Mwangi & 21 others v Attorney General (Civil Appeal 374 of 2014) [2022] KECA 597 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 597 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 374 OF 2014

RN NAMBUYE, F SICHALE & S OLE KANTAI, JJA

APRIL 28, 2022

BETWEEN

JAMES MWANGI & 21 OTHERS ..... APPELLANT

AND

ATTORNEY GENERAL ..... RESPONDENT

(An appeal arising out of the Ruling/Orders of the Employment and Labour Relations Court at Nakuru (Ongaya, J) dated 13th June 2014) IN Industrial Court Petition No. 4 of 2013, (formerly Nairobi HC. Petition No. 105 of 2010))

JUDGMENT

1. James Mwangi & 21 others; (the appellants herein), are aggrieved by the ruling and orders of the Employment and Labour Relations Court (Ongaya, J.) dated June 13, 2014, in which the learned Judge declined to review and/or set aside the judgment of Mumbi, J. (as she then was), in Nairobi High Court Constitutional Petition No. 105 of 2010, delivered on July 11, 2012.

2. A brief background in this matter is as follows; in June 2009, the 1st respondent herein declared 51 of its employees redundant on terms negotiated and agreed with a workers' union that represented those employees. The appellants were among those employees to be declared redundant. Subsequent thereafter, the 1st respondent made payment of the agreed sums to the labour office in Nakuru.

3. The appellants were however dissatisfied with the agreement arrived at by the Union and the 1st respondent and instituted proceedings at the then Industrial Court being Cause Number 327 (N) of 2009. The Industrial Court found that their claim was in breach of Section 73 (3) of the *Labour Relations Act*, and dismissed the application for injunction that had sought to restrain the redundancy, after which the appellants thereafter withdrew their case.

4. Subsequent thereafter, the appellants filed yet another case being Industrial Cause No. 462 N of 2009, which repeated the same claims as those that had been made in the Industrial Cause No. 327

(N) of 2009 which had been withdrawn and the Industrial Court proceeded to award them Kshs. 6,278,165.00

5. The 1st respondent thereafter filed Nairobi High Court Constitutional Petition No. 105 of 2010, against the then Industrial Court in which the appellants were named as the Interested Parties contending inter alia that; pursuant to the provisions of Section 70 (a) of the *retired Constitution,* the same required the Industrial Court to enforce Section 73 (3) of the Labour Relations Act by insisting that claims by Union members against the 1st respondent should be brought only by and through the Union, which Petition was upheld by the High Court (Mumbi, J), on July 11, 2012.

6. On May 17, 2013, the appellants filed an application seeking review and/or setting aside of the orders made by Mumbi, J on July 11, 2012, on the grounds inter alia that they were never served with the petition, which application was dismissed by Ongaya, J on June 13, 2014, thus provoking the instant appeal vide a Notice of Appeal dated June 18, 2014. The appellants further filed a Memorandum of Appeal dated December 8, 2014, raising 7 grounds of appeal which we shall revert to shortly.

7. On February 2, 2022, the appeal came up before us for hearing via "GoToMeeting video link" on account of the Covid 19 protocols. Mr. Olonyi, leaned counsel appeared for the appellants. There was no appearance for the 1st and 2nd respondents. Mr. Olonyi however intimated to the Court that the firm of Walker Kontos Advocates were on record for the 1st respondent and that they had filed written submissions on account of which Mr. Olonyi was allowed to prosecute the appeal.

8. It was submitted for the appellants that pursuant to Section 2 of the *Labour Relations Act*, it is the Secretary General of a trade union that can move the Court and that further Section 73 (3) of the Act was not couched in mandatory terms as unions can abandon their members and that as such, the Court should not refuse to hear the parties as this will go against the provisions of Articles 27 and 50 of *the Constitution* and that in the circumstances, Section 73 (3) of the Act could not be read in isolation.

9. It was further submitted that coming to the review proceedings, the 1st respondent had approached the Court with unclean hands, dirtied by the fact that they never served the appellants with the petition and that they dishonestly chose to proceed with the hearing of the same without notifying the Court of the fact that there was an error as they had not served them with the petition.

10. On the other hand, it was submitted for the 1st respondent that to the extent that the appellants do not argue that Section 73 (3) of the *Labour Relations Act* precluded them from presenting their original claim, then this appeal must fail. It was further submitted that the appellants were members of a Union and they were precluded from maintaining a claim other than through their Union and that further their Union, had agreed with the 1st respondents on the terms of their redundancy and that their suit was an attempt to circumvent an established system of collective bargaining through their Union in breach of the *Labour Relations Act*.

11. Regarding the appellants' contention that they were not heard, it was submitted that the High Court had correctly observed by the appellants own admission that their advocates had conceded that they were aware about the constitutional petition.

