



**Public Transport Operators Union v Apollo Tours and Travel;
Transport Workers Union & another (Interested Parties) (Cause
E882 of 2021) [2024] KEELRC 869 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 869 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E882 OF 2021
SC RUTTO, J
APRIL 5, 2024**

BETWEEN

PUBLIC TRANSPORT OPERATORS UNION APPLICANT

AND

APOLLO TOURS AND TRAVEL RESPONDENT

AND

TRANSPORT WORKERS UNION INTERESTED PARTY

UNIONISABLE EMPLOYEES OF APOLLO TOURS AND

TRAVEL INTERESTED PARTY

RULING

1. Vide a Ruling delivered on 9th December 2022, this Court upheld the Respondent’s Preliminary Objection dated 31st March 2022, thereby dismissing the suit herein.
2. As a consequence to the Ruling, the Applicant filed an Application dated 28th April 2023, seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. THAT the applicant’s application dated 27th day of October 2021 be and is hereby reinstated.
 - d. THAT the applicant’s application dated 27th day of October 2021 be consolidated with and or heard together with Cause 694 of 2020.



- e. THAT costs to the application be provided for.
3. The Application is premised on the grounds appearing on its face and the Affidavit of Fenus Okonji, its Secretary General. Mr. Okonji deposes that the Rule of sub judice, may be cured by seeking the consolidation of the matters, and or that the matters may be heard together with the matter that is alleged to be similar to the one alleged to have contravened the sub judice Rule.
 4. He further avers that justice would have been seen to have been served had the Court directed that the matter be referred to the other Court, wherein the subject matter would have been considered alongside this suit.
 5. He is aware that the Respondent has been deducting trade union dues with respect to the Applicant's members and holding on to the said monies without remitting them to the Applicant.
 6. With respect to the conciliation in Cause No. E694 of 2020, the Applicant put in a number of complaints in writing to the Labour Commissioner and the appointed Labour Officer with respect to the manner in which the said parties appeared to be conducting the conciliation process in total isolation of the Applicant.
 7. Mr. Okonji avers that the issues as were stated by the Applicant in Cause No. E694 of 2020 were not the same issues as were stated in the Applicant's Notice of Motion in Cause No. E882 of 2022, as for the Court to have arrived at the sub judice determination.
 8. That the trial court in this matter had made substantial progress and steps with respect to the subject matter in the said matter.
 9. In a further Affidavit sworn on 9th October 2023, Mr. Okonji states that the Respondent herein moved the Court in Cause No. E694 of 2020, intimating to have withdrawn the matter.
 10. That the import of the Notice of Withdrawal terminating the proceedings in Cause No. E694 of 2020, automatically vitiated and or negated the basis upon which the Court may have exercised its jurisprudence when it allowed the Respondent's Preliminary Objection in this matter, and which basis was the Rule of sub judice.
 11. That the Notice of Withdrawal will be, and should be the basis and justification for the Court to grant prayer (3) in the instant Notice of Motion dated the 28th day of April 2023, and proceed to assume and exercise its jurisdiction in the matter herein to its logical end.
 12. That further, the 1st Interested Party (sic) who are employees of the Respondent were never parties to the matter being withdrawn in Cause No. E694 of 2020 hence reinstatement will afford the said party an opportunity to have its concerns and interests justly ventilated in the matter herein.
 13. In response to the Application, the 2nd Interested Party filed a Replying Affidavit sworn by Mr. George Ochanda on 16th November 2023.
 14. Mr. Ochanda who describes himself as a member of the 2nd Interested Party and a former employee of the Respondent, avers that the suit Nairobi ELRC Cause No. E694 of 2020 has been withdrawn by the Respondent herein, vide a Notice of Withdrawal dated 31st May 2023. He contends that such withdrawal now means that the earlier suit no longer exists so this suit should be reinstated and proceed to full hearing.
 15. He further deposes that their claim in this suit is that they had resigned from the 1st Interested Party and consequently joined the Applicant herein but despite this, the Respondent continues to make unauthorized, illegal and wrongful deductions from their salaries disguised as agency fees and remitting



the same to the 1st Interested Party despite their resignation and further continues to deduct trade union dues but fails to remit the same to their desired trade union, the Applicant herein.

16. The Respondent and the 1st Interested Party did not file their responses to the Application as the same were missing from the Court's physical court record and the online portal.
17. The Application was canvassed by way of written submissions. The Applicant and the 2nd Interested Party filed written submissions which I have considered. However, the Respondent and the 1st Interested Party did not file written submissions.

Analysis and Determination

18. The Court has considered the Application, the response by the 2nd Interested Party, as well as the submissions on record and has identified the main issue for determination as being whether the Applicant has satisfied the requirements for the grant of an order for Review.
19. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016, is very explicit that the Court can only review its orders if the following grounds exist: -
 - 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.
20. The gist of the Application by the Applicant is review of the Court's Ruling delivered on 9th December 2022, through which the Court upheld the Respondent's Preliminary Objection and dismissed the suit.
21. As can be discerned from the aforementioned Ruling, the Court arrived at its determination upon finding that the issues in the instant matter were related to the same subject matter in ELRC Cause No. E694 of 2020.
22. According to the Applicant and the 2nd Interested Party, the suit in ELRC Cause No. E694 of 2020 was withdrawn vide a Notice of Withdrawal dated 31st May 2023. Notably, this position was not controverted by the Respondent and the 1st Interested Party, seeing that they did not respond to the Application.
23. It is worth pointing out that in as much as the Applicant indicated in its list of documents dated 9th October 2023 that it had annexed the Notice of Withdrawal dated 31st May 2023, the same was missing from the bundle of documents on the court record. This being the case, the Court has had the opportunity to review the court record in ELRC Cause No. E694 of 2020 and evidently, a Notice of Withdrawal dated 31st May 2023 was filed on 5th June 2023.
24. The court record further reveals that on 25th October 2023, the Court marked the suit as withdrawn hence the matter was marked as closed.
25. Revisiting the provisions of Rule 33(1) of this Court's Rules, one of the grounds under which the Court may review its decision is where 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.



26. In this case, it is apparent that the Notice of Withdrawal dated 31st May 2023, constitutes new and important evidence that could not be produced by the Applicant at the time when the Court delivered its Ruling on 9th December 2022.
27. This is moreso noting that the main ground for dismissal of the suit was the existence of ELRC Cause No. E694 of 2020. With the Notice of Withdrawal having been filed on 5th June 2023, hence ELRC Cause No. E694 of 2020, having been withdrawn, it is apparent that the instant Application has satisfied the threshold established under Rule 33(1)(a) of the Employment and Labour Relations Court (Procedure) Rules, 2016.
28. Accordingly, and in the interest of justice, the Application dated 28th April 2023 is hereby allowed and the suit is reinstated.
29. There will be no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of April 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Odunga for the Claimant/Applicant

Ms. Sayo for the Respondent.

Mr. Ndege for the 1st Interested Party

Mr. Awiti instructed by Mr. Rautta for the 2nd Interested Party

Millicent Kibet Court Assistant

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 had 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.

STELLA RUTTO

JUDGE

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