Kenya Engineering Workers Union v Drilling Spares and Services Limited (Cause 1265 of 2018) [2023] KEELRC 1319 (KLR) (9 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1319 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1265 OF 2018

NZIOKI WA MAKAU, J

MAY 9, 2023

BETWEEN

KENYA ENGINEERING WORKERS UNION .... CLAIMANT

AND

DRILLING SPARES AND SERVICES LIMITED .... RESPONDENT

RULING

1. The Claimant/Applicant seeks review of the judgment of the court delivered on January 24, 2020 by Radido J The Claimant asserts that it is aggrieved by the decision of the learned Judge as it requires a review of the judgment as its constitution covers the sector the Respondent operates in. The Application was supported by the affidavit of Wycliffe Amakombo Nyamwata.

2. The Respondent opposed the application and filed a replying affidavit sworn by Mr Kamal Pal Bhalla who deposed that on advice by his counsel, the application was a sham and a wastage of the court's resources and that it has not satisfied the court's requirements for a review. He deponed that the parameters for review are that 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; on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The Respondent depones that the application had not raised any grounds to warrant the review of judgment. He deponed that he was advised by counsel that the application is an appeal disguised as an application for review. He deponed there was also an unreasonable delay before the application for review was made.

3. The application as disposed of by way of written submissions. The Applicant submits that the application qualifies for review having produced the certificate of registration that the Respondent failed to produce in court. It submits that in line with section 16 of the *Employment and Labour Relations Court Act*, 2016 and Rule 33 of the *Employment and Labour Relations Court (Procedure)*

Rules, 2016 the case can be reviewed. She cites the decision in *Amalgamated Union of Kenya Metal Workers v Dock Workers Union & Associated Assemblers Limited* [2019] eKLR where Rika J. held:

> It is therefore not a substantive point of law, for the 2nd Respondent, to posit that the 1st Respondent is not the relevant Trade Union to represent Employees in the motor trade group. Recent decisions from the Courts have tended to overlook industrial trade unionism, in favour of freedom of association. Realities on the ground have shown that the principle of 'one industry, one trade union' is no longer workable. As the Dock Workers Union has recruited a sizable number of willing Employees from the motor industry, it cannot be barred from enjoying recognition from this industry, on the mere ground that its constitution restricts its area of representation to port and marine sector. Demarcation in areas of activity has become blurred, under the *Constitution* and recent Judgments of our Courts.

4. The Applicant thus urges that the Court grants the application and prayers in the memorandum of claim dated July 30, 2018 also be allowed.

5. The Respondent on its part submitted that the sole issue to determine was whether the application for review was merited. The Respondent submits that section 16 and Rule 33 provide for the review of judgments and decrees of the court. The Respondent submits that a review is confined to where there is discovery of new and important matter or evidence; on account of some mistake or error apparent on the face of the record; if the judgment or ruling requires clarification; or for any other sufficient reason. The Respondent submits that the Applicant submits there was failure to consider exhibits produced in court. The Respondent submits that failure to consider evidence is not a ground for review but rather, appeal. The Respondent relies on the case of *Anthony Chelimo v Kenya Commercial Bank Limited* [2020] eKLR where the court was confronted with an application for review premised on the principal grounds that the court had failed to take into account some evidence. The Court (ON Makau J.) held:

> 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.

6. The Respondent submits that the court went on to dismiss the application stating that the motion was an appeal disguised as a review. The Respondent further relied on the case of *Shreeji Enterprises Limited v John Muigai Chai* [2020] eKLR where R Nyakundi J held:

> I have carefully considered the submissions of the applicant and the respondent and do find that the application is based on the fact that the Learned Judge did not consider crucial evidence. This is not a ground for review but it is a ground for appeal. Moreover, failure to analyze evidence is not a ground for review. Consequently, I find that there was no error apparent on the face of the record as the appellant's main contention is that the Learned trial

> Magistrate should have considered the expert opinion given by the appellant's physician and not the one given by the respondent's, this is a good ground for appeal and not for review.

7. The Respondent further submits that there is unexplained delay wherein the Applicant made the application for review 15 months after the decision was made. It submits that where a party does not explain the delay that amounts to unreasonable delay. It cites the case of *Executive Committee Chelimo Plot Owners Welfare Group & 288 others v Langat Joel & 4 others (sued as the Management Committee of Chelimo Squatters Group)* [2018] eKLR where the JM Onyango J. held:

   > The fourth condition that the applicant have to satisfy under order 45 of the Civil Procedure Rules is whether the application has been made without undue delay. The Ruling sought to be reviewed was delivered in November 2016 whereas the application for review was made in February 2017. Whereas three months appears not to be unreasonable, failure to explain the delay may nevertheless cause the delay to be construed as unreasonable.

   The Respondent thus urges the dismissal of the Claimant's application with costs.

8. The Court is called upon to review the decision of Radido J made on January 24, 2020. The Application for review was made on April 21, 2021, a period of over 1 year 3 months. There is no explanation given as to why the review application was not made within a reasonable period. Secondly, the application for review attacks the decision on account of failure to take into consideration two exhibits in the trial. That can never be a ground of review. Failure to consider evidence is basis for an appeal and not review. The application before me was a sham, a waste of precious judicial resources as it does not meet the requirements for a review. As the application for review lacks merit, it is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nairobi this 9th day of May 2023

Nzioki wa Makau

JUDGE