12. Consequently, we were urged to dismiss the appeal with costs.

13. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law.

14. The facts in this appeal are rather straightforward. It is indeed not in dispute that vide a judgment dated July 11, 2012, in Nairobi High Court Constitutional Petition No. 105 of 2010, Mumbi, J. (as she then was), held inter alia that the then Industrial Court had entertained and adjudicated on a dispute

which the law at Section 73 (3) of the *Labour Relations Act*, clearly provided it had no jurisdiction to entertain and therefore exceeded its jurisdiction, thereby rendering its decision amenable to the supervisory jurisdiction of the High Court.

15. The learned Judge further went on to hold that the award made by the Industrial Court in Industrial Cause No. 462 N of 2009 was null and void for want of jurisdiction. Vide a motion dated May 17, 2013, the appellants sought review/setting aside of the judgment delivered by Mumbi, J. on July 11, 2012, which application was dismissed by Ongaya, J. on June 13, 2014 , thus provoking the instant appeal.

16. It is indeed not in dispute that the appellants herein were not direct parties in Nairobi High Court Constitutional Petition No. 105 of 2010 as they were merely listed as interested parties. As a matter of fact, no orders had been sought against them in the impugned petition.

17. It is also not in dispute that the appeal that is currently before us is an appeal against the ruling and orders of Ongaya, J. dated June 13, 2014 and not an appeal against the judgment of Mumbi, J. dated July 11, 2012. The Notice of Appeal dated June 18, 2014, indicates as much. It is also not in dispute that the application that was before Ongaya, J. that culminated into a ruling being delivered on June 13, 2014, was an application by the appellants seeking inter alia review/setting aside of the orders issued by Mumbi, J. on July 11, 2012.

18. It follows therefore that the appellants' lengthy submission on the non-service of the impugned petition and that their rights to a fair hearing were breached cannot be the subject of this appeal. Similarly, the appellants cannot purport to canvass the issue of locus standi nor the provisions of Section 73 (3) of the *Labour Relations Act* since that is not one of the issues before this Court for determination. The appeal before this Court is against the ruling and orders of Ongaya, J. issued on June 13, 2014 in which he dismissed the appellants' application dated May 16, 2013, seeking setting aside/review of the orders of Mumbi, J. dated July 11, 2012. The matters that were before Mumbi, J. in Nairobi High Court Constitutional Petition No. 105 of 2010 are not the subject of this appeal and cannot be the subject of this appeal before us.

19. Ongaya, J. while dismissing the appellants' application seeking review/setting aside of the orders of Mumbi, J. dated July 11, 2012 stated inter alia as follows:

> " There is no dispute that while the petition was pending, the advocates for the applicants on record in the proceedings before the 1st respondent and which were in issue in the petition were made aware of the petition proceedings but took no steps to file relevant proceedings or papers in the petition. The court finds that the applicants were aware through their advocates of the petition proceedings and subsequently the judgment but opted not to file the application for review until after the unexplained delay. The court finds that the application for review was filed after the unexplained and inexcusable delay."

The learned Judge concluded thus:

> " The applicants, as submitted for 1st and 2nd respondents, have failed to meet and establish any of the settled grounds for grant of an application for review and the court finds accordingly."

20. The appellants' application was premised on the grounds inter alia that they had not been served with the petition or other pleadings in the petition.

21. The learned Judge having found that the appellants were made aware of the petition proceedings and in our opinion rightly so, we have no basis to interfere with the learned Judge finding on this issue.

22. Additionally, Order 45 of the *Civil Procedure Rules* clearly sets out the grounds upon which a Court can review its orders. These are; there must be a discovery of a new and important matter which after the exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed, or the order was made; or mistake or error apparent on the face of the record; or there were other sufficient reasons; and finally the application must have been made without delay.

23. From our re-evaluation of the background of this case, and the material before us, the appellants have not met the threshold requirements that would warrant issuance of orders of review. It is also evident that the appellants sought to review the judgment of Mumbi, J. dated July 11, 2012 in which the learned Judge held that the Industrial Court as then constituted entertained and adjudicated on a dispute which the law at Section 73 (3) of *Labour Relations Act* clearly provided it had no jurisdiction to entertain and therefore exceeded its jurisdiction thereby rendering its decision amenable to the supervisory jurisdiction of the High Court. The impugned judgment was therefore based on a pure point of law touching squarely on jurisdiction and the same could only be amenable to an appeal as opposed to review.

24. As was stated in *Origo & another vs Mungala* [2005] 2 KLR 307,

> "Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end."

25. The upshot of the foregoing is that we find no reason to interfere with the ruling of the Court below. Accordingly, the appellants' appeal is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR