Kenya Petroleum Oil Workers Union v Proto Energy Limited (Employment and Labour Relations Cause E331 of 2022) [2024] KEELRC 231 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 231 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E331 OF 2022

AN MWAURE, J

FEBRUARY 9, 2024

BETWEEN

KENYA PETROLEUM OIL WORKERS UNION ..... CLAIMANT

AND

PROTO ENERGY LIMITED ..... RESPONDENT

RULING

1. The Respondent filed a Notice of Motion dated 20th July 2023 seeking orders that:
    1. spent
    2. this Honourable Court be pleased to order a Stay of the execution of the Ruling and the Consequential Orders delivered on 7th July, 2023 pending the inter parties hearing and determination of this application.
    3. this Honourable Court be pleased to review and/or Set aside its Ruling and the Consequential Orders delivered on 7th July, 2023.
    4. the Honourable Court do issue such orders and give such directions as it may deem fit and just in the circumstances.
    5. the costs of this application be provided for.
2. The Application was supported by an Affidavit sworn by Wambui Maina.

Respondent/ Applicant's Case

3. The Respondent/ Applicant avers that this court delivered a Ruling in respect to the Claimant's Application dated 19th May 2022 on 7th July, 2023, by allowing the same and granted the following orders:

> " i. This Honourable Court do issue orders to compel the Respondent to deduct and remit to the Claimant Union dues for all the 722 members who are the Respondent's employees;
>
> ii. This Honourable Claimant's Court do issue orders directing the Respondent to avail the list of unionisable employees to the Claimant;
>
> iii. This Honourable Court do issue orders directing the Respondent to sign the Recognition agreement sent on 23rd August, 2021 in accordance with section 54 of the *Labour Relations Act*, 2007."

4. The Respondent/ Applicant avers that it is aggrieved by the Court's Ruling and seeks to review and/or set aside the same on account of apparent errors and/or mistake on record as well as on sufficient cause.

5. The Respondent/ Applicant avers that the ruling only referred to the Grounds of Opposition and did not consider the Respondent's replying affidavit and submissions which had detailed responses to the allegations contained in the Union's application dated 19th May 2022. The court only referred to the Claimant's submissions and supplementary thereof.

6. The Respondent/ Applicant's avers that Contrary to the court's finding at paragraph 15, it said nothing about the Ministerial Order presented by the Union. The Respondent at paragraph 21(c) of its Replying affidavit made clear response to the Ministerial Order produced by the Union. This indicates that the Court did not consider its Replying affidavit and therefore must have based its ruling/decision on a mistaken belief that the Respondent had nothing to say about the Ministerial Order.

7. The Respondent/ Applicant avers that the court found that there was no proof that it has been deducting and remitting union dues. However, the Respondent has been doing so for eligible employees as Claimant members as well as those that belong to Central Organization of Trade Union (COTU) as per the remittance notes, which were attached to the Replying affidavit.

8. The Respondent/ Applicant avers that paragraph 5 of its replying affidavit indicated that even though the Union had allegedly recruited a total of 722 members, there were discrepancies in these numbers and as such there was need for a proper verification before the orders could be given. The court did not refer or make any finding on these discrepancies.

9. The Respondent/ Applicant avers that paragraph 15 of the replying affidavit gave a breakdown of the number of its employees and those allegedly recruited by the union as follows:56 members whose details were not available as part of its data and were not available on its payroll;107 members who had directed the Respondent not to deduct their salaries on account of them not being members of the Union;4 deceased employees;One expatriate employee;70 employees whose details had been repeated in the check-off forms;2 employees who are in the Respondent's management positions.

10. The Respondent/ Applicant avers that there are errors apparent on the face of the record that the court did not consider its Replying affidavit as well as its submissions. This constitutes sufficient reasons that warrants review of the orders granted by the Court.

11. The Respondent/ Applicant avers that it has been greatly prejudiced since the substantive far reaching orders were made yet the ruling does not indicate and analyse key issues that the court needed to synthesize and analyse in accordance with Rule 28 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016.

12. The Respondent/ Applicant avers that its right for a fair hearing would be curtailed unless the court considers its pleadings and reviews its orders.

13. The Respondent/ Applicant avers that the orders were final in nature and should only be issued in exceptional circumstances after hearing parties on merit. In particular, the orders compelling the Respondent to deduct union dues as well as enter into a recognition agreement (which are the same orders sought in the main suit), without scrutinizing the fundamental discrepancies and issues raised, render academic the main hearing, yet the Respondent raised pertinent issues which were not considered by the court.

Claimant's Case

14. In opposition to the application, the Claimant filed an affidavit dated 24th August 2023.

15. The Claimant avers that the Application was filed after the Appeal was lodged hence it is an abuse of the court process and should not be tolerated. A party cannot pursue an appeal and the same time seek for review against the same decision. By choosing to proceed by the way of an appeal automatically, the party loses the right to seek for a review.

16. The Claimant avers that the Respondent/ Applicant's application is based on general submission and has opened up protracted arguments made prior to the ruling made on 7th July 2023 hence falls outside the requirements of a review application.

17. The Claimant avers that the Respondent/ Applicant stands to suffer no irreparable injury and/or harm if the orders granted on 7th July 2023 are implemented as union dues as deduced from unionised employees who have confirmed the membership, the employee salaries are not the Respondent's funds hence there should be no stay orders granted.

18. The Claimant avers that since ruling was delivered, the Respondent/ Applicant failed to comply with the orders before the interim stay orders were granted on 31st July 2023 hence the Respondent is a contemnor who does not deserve audience of this court.

19. The Claimant avers that the Respondent/ Applicant at paragraph 21(d) of the Replying Affidavit stated that the number of unionisable employees stands at 482 members who are of good standing, however, it does not explain why it is remitting dues for a section of the unionisable employees and leaving the rest without any justifiable cause despite sufficient evidence being adduced in court.

20. The Claimant avers that the Respondent/ Applicant grounds cited on the face of the replying affidavit were duly considered by the court hence seeking an appeal couched as a review is an abuse of the court process.

21. The Claimant avers that the Respondent never raised an issue with the ministerial order before the conciliator and alleges to have issues with it and on the other hand submits that they have been remitting union dues and wishes to verify the union membership of various employees shows the contradiction.

22. The Claimant avers that the Respondent/ Applicant never adduced any evidence before the conciliator to challenge the number of union membership but only commenced intimidating employees who had

joined the union and never challenged the conciliator's findings or sought the same to be quashed by this court as per section73 of the *Labour Relations Court,* the Claimant moved this court to enforce the conciliators report.

23. The Claimant avers that the Respondent/ Applicant alleged verification process of union membership is tantamount to subverting the right of every worker to join or form a trade union as set under Article 41 of the *Constitution*. This has been a ground used to even frustrate the employees who are already union members.

24. The Claimant avers that the Respondent unilaterally failed to deduct and remit union dues of several unionised members without their resignation. The Respondent only started remitting the union dues after the matter was referred to conciliation after efforts to frustrate failed.

Respondent/ Applicant's Submissions

25. The Respondent/Applicant submitted that the Claimant's check off raised fundamental issues which is required through verification to confirm the status of the members recruited.

26. The Respondent/ Applicant submitted that the alleged number of 722 employees asserted as the Claimant's by the Claimant came down to 482 employees after deducting the employees whose details were included in the check-off forms.

27. The Respondent/ Applicant submitted that it is important that the number of "unionisable employee" is determined, to ascertain the simple majority for purposes of recognition under Section 54 of the *Labour Relations Act*. It is not the Respondent's entire population that is used to measure the threshold of recognition. The unionisable employees cannot be ascertained without thorough verification.

28. The Respondent/ Applicant submitted that it only filed a notice of appeal to reserve the right of appeal. This was filed because the court's ruling was not available due to delay of its release by the court during the Employment and Labour Relations Court Award Symposium and Exhibition in July 2023.

29. The Respondent/ Applicant submitted that the mere filing of an appeal did not constitute an appeal as rightly established by the Court of Appeal as held in the case of *Noradhco Kenya Limited v Loria Michele* [1998] eKLR.

Claimant's Submissions

30. The Claimant submitted that the Respondent/ Applicant lodged the notice of appeal and expressed the intention to appeal against the entire ruling delivered on 7th July 2023. Therefore, the review application did not fall within Rule 33(1) of the *Employment and Labour Relations Court Rules*, 2016 as the Respondent decided to pursue an appeal which was a right. The Respondent/ Applicant could only file the review application after proper withdrawal of the notice of appeal pursuant to Rule 83 of the *Court of Appeal Rules*, 2022.

31. The Claimant submitted that upon raising issues of the Respondent's application being incompetent for lodging a notice of appeal in the Replying Affidavit sworn on 24th August 2023, the Respondent/ Applicant upon service decided to try and regularise their position by filing a notice of withdrawal of the notice of appeal in order to salvage the incompetent review application.

32. The Claimant submitted that the Court of Appeal 's decision in *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR which is binding is clear that a notice of appeal filed was sufficient to preclude the prosecution of an application for review.

