Kenya Union of Commercial, Food and Allied Workers v Gusii Water & Sanitation Company (Cause 3 of 2022) [2025] KEELRC 1014 (KLR) (31 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 1014 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE 3 OF 2022

JK GAKERI, J

MARCH 31, 2025

BETWEEN

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS ..... CLAIMANT

AND

GUSII WATER & SANITATION COMPANY ..... RESPONDENT

RULING

1. Before the Court for determination is the Applicant/Respondent's Notice of Motion dated 22nd November 2024 filed under Certificate of Urgency seeking orders that:

    1. Spent.

    2. Spent.

    3. This Honourable Court be pleased to review and set aside its Judgment and order issued on 18th July 2024.

    4. The costs of this application be in the cause.

2. The Notice of Motion is expressed under Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024 and is based on the grounds outlined on its face and the Supporting Affidavit of Lucy Wahito who deposes that despite the Court Judgment dated 18th July 2024, all employees of the Respondent left the union and joined the Kenya Union of Water and Sewerage Employees (KUWASE), as a constitutional right under Article 41 of *the Constitution* of Kenya and the Applicant/Respondent had a collective Bargaining Agreement with KUWASE and has been remitting union deductions to the union and the Claimant had commenced execution process.

3. The affiant states that the court did not consider the fact that employees had changed their trade union particularly since the Respondent/Applicant inadvertently failed to file evidence of the new union membership.

4. That if the Judgment is implemented, there will be industrial disharmony as the applicant will be forced to deal with two trade unions who have valid Recognition Agreements with it.

5. The affiant further deposes that there is a sufficient reason to review the Judgment.

6. That the affiant would be committed to Civil Jail as one employer cannot deal with two different unions. That the application be allowed in the interests of Justice.

Respondent's case

7. In his Replying Affidavit sworn on 20th December, 2024, Mr. George Obung'o depones that the applicant had ignored the claimant's proposal marked "A".

8. That it is upon incorporating them in a collective Agreement and upon registration that unionisable employees of the applicant will be on the adopted terms.

9. The affiant deposes that the applicant's failure to incorporate the proposals in a Collective Bargaining Agreement defies the Judgment of the court and continues in such disobedience giving rise to contempt proceedings.

10. That revocation of union membership is provided for under Section 48 (6) (7) and (8) of the *Labour Relations Act* 2007 and no evidence was availed of withdrawal of membership from the respondent's union to validate the new union membership.

11. The affiant depones that since the applicant had a Recognition Agreement with the respondent union, it was obligated to negotiate a Collective Bargaining Agreement with it and the Recognition Agreement had not been revoked.

12. That the applicant cannot purport to recognize another union without terminating the existing Recognition Agreement and any Collective Bargaining Agreement made thereafter would be void and the applicant's contract of dealing with two (2) unions invited disharmony to itself.

13. That the Recognition Agreement allegedly signed in 2022, more than 2 years before the Judgment was backdated to defeat the Judgment of the court and course of Justice.

14. The affiant further depones that after court attendance on 22nd November 2022, employees were being intimidated and coerced to revoke union membership and sign check off sheets for the other union.

15. That the application does not meet the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010.

16. Relying on Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024 the affiant deponses that no new and important matter or evidence had been discovered.

17. That if the Claimant/Respondent lost its membership prior to signing of a second Recognition Agreement on 8th February 2022 , the applicant was also aware though no proof of withdrawal had been furnished.

18. That there is no proof of shift of union membership and the validity of the existing Recognition Agreement was never raised.

19. In a Further Affidavit, Mr. Stephen Bosire deposes that the Applicant had been deducting and remitting union dues to KUWASE and did not coerce or force employees to join KUWASE as alleged by the Claimant union.

20. The affiant deposes that employees occasioned the presence of the two unions and the applicant had no role to play and there is sufficient reason to review the Judgment and the Claimant did not dispute that there was another trade union.

21. That implementation of Judgment will be problematic as the Claimant union has no members in the respondent and court orders cannot be given in vain.

Applicant's submissions

22. As to whether the Judgment dated 18th July 2024 should be reviewed, Counsel for the applicant submitted that one of the grounds for review of a court decision is when there is sufficient reason to do so.

23. Counsel urges that the applicant has faced difficulties in implementing the Judgment as it had no employees unionisable by the Claimant as they joined KUWASE and it acted on the instructions of the employee and was remitting dues to KUWASE.

24. That to the extent that the Judgment created new terms of service for employees who are unionised by the Claimant, it creates industrial disharmony as the respondent will be forced to deal with the two unions simultaneously and the Claimant union had no members in the applicant's employ.

25. That the predicament is sufficient reason for review and setting of aside the Judgment.

26. The Respondent/Claimant did not avail a copy or file submission and none was traceable on the CTS.

Analysis and determination

27. It is common ground that the Claimant union and the Respondent/Applicant have a Recognition Agreement dated 2nd February 2015, but had by the commencement of this suit not concluded a Collective Bargaining Agreement (CBA).

28. Indeed, the suit was precipitated by the respondent's lack of enthusiasm in the negotiation and conclusion of a Collective Bargaining Agreement as evidenced by the record and the Judgment of Justice Baari dated 18th July 2024.

29. The applicant's case is founded on the contention that its unionisable employees had shifted from the Claimant union to another union and having two unions will occasion industrial disharmony as the Claimant union had no members and there are two Recognition Agreements.

