Kenya National Union of Nurses v Avenue Healthcare Limited (Cause E577 of 2020) [2023] KEELRC 1647 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1647 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E577 OF 2020

B ONGAYA, J

JULY 7, 2023

BETWEEN

KENYA NATIONAL UNION OF NURSES ..... CLAIMANT

AND

AVENUE HEALTHCARE LIMITED ..... RESPONDENT

RULING

1. The respondent filed an application dated February 20, 2023 through Lilan and Koech Associates LLP. The application was under rule 33 of the *Employment and Labour Relations Court Rules*. The respondent prayed that the court be pleased to set aside, review or vary its orders made by the judgment of February 10, 2023 and the applicant be allowed to present additional evidence; and, costs of the application be provided for.

2. The application was based on the annexed supporting affidavit of Jay Michoma and upon the following grounds:

    a. The Court delivered the judgment on February 10, 2023 directing the applicant to sign a recognition agreement within 14 days. However, the union has not recruited a simple majority of the applicant's unionisable employees.

    b. The Court found that the applicant had not provided evidence to show that the numbers of unionisable employees had decreased to below simple majority and the applicant has found the requisite evidence and wishes to produce it before the Court. The new evidence could not be provided at the hearing as it only existed after the fact.

    c. The order of the Court as of December 2019 was that the claimant union had only recruited 67 members falling short of the simple majority threshold. Thus there is a manifest error on record.

d. There is good reason to review the judgment as is unfair and unjust for the applicant to conclude a recognition agreement with a union that has not recruited a simple majority of the unionisable employees.

3. The claimant opposed the application by filing the replying affidavit of its Industrial Relation Officer David Benedict Omulama sworn on November 27, 2023. It was urged and stated for the claimant as follows:

a. The application does not meet the threshold for review under rule 33 as invoked.

b. Cause No 675 of 2019 was about deduction and remission of union dues and not recognition and was separate from the instant suit between the parties.

c. The judgment was based on the facts before the Court as at the hearing and determination.

d. Threshold for recognition is as at the time the same is requested for and not later time.

e. The documents in the affidavit of Fridah Kanana canot be reconsidered as they were all along on record and such reanalysis can only be upon appeal. The Court should not be invited to sit on appeal of its own decision.

f. The conciliator's report is not binding to the Court and is not new evidence.

g. The alleged new evidence does not change the status as at time the request for recognition was made.

4. The parties filed their respective submissions on the application. The Court has considered the application, affidavits and the submissions and returns as follows.

5. First, as urged for the claimant, there is no established error on record but if the applicant is dissatisfied with the Court's findings in the judgment, the correct path is to appeal. It is submitted for the applicant that there is an error on record at paragraph 18 of the judgment when the Court found that the applicant failed to state when the numbers of nurses recruited by the union dropped whereas that information was on record. Further, it was submitted for the respondent that the Court found that the applicant did not adduce evidence of resignations from union membership while that evidence was in fact on record. The Court finds that clearly, the applicant is inviting the Court to change its reasoning in the findings in the judgment – a matter for appeal and not review. The Court stated at paragraphs 17 and 18 of the judgment thus, "17. The respondent admits that at some point in 2013, the claimant had recruited a simple majority of unionisable nurses in its employment. It however states that 7 were in management, 14 left the organisation, 1(one) was promoted and 17 voluntarily resigned. That the Claimant had only 41 members. 18. The Respondent does not state when the numbers of the nurses recruited reduced from 77 to 41 or 38 as alleged by the Respondent." The Court considers that essentially, the Court found that the applicant had failed to show and establish by evidence the fact that the claimant had not met the simple majority when it recruited 77 nurses as admitted by the applicant. The Court further found that in any event, the applicant had admitted that the claimant had at one point recruited 77 nurses being the simple majority entitling the claimant union to recognition thus, "20. Further, recognition is reckoned as at the date on which the union seeks recognition. It was therefore important that the Respondent states the date when the Claimant ceased to represent a simple majority of the unionisable nurses of the Respondent."

6. Second, the Court returns that as urged for the claimant, the purported new evidence was available to the applicant throughout the hearing of the suit. Exhibit JM3 are documents dated on diverse dates in 2020, were all throughout in the applicant's possession, and, no reason has been advanced to show that

with exercise of due diligence, they could not be placed before the Court during the proceedings. As submitted for the claimant, in any event they do not affect the Court's finding that the claimant having met the simple majority at one point as at request for recognition, the threshold for recognition per section 54 of the *Labour Relations Act, 2007* had been met and, the claimant entitled to the recognition as was ordered in the judgment.

7. Third, the submission for the applicant that the conciliator had found the claimant had recruited 77 nurses who had fallen to 38 is found untenable as a justification for the review. As urged for the claimant, that is inviting the Court to reconsider its reasoning, a matter for appeal and not falling as an error on record. Second the judgment has already elaborately explained that the applicant failed to show when the falling number of recruited nurses accrued and even then, it would not defeat the already attained simple majority. Evidence of falling numbers in the replying affidavit of Fridah Kanana sworn on November 23, 2023 does not defeat that finding.

8. Fourth, as relates the consent order in cause 675 of 2019 that union dues be deducted and remitted for 67 recruited nurses, the judgment herein addressed the issues at paragraphs 3, 4, and 5 and as submitted for the claimant, the dispute in that case was not about recognition but union dues only.

In conclusion the application for the respondent herein dated February 20, 2023 is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 7TH JULY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE