



**Kenya Union of Commercial Food and Allied Workers Food Abd
Allied Worers v Amritlal S Shah Wholesalers Limited (Cause
4 of 2019) [2024] KEELRC 2264 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2264 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 4 OF 2019
MA ONYANGO, J
SEPTEMBER 20, 2024**

BETWEEN
**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**
AND
AMRITLAL S SHAH WHOLESALERS LIMITED RESPONDENT

RULING

1. The Respondent herein filed the instant application dated 11th December 2023 brought under the provisions of section 1A, 3 and 3A Civil Procedure Act, Section 16 of the Employment and Labour Relations Court Act, Rule 33(1), (2), (3), (4) and (5) of the Employment and Labour Relations Court (Procedure) Rules, seeking for orders that:
 - i. Spent
 - ii. Spent
 - iii. That this court be pleased to review, vacate, vary and or set aside its judgment of 24th November 2023.
 - iv. That the cause be reopened and direction be given to include evidence which was not within the knowledge of the court and other considerations which were overlooked at the time of writing judgement.
2. The application is supported by the affidavit of Kamal Amritlal Shah, the Respondent’s Director in which he states that in the judgment entered against the Respondent on the 24th November 2023 the court relied on circumstances of the case which were prevailing in the year 2018 in disregard of the current situation.



3. According to the deponent, the circumstances that prevailed on the ground in 2018 had since changed and the Respondent did not have members among its employees as was evidenced by the sworn affidavits which indicated that the Respondent's employees had not joined membership of the Claimant Union.
4. The Respondent deposes that on 17th October 2019, this court ordered that there be a conciliation for the purposes of ascertaining the number of members the Claimant had recruited. That a head count was conducted which showed that the Claimant's members were the minority.
5. The Respondent further states that a report was made and filed in court by the County Labour Officer, Uasin Gishu and an order was made that the County Labour Officer attends court to shed light on the report in order to give directions on the way forward but the said officer never attended court. That subsequently, on 23rd January 2023, the Claimant made a request for directions to be given on the report.
6. It is the Respondent's contention that the Claimant came to court on 4th July 2023 without notifying the Respondent and sought directions to file submissions, a prayer which was granted in disregard of the previous orders made and which misdirected the court.
7. The Respondent states that it was served with a notice for mention of the case for purposes of taking directions and was served with the submissions on 8th September 2023 which related to the labour officer's report dated 22nd October 2020 that was awaiting directions. That it was not informed of the directions taken and the next mention date.
8. That it is only by chance that the Respondent's advocate was in court on 20th September 2023 when the matter was called and he pleaded to be allowed to file submissions before judgement was rendered.
9. According to the Respondent, the court proceeded to give a date for judgment without giving a mention date to confirm submissions had been filed. That for the above reasons, an injustice was occasioned. The court was urged to review its judgment and set aside its orders.
10. The Claimant opposed the application vide a Replying Affidavit sworn by its General Secretary, Mr Bonface Kavuvi on 23rd February 2024. The Claimant states that the judgment issued by this court on 24th November 2023 does not aggrieve or injure the Respondent in any way since it just orders the Respondent to comply with the law as provided for in the [*Labour Relations Act, 2007*](#).
11. According to the Claimant, it raised its concerns on the issue of the purported head count conducted on 22nd October 2020 but the Labour Officer ignored the Claimant's concerns and went ahead with the said exercise even though the Claimant never participated.
12. The Claimant states that the Labour Officer was only summoned to court to explain why she had not filed her report and not to shed light on her report. That since she had filed the report, there was no reason for her to appear before the court.
13. The Claimant contended that the Respondent is bringing in new evidence that was not produced/ filed in court before judgement was delivered, while it fully participated in the matter till the end.
14. In a rejoinder, the Respondent through a further affidavit filed on 2nd April 2024 sworn by the Respondent's Director, reiterated the contents of the supporting affidavit. In addition, the director averred that the judgment delivered on 24th November 2023 greatly aggrieves and injures the Respondent since there were key parts of evidences that were not taken into consideration. That its grievance was not merely an order to comply with the law as alleged by the Claimant. He contends



that the evidence contained in the instant application was existing at the time and it is key in making a correct determination of the Respondent's claim.

15. The Respondent thus urged the court to exercise its unfettered discretion to review its judgment and admit the Respondent's evidence.
16. The application was disposed of by way of written submissions as directed by the court on 5th March 2024. I have perused the record and only found submissions for the Applicant which are dated 19th March 2024.

Determination

17. Upon taking into consideration the application, the rival affidavits as well as the submissions on record, I find that the only issue that presents itself for my determination is whether the Applicant has made out a case to justify the grant of orders for review.
18. The law on review is provided for under Rule 33 of the [*Employment and Labour Relations Court \(Procedure\) rules, 2016*](#). The Court Rules requires that;

“ 33.

- (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.

19. The Applicant's main reason for seeking the orders of review in the instant application is that the court in its judgment delivered on 24th November 2023 relied on circumstances which were prevailing in the year 2018 and did not consider any recent happenings when writing the judgement.
20. According to the Applicant, its current employees had given evidence to the effect that they are not members of the Claimant union as evidenced by.
21. In its submissions, the Applicant maintained that the court ordered a conciliation for the purposes of ascertaining the number of members the Claimant had recruited to be undertaken, and a headcount was undertaken which showed that the Claimant had not yet attained the simple majority of the employees as evidenced by the report of the County Labour Officer dated 22nd October 2020.
22. The Applicant states that the court on 4th July 2023 proceeded to give directions to file submissions at the instance of the Claimant without notice to the Respondent and in granting the Claimant's request,



the court failed to consider the Labour Report which was on record and was awaiting directions which would have determined the issue of membership.

23. I have carefully perused this court's judgment delivered on 24th November 2023. The court in its judgment observed as follows:

- “..... According to the report filed by the County Labour Officer dated 22nd October 2020, a headcount was conducted at the Respondent's two premises at Kisumu Road and Oloo Street. Five employees confirmed membership while 74 stated they were not members of the union.
25. The report states that the Union representative left the premises at Kisumu Road just before voting ended and did not attend voting at Oloo Street. The report further states that 92 employees were listed in the register.
26. In view that the Claimant has rejected the report, it falls on this court to determine the suit as stated in the court's ruling of 17th October 2019.”

24. From the above paragraphs of the judgment, it is evident that the court considered the report of the County Labour Officer in making its determination.
25. The Applicant's allegation that the court failed to consider that report, which is the only ground in support of the instant application, is therefore not correct.
26. Further, the affidavit in annexure KAS-3 of the Applicant's application is dated 11th December, 2023, after the date of the judgment. It can therefore not form the basis of review of the judgment as it does not constitute evidence that was not within the knowledge of the Applicant at the time of hearing of the suit nor is it evidence that was overlooked as alleged by the Applicant.
27. It is important to point out that a court, while determining a case, relies on evidence on record and not on the circumstances prevailing at the time of writing judgment unless this is brought to the court's attention before writing the judgment and the new evidence is admitted with consensus or after hearing arguments from both parties in respect thereof.
28. Consequently, I find the application dated 11th December 2023 to be unmeritorious and I hereby dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 20TH DAY OF SEPTEMBER, 2024

MAUREEN ONYANGO

JUDGE

