Kenya Private Universities Workers Union v Kenya Highland University (Cause 103 of 2016) [2024] KEELRC 1185 (KLR) (21 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1185 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE 103 OF 2016

HS WASILWA, J

MAY 21, 2024

BETWEEN

KENYA PRIVATE UNIVERSITIES WORKERS UNION ..... APPLICANT

AND

KENYA HIGHLAND UNIVERSITY ..... RESPONDENT

RULING

1. This Ruling is in respect of the Applicant's Notice of motion dated 14th November, 2023, filed on 31st January, 2024. The Application is expressed under rule 33(1)(a) &(d) of the *Employment and Labour Relations (Procedure) Rules* and all other enabling provision of the law, seeking for the following orders; -

    1. Spent.

    2. That this Honourable Court be pleased to review, vary and or set aside the Ruling made on the 21st March, 2023, as there is a discovery of new and relevant evidence for the Court's consideration for review.

    3. That costs be provided for by the Respondent.

2. The basis upon which the Application is made is that the Applicant had discovered new and relevant evidence for the Court consideration, which was not within the knowledge of the Applicant previously.

3. It is averred that this Court made an error in the ruling of 21st March, 2023 by dismissing the suit on basis that there was no recognition Agreement between the claimant and the Respondent, when in fact there was one in place.

4. He stated the Respondent had withheld information concerning the existence of the said Recognition Agreement, which led to the issuance of the adverse orders against the Applicant herein.

5. It is averred that the dismissal of the suit, left the Unionisable employees highly prejudiced as the negotiations touching on the CBA were abandoned.

6. He prayed for the Application to be allowed and the suit be determined on merit.

7. The Application herein is supported by the affidavit sworn on 14th November, 2023 by Peter Emisembe Owiti, the General secretary of the Applicant.

8. The Application is opposed by the Respondent who filed a replying affidavit sworn on 13th February, 2024, by Prof. Wilson Langat, the Respondent's vice chairperson and the secretary of the Board.

9. The affiant stated that the decision of the Court had considered all facts tabled before it, as the Court found the Recognition Agreement between the parties to have been terminated validly after the the Respondent had given 3 months' notice to withdraw from the said agreement in accordance with the termination clause of the agreement, as such there was no subsisting Recognition Agreement after the lapse of the said Notice period.

10. The affiant stated that the evidence that the Applicant purport to have discovered was actually attached to its application dated 2nd December, 2023 and was even extensively relied upon by the Applicant in the submission before this Court. Therefore, that no new evidence has been discovered.

11. The deponent stated that the Applicant herein is guilty of inordinate delay in bringing up this Application.

12. He also took issue with the allegations that the respondent was the one that concealed the material fact and stated that the evidence that is alleged to have been concealed was before Court and thus nothing was concealed by the Respondent. In any event that the Court stated in its ruling that the Recognition Agreement had been terminated via the Respondent's letter dated 7th July, 2022.

13. From the foregoing, the affiant stated that the allegations that an error has been made by this Court in dismissing the claim is misplaced and misconceived.

14. In the circumstances, the Respondent urged this Court to find the application frivolous, vexatious and an utter abuse of Court process, in effect dismiss the Application with costs to the Respondent.

15. The Application was canvassed by written submissions with the Applicant filing submission on 11.4.2024 and the Respondent filed on 8.4.2024.

Applicant's Submissions

16. It was submitted for the Applicant, that the review application is brought before this Court on the ground that the instant matter proceeded in Court without vital particulars that would have assisted the Court in arriving at a fair determination.

17. It was argued that the Court erred in dismissing the suit and holding that there was no Recognition Agreement between the the parties when in fact a Recognition Agreement had been entered between the parties herein.

18. It is on this note, that the Applicant urged this Court to re-consider its decision and find that a Recognition Agreement was in place and allow the Application as prayed with costs.

Respondent's Submissions.

19. The Respondent on the other hand submitted on whether the Application is merited and argued that since the substantive order sought in the Application is a Review, it follows that the the application has to be construed in line with order 45(1)(b) of the *Civil Procedure Rules*.

20. Accordingly, that the Applicant herein claim to have discovered new and important evidence to wit, a Recognition Agreement, between the Applicant and the Respondent. Further that the Applicant alleges that the Respondent concealed material fact on the existence of the said Recognition Agreement, when in fact the said Recognition Agreement is annexed to the Applicant's Notice of Motion dated 2nd December, 2022 and extensively relied upon.

21. It was submitted further that evidence was led before this Court that the said Recognition Agreement had been terminated by the letter of the Respondent dated 7th July, 2022 issuing a three-months' Notice which lapsed, therefore that there was no basis for proceeding with the Negotiation on the CBA.

22. He argued that the allegations that there is an error on the face of the Ruling is misplaced and misconceived. In any event that even if the said Application was indeed dismissed erroneously, then the Applicant only option to address the issue is through Appeal and not Review. To support this, the Respondent relied on the case of *Philip Kipngetich Cheruiyot and Another v County Government of Bomet and 6 Others* [2024] KEELC 581 (KLR), where the Court held that; -

> " It is clear that an erroneous conclusion of law or evidence is not a ground for a Review but may be a good ground for Appeal. A Review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier but should only be exercised for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it as was in the present case."

23. The Respondent also relied on the case of *Hasham Lalji Properties Limited V Philip Kimaiyo Komen & 2 others* [2017] Eklr where the Court held that;-

> " A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. See Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. GoldsMid (1894) 1 QBD 186.
>
> A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.
>
> A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v) where it can really lead to no possible good. See Willis Vs. Earl Beauchamp (1886) 11 PD 59."

24. In conclusion, the Respondent submitted that the Applicant has not met the condition for Review under Order 45 of the Civil Procedure Rules and prayed for the Application to be dismissed with costs to the Respondent.

25. I have examined the averments and submissions of the parties herein. The applicants have sought review of this court's ruling dated 21/3/2023 which ruling dismissed the applicant's application on the ground that there was no recognition agreement between the applicant and Respondent.

26. The Applicants have now applied for review on the ground that there is discovery of new and important information which information the applicant avers is that the Respondent withheld information concerning the existence of the said Recognition Agreement which led to the Issuance of the adverse orders against them.

27. The Respondents on the part aver that the alleged Recognition agreement was actually attached to its application dated 2nd December 2023 and was ever heavily relied upon by the applicant in the submissions before the court and so there is no new evidence has been discovered.

28. I have looked at the recognition agreement annexed to the application being annexture KPUWU – 1 dated 23/6/2016.

29. This recognition agreement dated 23rd June 2016 was actually annexed to the application dated 2nd December 2022. In this court's ruling dated 21/3/2023, this court also made reference to this CBA at paragraph 25 of the ruling as follows: -

> 25. On that basis, it was submitted that clause 4 of the Recognition Agreement dated 23rd June, 2016 provides as follows;
>
> "... this agreement shall come into force on the 23rd June, 2016 and shall continue in force until amended or terminated by either party giving Three Months' Notice in writing on intention to terminate."

30. I further stated at paragraph 29 of the ruling as follows:

> 29. In conclusion, it was submitted that the recognition agreement which forms the basis of the suit herein terminated pursuant to its own terms and a notice on 7th July, 2022, therefore there is nothing that the parties can negotiate on. Further that the allegation of victimization has not been proved by the Respondent as required under section 11 of the *Labour Relations Act*. They prayed for the application to be dismissed.

31. At paragraph 37 of the ruling the court stated as follows:-

> 37. Clause 4 of the agreement provides as follows;-
>
> "4. Modification To And Termination Of This Agreement
>
> This agreement shall come into force on the 23rd day of June 2016 and shall continue in force until or amended or terminated by either party by giving three months' notice in writing of intention to terminate.
>
> Either party wishing to amend or modify the agreement shall give three (3) months' written notice to the other party with details of the proposed amendments of the agreement, then either party may refer the dispute to the minister for labor for normal action terms of the *labour relations Act* 2007.
>
> Both parties to this agreement recognize that they are non-political organizations solely concerned with the welfare of all those engaged in the university, be they Employer or employees".

32. I therefore find that the CBA though having executed was terminated vide a letter of 7th July 2022 to which the applicants never responded to.

33. In the circumstances of this case the recognition agreement was always part of the proceedings and this court made its ruling whilst considering it. The submissions that it is a new discovery is therefore not true.

34. I therefore find the application for review unmerited and is dismissed accordingly. There will be no order of costs.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF MAY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mr. Okonda holding brief Guserwa for Claimant Applicant

Respondent – Absent

Court Assistant - Fred