33. The Claimant submitted that the application for review was lodged after the notice of appeal was filed and not after its withdrawal, therefore, the application should not succeed as the Respondent/ Applicant decided to shift the goal post midway by trying to withdraw the notice of appeal and introducing the same in a supplementary affidavit without the Claimant having an opportunity to respond.

34. The Claimant submitted that the notice of withdrawal of the notice of appeal filed by the Respondent on 31st August 2023 does not change the position in law that as at the time the review application was filed, this court did not have jurisdiction to hear and determine the application. It relied on the case of *Fanikiwa Limited v Joseph Komen & 3 Others* [2018] eKLR.

35. The Claimant submitted that the grounds cited by the Respondent/ Applicant do not amount to mistake or errors apparent on the face of record but the court is being called to appeal on its own decision. If the Respondent was aggrieved by the said ruling, it had an option of filing an appeal at the Court of Appeal.

36. The Claimant submitted that the Respondent faults the ruling for failing to analyse the key issues that the court needed to synthesize and analyse in accordance to Rule 20 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016. The Respondent also faults the court for making orders in the nature of final mandatory orders. It also cites the orders for deduction of union dues and signing of recognition agreement ought not to have been granted by this court. These grounds cannot fit under the issues for review. It relied on *Republic v Public Procurement Administrative Review Board & 2 Others* [2018] eKLR.

37. The Claimant submitted that respondent introduced new facts and issues in the supplementary affidavit dated 31st August 2023 which were initially not introduced prior to the ruling delivered on 7th July 2023. The Respondent/ Applicant alleges that it has 29 active members of the Claimant/ Respondent and 44 members of Kenya Engineering Workers Union (KEWU).

38. The Claimant submitted that the Respondent/ Applicant never filed the documents or produced the same during the hearing and determination of the Claimant's application; the Respondent/ Applicant is trying to have second bite at the cherry by introducing new facts and documents which they had in their custody but withheld for reasons known to them.

39. The Claimant submitted the Respondent/ Applicant's ground for review does not touch on discovery of new and important evidence, therefore, the court should not consider any additional evidence introduced.

40. The Claimant submitted that the Respondent/ Applicant never adduced any evidence before the conciliator to challenge the number of union membership but commenced the process of intimidating employees who had joined the union by giving them additional consent forms to disaprove their membership when the conciliation process was ongoing and never challenged the conciliator's findings or sought for the same to be quashed before this court pursuant to Section 73 of the *Labour Relations Act*, 2007, it is the Claimant who moved this court to enforce the conciliator's findings.

Analysis and Determination

41. The main issue for this court's determination is whether the application has met the threshold for granting the review order sought.

42. In *Anthony Chelimo v Kenya Commercial Bank Limited* [2020] eKLR, the court held that:

> " The threshold for granting the review order is set out under Rule 33(1) of the ELRC Procedure Rules which provides that:
>
> "33(1) A person who is aggrieved by a decree or order ... 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...;
>
> (b) on account of some mistake or error apparent on the record;
>
> (c) if the judgment... requires clarification; or
>
> (d) for any other sufficient reason."
>
> In a nutshell, the foregoing rule allows the court to review its order if:
>
> (a) The order has not been appealed against.
>
> (b) The application is made without inordinate delay.
>
> (c) Any of the grounds set out in Rule 33(1) (a) (b) (c) and (d) above is proved."

43. The Respondent/ Applicant averred that it seeks review and/ set aside of the ruling dated 7th July 2023 review on account of apparent errors and/or mistake on record. It argues that Court failed to consider its replying affidavit and submissions submitted in the Claimant's application.

44. The Claimant however submitted that the grounds cited by the Respondent/ Applicant do not amount to mistake or errors apparent on the face of record but the court is being called to appeal on its own decision. If the Respondent was aggrieved by the said ruling, it had an option of filing an appeal at the Court of Appeal. The respondent admitted they filed a notice of appeal to reserve the right of appeal

45. The court has considered the grounds raised by the respondent for setting aside the court's ruling of 7th July 2023 and or to review or set aside the aforesaid ruling. The court finds no error or discovery of any new evidence to justify setting aside the ruling or to review the said ruling.

46. The claimant had submitted check off forms to the respondent dated 12th august 2021, 25th August 2021, September 2021, 4th October 2021, 8th November 2021, 9th November 2021 and 11th November 2021 on 16th August 2021, 24th August 2021, 31st August 2021, 7th October 2021, 8th November 2021, 10th November 2021 11th November 2021. This is as per the documents from pages 22-135 of the claimants documents annexed to their supporting affidavit dated 19th May 2022.

