



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 35 OF 2019

KENYA HOTELS AND ALLIED WORKERS UNION1ST CLAIMANT

DANIEL OCHIENG OGAYI.....2ND CLAIMANT

VERSUS

MAYFAIR HOLDINGS LTD (IMPERIAL HOTEL).....RESPONDENT

RULING

1. This ruling relates to a Notice of Motion application dated 21st December, 2021 by the 2nd Claimant, seeking review of the orders of this court made on 9th December, 2021, and leave to amend his memorandum of claim.
2. The motion is supported by grounds on the face thereof and an affidavit sworn by **Daniel Ochieng Ogayi**, the 2nd Claimant/Applicant herein. The crux of the application is that in a ruling rendered by this court on 9th December, 2021, the court allowed the Applicant to be joined to the suit as the 2nd Claimant, but declined to set aside a consent order entered between the 1st Claimant and the Respondent on behalf of the 2nd Claimant/Applicant.
3. The Applicant in the instant application seeks review of the earlier orders of the court to set aside the consent order, and have the matter go to hearing. The Applicant contends that the consent was entered into in bad faith as he, as the Claimant was not consulted and the amount of the consent is much lower than his entitlement.
4. The Applicant submitted that despite the consent agreement, he has to date not received the amount of the consent from either the 1st Claimant or the Respondent.
5. The 1st Claimant filed grounds of opposition dated 2nd February, 2022, but did not participate in the hearing of the instant application.
6. The Respondent opposed the application vide grounds of opposition filed in court on 18th January, 2022. The Respondent avers that the application does not lay basis for review as no new matter has arisen since the ruling of this court on 9th December, 2021, to warrant review.
7. The Respondent asserts that there are ways known to law for the Applicant to pursue the Union.

Determination

8. I have considered the application, the parties' oral submissions and the written submissions by the 2nd Claimant/Applicant. The issue for determination is whether the Applicant is entitled to the prayers sought.
9. Rule 33 of the Employment and Labour Relations Court Rules, 2016 provides grounds for review to include discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the 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; if the judgment or ruling requires clarification; or for any other sufficient reason.
10. Considering the ruling subject of the application vis-à-vis the evidence in the instant application, I see no new evidence, error or mistake that would justify the review of the orders granted earlier. However, It is evident that the relationship between the 1st Claimant and her member, now 2nd Claimant, has irretrievably broken down and may no longer be tenable. To belong to a union and be represented by it in a

case such as this, is an employee's right and so is to decline any such representation.

11. The 1st Claimant opposed this application through only filing grounds of opposition. She has not intimated to this court on whether or not the amount of the consent agreement has been remitted to the Applicant. In the circumstance, to decline the Applicant's application will in my opinion violate his right to be heard under Article 50(1) of the Constitution.

12. That the 1st Claimant has not remitted the consent sum to the Applicant, which in effect continues to deny the Applicant the fruits of the consent, is in my view sufficient reason to allow the 2nd Claimant/Applicant application, and which I hereby do, with the effect that the consent order entered between the 1st Claimant and the Respondent, is hereby set aside and the 2nd Claimant's set at liberty to process his claim for hearing and determination on the merits.

13. The 2nd Claimant is further allowed leave to amend his Claim before the same is fixed for hearing.

14. The costs of this application shall abide the cause.

15. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF MARCH, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Ombati present for the 1st Claimant

Mr. Daniel Ochieng Ogayi the 2nd Claimant present in person

N/A present for the Respondent

Ms. Christine Omollo-C/A