



REPUBLIC OF KENYA



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**Kenya Plantation Agricultural Workers Union v Lauren International
Flowers Limited (Employment and Labour Relations Cause
E306 of 2022) [2023] KEELRC 107 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 107 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E306 OF 2022
SC RUTTO, J
JANUARY 20, 2023**

**BETWEEN
KENYA PLANTATION AGRICULTURAL WORKERS UNION CLAIMANT
AND
LAUREN INTERNATIONAL FLOWERS LIMITED RESPONDENT**

RULING

1. The Respondent/Applicant filed an Application dated July 18, 2022 through which it seeks a review of the Court's Ruling delivered on June 10, 2022. In the said Ruling, the Court dismissed the Applicant's Notice of Preliminary Objection dated May 25, 2022.
2. It is apparent that the Applicant was dissatisfied with the Ruling of the Court hence filed the instant Application for review. The Application is expressed to be brought under Rule 33 (1) (a) (b) (d) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law.
3. The Application is premised on the annexed Affidavit of Mr Joseph Tawk who describes himself as the Director of the Applicant. Briefly, he avers that:
 - a. He has been informed by his Advocate which information he verily believes to be true that there exists a mistake and an error apparent on record in the Ruling dated June 10, 2022 which if allowed to stand, will not only subvert the Constitution, the Labour Relations Act, principals of uniformity of decisions and precedent but will also create confusion in law.
 - b. That there are sufficient reasons in particular the decision by Hon Justice Nzioka wa Makau which although not binding on this Court, is persuasive and affirms the correct position of the law.



- c. The decision by Justice Nzioka wa Makau was delivered on June 8, 2022 while the instant decision by this Court was delivered on June 10, 2022 and the Applicant could not through exercise of due diligence provide the decision as it had not been released by the Court but on the date of delivery of this Ruling dated June 10, 2022, he was informed by his advocate of the stated decision.
 - d. The decision delivered by Hon Nzioki wa Makau flows and applies to the Applicant's matter herein as it involves similar set of facts and provisions of the law.
 - e. If the Ruling is not reviewed and corrected, the Applicant shall be prejudiced and the decision rendered shall create a bad precedence to future litigants.
 - f. The Application has been made without unreasonable delay and it is necessary and just that the order sought be granted.
4. In a Further Affidavit sworn on October 13, 2022, Mr Tawk avers that:
 - a. There exists no relationship between the Applicant and the Claimant which is in line with the statutory requirement of the *Labour Relations Act* particularly section 48 and 49.
 - b. There exists no recognition agreement between the parties to create any contractual relationship.
 - c. There being no recognition agreement nor an order from the Minister according to section 48(2) and (3) of the *Labour Relations Act* as was held by Hon. Justice Nzioki wa Makau in Banking Insurance & Finance Union vs Equity Bank Limited Cause No 139 of 2016.
5. The Claimant opposed the Application through the Replying Affidavit sworn on July 26, 2022, by Ms Ateko Ingati, its Advocate on record. She avers that:
 - a. The Application is an abuse of the Court process and it is intended to further delay the delivery of the Ruling of the Claimant's Application dated May 12, 2022 which was filed under a certificate of urgency.
 - b. The Application does not fulfil conditions for review. That there is no error apparent on record in this Court's Ruling dated June 10, 2022. That if indeed such error or mistake was apparent, the same ought to have been specified and or highlighted by the Applicant.
 - c. The issues raised and thereby addressed in Cause No 139 of 2016 in the Judgment of Nzioki wa Makau have no relation with the jurisdiction of this Court as raised in the Preliminary Objection.

Submissions

6. The Application was canvassed by written submissions. The Applicant submitted that a trade union can lodge a claim against an employer if there is a dispute between its member and secondly if there exists a trade dispute. That the Claimant can only act on a live employment agreement and not an extinguished relationship. It was further submitted that the dispute is contractual in nature but instead couched to constitute a labour related dispute with prayers seeking reinstatement of a former employee.



That the Claimant has failed to disclose its relationship with the respondent because there exists none. That the Claimant's process of unionizing the respondent's employees was unprocedural, irregular and untenable in law. That further, the Claimant lacks locus standi to institute the suit. In support of its submissions, the Applicant placed reliance on the authorities of *Alfred Njau & 5 others vs City Council of Nairobi (1983) eKLR* and *Savings & Loan Limited vs Kanjenje Karangita Gakombe & another (2015) eKLR*.

7. It was the Applicant's further submission that access to the employer's premises under section 56 of the *Labour Relations Act* requires existence of a Recognition Agreement.
8. The Claimant on the other hand submitted that a trade union and their authorized officers have the locus standi to take out proceedings and appear in court on behalf of union members. To support this argument, the Claimant placed reliance on the case of *Modern Soap Factory vs Kenya Shoe and Leather Workers Union (Civil Appeal No 37 of 2019)*

Analysis and determination

9. The Court has considered the Application, the response thereto and the parties' submissions and to my mind, the issue that stands out for determination is whether the Applicant has satisfied the requirements for grant of an order for review.
10. The crux of the Application is review of the Court's Ruling delivered on June 10, 2022. The Applicant avers that there is a mistake and error apparent on record in the Ruling. To this end, the Applicant has placed reliance on the determination by Hon Justice Nzioki wa Makau in Nairobi ELRC Cause No 139 of 2016, Banking Insurance & Finance Union vs Equity Bank Limited. In this regard, the Applicant submitted that the said decision by Justice Nzioki wa Makau was delivered on June 8, 2022 while the instant decision was delivered on June 10, 2022 hence it could not through exercise of due diligence provide the decision as it had not been released by the Court.
11. Rule 33 of the Employment and Labour Relations Court Rules 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.
12. In regards to discovery of new evidence and important matter, the Court of Appeal held as follows in the case of *Pancras T Swai vs Kenya Breweries Limited [2014] eKLR*:

' The trial Judge went on to find that the appellant and his counsel 'had not exercised due diligence' and had they done so, they would have produced the two authorities which were in existence then.' This reasoning on the basis of which Lesiit J, reached her decision was a misdirection. Failure by counsel to know or to cite relevant authorities that would have impacted on the Court decision had no relevance under rule 1 of Order 44. The Court was deemed to know the law and ought to have been aware of the Treaty. Its lack of awareness of the Statute or case-law, however obscure, was not a mistake or error apparent on the face of the record nor was it a new and important matter or evidence which was discovered.



The three limbs of rule 1 in Order 44 (now Order 45) relate to issues of fact. The issues raised by the appellant related to law. Where the Court is not well served, an error of law in a decision predicated on correct facts cannot be blamed on a litigant or his counsel. But it can be challenged on appeal.'

13. As stated herein, the Applicant buttressed its argument in support of its Application for review, with the decision in *Banking Insurance & Finance Union vs Equity Bank Limited* (supra) which it has termed as new evidence which it could not produce before the Ruling was delivered.
14. Applying the determination by the Court of Appeal in *Pancras T. Swai vs Kenya Breweries Limited* (supra), a Court's lack of awareness of the Statute or case-law cannot be not termed as mistake or error apparent on the face of the record or new and important matter or evidence which was discovered. I wholly agree with the position taken by the Court on this issue. Further, and as rightly held by the Court, the issues envisaged under Order 45 of the Civil Procedure Rules (and in this case Rule 33 of this Court's Rules), relate to issues of fact and not law.
15. Indeed, I have considered the reasons for the Applicant's dissatisfaction with the Court's Ruling and respectfully, I find that the said grounds do not constitute an error of law or fact apparent on the face of the record as would justify a review. On this issue, I am fortified by the determination in *National Bank of Kenya Ltd vs Ndungu Njau (1997) eKLR* where it was held that:

' A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it'. Underlined for Emphasis.

16. The Court therefore finds that the Applicant's dissatisfaction with the findings in the Ruling of June 10, 2022, may constitute grounds of appeal and certainly not review.
17. The above finding aside, I have carefully considered the decision in *Banking Insurance & Finance Union vs Equity Bank Limited* (supra) and find the said decision to be quite distinct from the case herein. In that case, the Court isolated two issues for determination being whether the parties had a nexus under the *Labour Relations Act* as parties to a Collective Bargaining Agreement (CBA) and whether the employees of the respondent were in the position of members enjoying benefits of the CBA and thus ripe for payment of agency fees.
18. In the instant case, the issues raised relate to amongst others, payment of undeducted and unremitted union dues due to the Claimant union as well as an order barring the Applicant from interfering with its membership unless as provided under law. It does not bring issues in respect of collective bargaining and payment of agency fees as in the case of *Banking Insurance & Finance Union vs Equity Bank Limited* (supra).