30. Section 16 of the *Employment and Labour Relations Court Act* provides that:

> " The Court shall have power to review its Judgments, awards, orders or decrees in accordance with the Rules.
>
> Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides: -
>
> (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 a new and important matter or evidence which, despite 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."

31. The applicant avers and submits that the circumstances in this case justify a review of the Judgment delivered on 18th July 2024 on the ground that there is sufficient reason.

32. On timing of the instant application, the applicant filed the Notice of Motion on 27th November 2024 about 4 months after the Judgment sought to be reviewed.

33. Granted that the Court had accorded the applicant/respondent 60 days to align the terms of services of the unionisable employees with the Claimant's proposal marked "A", the 4 months delay is not unreasonable and the application has not been contested on that aspect.

34. See Abdullahman Avan Hassan National Bank of Kenya Ken freight (EA) Ltd v star East Africa Co. Ltd Muyondi B Industrial and Commercial Development & another on delay; Mbogo V Gathuiku

35. On the Justification for review the applicant placed reliance on Ajit Kumar Rath v State of Orisa & Others Supreme Court Cases 596 at 608. The Supreme Court of India stated:

> " ...It may be pointed out that the expression "any other sufficient reason" ... means a reason sufficiently analogous to those specified in the rule."

36. The Court expressed similar sentiments in Sadar Mohamed v Charan Singh [1963] EA 557.

37. However, in Tokesi Mambili and Others v Simion Litsanga [2004] eKLR, the Court of Appeal held inter alia:

Where the application is based on sufficient reason, it is for the court to exercise its discretion."

38. In Wangechi Kimita v Wakibiru Mutahi [1985] eKLR Nyatangi JA held that:

> " The words "for any other sufficient reason" have therefore to be construed ejudem generis with the ground of discovery to which I have referred: See Tanitalia LTD v Mewa Handels Anstalt [1951] EA 2015. In other words, the words "for any sufficient reason" in Order XLIV Rule 1 are hence confined to a reason which would be regarded as kin to those specified immediately previously in order, See Ahmed Hassan Nivji v Shirinbhai Jadavji [1963] EA 217, Yusuf v Nokrach [1971] EA104.
>
> I see no reason why any other sufficient reason needs to be analogous with the other grounds, in the order because clearly section 80 of the *Civil Procedure Act* confers an unfettered right to apply for a review and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the order. See Sadar Mohamed v Charan Singh 1963 EA 793..."

Hancox JA was of the view that:

> I would add that I also agree with the reasoning of Nyarangi JA that the third head under Order XLIV rule (1) (i), enabling a party to apply for renew, namely "or for any other sufficient reason" is not necessarily confined to the kind of reason stated in the two preceding heads in that sub-rule which do not in themselves for a genus or class of things with which the third general head could be said to be analogous..."

39. Finally, in The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Grentment & Others Civil Appeal No. 147 of 2006, cited by Mativo J (as he then was) in Stephen Gathua Kimani v Harry Wanjira t/a Providence Auctioneers [2016] eKLR, the Court of Appeal of Tanzania expressed the view that:

> " It is difficult to attempt to define the meaning of the words "sufficient 'cause'. It is generally accepted however that the words should receive a liberal construction in order to advance substantial justice when no negligence or inaction in order or want of bona fides is imputed to the appellant."

40. The Jurisprudence advanced by the foregoing authorities is that the phrase "for any other sufficient reason' ought to be construed as such, and it is not confined to the words or phrases used before it under Rule 74 (1) of the Employment and Labour Relations Court (Procedure) Rules 2024 or Order 45 Rule 1 (1) of the Civil Procedure Rules, 2010.

41. However, the court is required to exercise its discretion Judiciously.

42. In the instant case, evidence reveals that both the applicant and the respondent were aware that there was another union in the equation and actions had been taken in furtherance of the relationship.

42. These are the circumstances the court should have been made aware of so as to determine whether they were material or not in the determination of the matter before it.

43. The court was denied this opportunity.

44. In his Replying Affidavit, Mr. George Obong'o deposes that "after court attendance on 22nd November, 2022 employee were being intimidated and coerced to revoke union membership and sign check-off sheets for the other union". This is clear evidence that the claimant union was aware of the going-on but did not disclose to the court.

45. On its part, the applicant admits that it had valid Recognition Agreement with KUWASE, but the evidence was inadvertently omitted.

46. Regrettably, both parties did not approach the court with clean hands contrary to the equitable maxim that he who comes to equity must do so with clean hands as both had vital information they did not disclose to the court, something analogous to leading the court up the garden path, perhaps in the expectation that the court would make favourable orders in absence of such information.

47. It is trite that bringing up an issue and proving it evidentiary are dissimilar. While the former generates more heat than light, the latter has a potential impact on the decision.

48. In the circumstances, the court is satisfied that the applicant has demonstrated a sufficient reason for reconsideration of the matter before the court, in the interest of Justice.

49. Justice is not concerned with winning and/or loosing of cases. It is about fairness and reasonableness. It is concerned with the proper manner of doing things and making decisions which are not only just to the parties, but perceived as just.

50. In the upshot the Applicant/Respondents Notice of Motion dated 22nd November 2024 is merited and orders granted as follows: -

    a. The Judgment of the court delivered on 18th July 2024 be and is hereby set aside.

    b. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 31ST DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

DRAFT