47. The deduction of union dues letters were also annexed thereto on pages 136-142 annexed to the same supporting affidavit.

48. The court made an informed ruling going by the pleadings on record and submissions and therefore made no error to justify setting aside the ruling or finding grounds to review the said ruling.

49. The court is of the view that should the respondent be dissatisfied with the court's ruling it is best to proceed and file an appeal so that the issues raised and in particular as pertains to the verification of the unionisable and non-unionisable members of the union be heard and determined by the appellant court.

50. In the case of *Anthony Chelimo v Kenya Commercial Bank Limited* (*supra*) the court observed and held that:

> "I agree with the respondent that the grounds advanced in support of the application for review are best suited for an appeal. The claimant is questioning the court's assessment of the evidence tendered and in his view concludes that the court made an error of judgment. He further contents that the court failed to consider or take into account certain evidence and as a result arrived at a wrong decision. According to him had the court taken into account the said evidence which was on record, its mind would have been swayed to arrive at a different decision. The foregoing averments may be good grounds of appeal because they come challenging the merits of the decision which requires a long process of reappraising the evidence to see if indeed there is such error of judgment or failure to take into consideration matters which ought to have been taken into account when making the impugned judgment.

51. I seek support from Pancras T. Swai v Kenya Breweries Limited [2014] e KLR where the Court Appeal cited its earlier decision in *Francis Origo & Another v Jacob Kumali Mugala C.A Civ Appeal No. 149 of 2001* where it expressed itself as follows: -

> "Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal."

52. I further rely on *Zablon Mokua v Solomon M. Choti & 3 others [2016]* eKLR where the Court of Appeal also cited its earlier decision in *Nyamogo & Nyamogo v Kogo [2001]* EA 174 where it held that:

> "... an error apparent on the face of the record cannot be defined precisely or exhaustively... and it must be left to be determined judicially on facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one on the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record." (emphasis added)

53. In view of the finding herein that the application herein challenges the merits of the impugned decision on grounds that the court may have erred in assessment of evidence and failure to take into account crucial evidence, I return that the application does not meet the threshold for review under Rule 33 (1)(b) of the *ELRC Procedure Rules*. On the contrary, I agree with the respondent that the applicant has filed an appeal disguising it as review."

54. Further, the court delved into the issue of mistake or error apparent on the face of the record as a ground for review in Jude Riziki Kariuki v Tharaka Nithi County Government & another [2019] eKLR the Court cited the Court of Appeal's decision in *Nyamogo and Nyamogo Advocates v Kogo* [2001] EA 173 on thus:

> "We have carefully considered the submissions made to us by the advocates of the parties to this appeal. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error

> on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of an error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

55. In this case it is the respondents argument that the court did not consider their replying affidavit and their submissions. The court however did consider all the pleadings and submissions and was well advised in its ruling.

56. The main issue in the matter is the number of the unionisable members of the respondent company and the date of service of the ministerial order by the claimant. The court did consider all these issues. And again as earlier stated and as per the cited authorities the respondent could best appeal the court's ruling as the court cannot sit to appeal its ruling.

57. As to the issue of the respondent filing both an appeal and a review at the same time the court is also is persuaded by the case of *Otieno Ragot company advocates v National Bank of Kenya Limit* Civil appeal No 60 & 62 of 2012.

58. In the aforementioned case the court held:

> A careful look at the ruling dated 17th August 2016 shows that what the respondent intended to appeal against though phrased as part was the entire ruling delivered by the learned judge. It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of Karani & 47 Others v Kijana & 2 Others [1987] the court held that:
>
> " .... Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal."
>
> See also: *African airlines international Limited v eastern & Southern Africa Trade Bank Limited* [2003] 1 EA 1 (Cak). Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the applicant for review was made, the notice of appeal was in place. In effect it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid its kind of scenario that the option either to appeal or review was put in place there can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal.
>
> See *Kamalaksh Amma v A. Karthayani [2001] AIHC* 2264. The respondents application for review was therefore incompetent hence the court did not have jurisdiction to grant the orders sought under section 80 of the *civil procedure act* and order 45 of the civil procedure rules. This determination is sufficient to dispose off the appeal."

59. In view of the foregoing, the court finds the respondent's application for setting aside its ruling of 7th July 2023 has not met the threshold for setting aside/and/or review of a ruling under order 45 rule

1 of *Civil Procedure Rules* but rather the same can be determined by an appellant court. The same is therefore dismissed.

60. Each party to meet their respective costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

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ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

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ANNA NGIBUINI MWAURE

JUDGE