19. Therefore, the facts are not similar to the instant case and do not apply herein.
20. With regards to the question of locus standi, the Applicant posits that the Claimant has failed to disclose its relationship with the parties' relationship as there exists none. That it therefore lacks locus standi to institute the suit. What I hear the Applicant to be saying is that there can be no trade dispute as the parties have no relationship by way of a recognition agreement. That the suit was instituted on behalf of Festus Walubengo who is a former employee. That the Claimant can only act on a live employment agreement and not an extinguished relationship between Mr Walubengo and the Applicant.
21. On this issue, I find useful guidance in the decision by the Court of Appeal in the case of *Modern Soap Factory vs Kenya Shoe and Leather Workers Union* [2020] eKLR, where the learned Judges held that:

' In our judgment, we can see no reason why a registered union, whose constitution so empowers, should not have standing to institute a claim on behalf of its members and to represent its members in court. We can see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact. Where there is a contest as to whether an employee is a member of a union, evidence would be required to settle that question. A recognition agreement is defined under Section 2 of the *Labour Relations Act* as an agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in court.'

22. I wholly adopt and reiterate the determination in the above case and apply the same to the case herein.
23. As I had stated in the Ruling of June 10, 2022, the Claim is composite in nature as it seeks redress at three levels being individual level, union level and membership level. It is therefore not restricted to the claim in respect of Mr Walubengo's termination. There are other issues to be considered, for instance deduction and remittance of union dues as well as the alleged victimization and harassment of the Claimant's members on account of their union membership.
24. I further reiterate the determination in the case of *Kenya Shoe & Leather Workers Union vs Falcon Tanners Ltd* [2013] eKLR where it was held that:

' The interest sought to be protected, or the legal right sought to be enforced, are germane to the Trade Union's purpose. Neither the claims asserted, nor the remedies sought, require the Claim to be filed and prosecuted in the names of the individual Members. Litigation in the Trade Unions own names, grants Trade Unions the opportunity to define, clarify and concretize Trade Union and Employee rights. Without the associational standing granted to the Trade Unions right from the early era of the Trade Disputes Act to the modern Constitutional era, labour law would be all the poorer. Employees have severe barriers to self advocacy. If the Court were to declare that Employees must bring termination claims in their individual names, this would expose disadvantaged Employees to orders for costs, barriers of a technical nature, and discourage Employees from pursuing remedies for workplace injustices. Allowing Trade Unions associational standing insulates Employees against some



of these realities of litigation. Associational standing also ensures that Trade Unions are able to enforce CBAs through Court intervention. Without the direct involvement of the Trade Unions in the litigation history of the Industrial Court, most of the developments in Kenyan Labour Law would not have been actualized. The new Constitution of Kenya has strongly endorsed the concept of associational standing, and in the view of this Court, it would be retrogressive to Industrial Relations, if the Court were to hold that Employees, who are Members of Trade Unions, or beneficiaries under CBAs concluded by Trade Unions, must now come to Court in their own names.

12. The rights of disadvantaged individuals and groups in the society cannot adequately be protected and promoted, if only the real parties in interest are permitted to file and prosecute claims in their individual names. Trade Unions in their associational role merit the description of 'aggrieved parties' under the Employment Law. When an Employee is victimized for associating with the Trade Union, the entire Association is offended. The interpretation given by the Respondent in mounting its challenge is very narrow, and oblivious of the unique characteristics of associational locus standi. The Court is of the view that the Trade Union has the right to represent its Members in Court, and to bring the Claim on their behalf, in its own name.'
25. What's more, it bears to note that pursuant to Articles 22(2) and 258(2) (d) of the Constitution, it is evident that post the Constitution 2010, the principle of locus standi has been broadened and there is a wide latitude as to who can move the Court to enforce the Constitution and the Bill of Rights.
26. Indeed, the Supreme Court in Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2014] eKLR held as follows in regards to the question of locus standi:
' (67) It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general. In John Wekesa Khaoya v. Attorney General, Petition No 60 of 2012; [2013] eKLR the High Court thus expressed the principle (paragraph 4):
'The locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in Articles 22 and 258 of Constitution which ensures unhindered access to justice.'
27. In light of the foregoing, the Claimant cannot be said to lack locus standi to move the Court as it has in the instant case.
28. In light of the foregoing and having considered the specific reasons given by the Applicant for seeking an order of review, it is my considered view that it has not satisfied the requirements for grant of the orders of review.
29. In the end, the Court finds that the Application is not meritorious as the Applicant has not established any ground for review of the Ruling delivered on June 10, 2022.
30. Consequently, the Application is dismissed with no orders as costs.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of January, 2023.



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STELLA RUTTO

JUDGE

Appearance:

Mr. Murage for the Applicant/ Respondent

Ms. Ateko for the Claimant

Court Assistant Abdimalik Hussein

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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