence of an error on the face of the record, he does not cogently point out the purported error.

23. The Claimant has suggested that the question of recognition between the parties was settled in ELRC Cause No 805 of 2017 long before it filed the instant action. However, the Respondent denies this assertion. The Respondent's position is that ELRC Cause No 805 of 2017 was still pending resolution as at 25th February 2024 when it filed its response to the instant application. Therefore, the issue of recognition between the parties was still alive, at least as at that date.

24. I have visited the Kenya Law website and noted that judgment in ELRC Cause No 805 of 2017 was delivered on 25th April 2024. However, nowhere in the decision does the court address the question of recognition between the Claimant and the Respondent (see*Kenya Private Universities Workers Union v Catholic University of Eastern Africa* (Cause 805 of 2017) [2024] KEELRC 956 (KLR) (25 April 2024) (Judgment)). Therefore, the Claimant's contention that the issue was settled in that case is farfetched.

25. One may wonder how the Claimant was able to represent some employees of the Respondent in ELRC Cause No 805 of 2017 without the benefit of a Recognition Agreement if at all. It is important to be cognizant of the fact that the law does not obligate a Trade Union to have a Recognition Agreement with an employer in order to represent its members who are in such employer's employment in court or elsewhere (*Modern Soap Factory v Kenya Shoe and Leather Workers Union* [2020] eKLR).

26. However, when it comes to the process of collective bargaining, section 54 of the *Labour Relations Act* makes the presence of a valid Recognition Agreement a prerequisite. This may account for the Claimant's presence and participation in ELRC Cause No 805 of 2017 despite the contested status of the Recognition Agreement between it and the Respondent.

27. From the foregoing, it is apparent that the issue of recognition between the Claimant and the Respondent had not been settled through ELRC Cause No.805 of 2017 when the Claimant filed the instant action. Therefore, it cannot be argued that the court made an error by purportedly failing to take note of the fact that the matter of recognition between the parties had been settled in the aforesaid cause.

28. The foregoing being the case, what then is the error which the Claimant is alluding to? Could it be that it (the Claimant) considered the court's pronouncement that the parties could not be legitimately compelled to enter into a CBA without the benefit of a valid Recognition Agreement an error apparent on the record? If that is what the Claimant is alluding to, does such a misstep amount to an error on the

face of the record which would entitle it to seek review of the court's decision or is it a misinterpretation of the law on the subject which entitles it (the Claimant) to appeal?

29. In a series of decisions, courts have taken the view that misapprehension of the law by a judicial officer does not provide a suitable ground for review. Rather, it provides a ground for appeal.

30. This point was made in *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR when the Court of Appeal observed as follows:-

> "It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction."

31. A scrutiny of the Claimant's affidavit does not disclose the presence of an error on the face of the record as purported by the Claimant. Rather, it points to a purported misapprehension of the law by the court when it took the view that the Respondent could not legitimately be compelled to enter into CBA negotiations with the Claimant in the face of the contested Recognition Agreement.

32. The Claimant has made another request which in my view is not well founded. It asks the court to set aside the order dismissing its suit and in place therefore to issue an order reinstating but staying the action pending determination of ELRC Cause No 4 of 2019 and ELRC Cause No 239 of 2019. This request is premised on the assumption that the instant suit had some legitimacy in law and therefore ought to have been saved.

33. The instant action purported to ask the court to compel the Respondent to sign the draft CBA prepared by the Claimant despite the fact that the Recognition Agreement between them was still the subject of litigation in other suits. Thus, the Claimant's request was not just untenable but irregular.

34. It would have been sensible if the Claimant had awaited resolution of the dispute relating to the validity of the Recognition Agreement in the pending suits before it ventured to institute proceedings to compel the Respondent to execute the draft CBA. Therefore, the instant suit, in so far as it ignored this reality, amounted an abuse of the court process and was amenable to be struck out.

35. As such, the court's decision to strike out the suit was within the law. Thus, the request to set aside the impugned order and substitute it with an order reinstating the case but staying it pending resolution of ELRC Cause No 4 of 2019 and ELRC Cause No 239 of 2019 has no basis.

36. The Claimant suggests that if the impugned decision is not set aside, this will prevent it from revisiting the issue of finalization of the CBA on account of the doctrine of res-judicata. I do not agree.

37. The impugned court ruling was to the effect that the CBA negotiations between the parties could not proceed unless the question of recognition between them was resolved through the pending suits. Thus, depending on how the court pronounced itself on the issue in the other causes, the parties are free to resume the CBA negotiations.

38. As the record suggests, the court in ELRC Cause No.4 of 2019 and ELRC Cause No 239 of 2019 arrived at the conclusion that the parties had, prima facie, concluded a Recognition Agreement between them. As such, the learned Judge was unwilling to interfere with the Recognition Agreement.

Consequently and depending on the interpretation the parties have ascribed to the decision, they are free to elect on how to proceed.

Determination

39. Having regard to the foregoing, I reach the conclusion that the Claimant's application is unmerited.

40. As a consequence, it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 8TH DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE