



Kenya Union of Commercial Food And Allied Workers v Sheer Logic Management Consultants Limited. Respondent (Cause 1361 of 2018) [2022] KEELRC 1787 (KLR) (6 May 2022) (Ruling)

Neutral citation: [2022] KEELRC 1787 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1361 OF 2018
MA ONYANGO, J
MAY 6, 2022**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

**SHEER LOGIC MANAGEMENT CONSULTANTS LIMITED.
RESPONDENT RESPONDENT**

RULING

1. Vide its amended notice of motion dated May 18, 2021, the applicant prays for stay of execution and review of the judgment herein which was delivered on May 15, 2018.
2. The grounds cited in both the application and the supporting affidavit of Anicetus Ben Lanya, the applicant’s human resource director sworn on May 18, 2021 are that the recognition agreement which the respondent was directed to sign covered mostly casuals engaged by the applicant to work for its client East African Breweries Limited pursuant to a labour supply agreement.
3. The affiant depones that the claimant’s jurisdiction is limited to the sector within which the employees were engaged. That the labour supply agreement has since expired and the respondent may have to either engage the concerned employees to provide labour to a different client in a different sector such as bakery or agriculture or shipping sector where the claimant does not have jurisdiction to operate in.
4. That the alternative would be that the concerned employees would not be engaged by the applicant in which event the claimant would not have any members.
5. That the result would be that the employees would have been denied an opportunity to be considered for employment in other sectors not covered by the claimant union.



6. It is therefore the averment of the affiant that it is not feasible nor possible for the parties to sign a recognition agreement. That in any event the claimant does not have in its membership a simple majority of 50% plus one (1) of the applicant's total unionisable employees.
7. The affiant states that the foregoing constitutes the discovery of a new and important matter or evidence which was not within the knowledge of the applicant at the time of delivery of judgment and constitutes significant reason to warrant the review of the judgment.
8. In the submissions filed by the applicant it is contended that the claimant has failed to demonstrate that the respondent is the rightful employer of its members for purposes of fulfilling the mandatory requirements of section 54(1) of the *Labour Relations Act*; that the orders in the judgment are incapable of being enforced; that the claimant has failed to demonstrate that it has met the threshold for recognition; that the judgment goes against section 54 of the *Labour Relations Act* and Part 11(3) of the Industrial Relations Charter on sectoral union representation and that it is untenable to comply with the judgment.
9. The claimant opposes the application vide the replying affidavit of Mike O Oranga, the national organising secretary of the union.
10. He deposes that contrary to the averments in the application that the judgment was delivered on May 15, 2018, the correct position is that the judgment was delivered on May 20, 2020.
11. He deposes that the issues in dispute were:
 - i. Refusal to deduct and remit union dues and,
 - ii. Refusal to sign recognition agreement
12. That in the entire body of their pleadings and prayers, the applicant did not mention East African Breweries Limited and argued the matter as between the parties herein.
13. That judgment of the court was delivered virtually on May 15, 2020 and till now, the applicant continued to delay the signing of recognition agreement and the last reason given was that their directors were bereaved.
14. That the application under consideration is dated May 18, 2021, and served on June 11, 2021. It was lodged more than one year after the judgment.
15. That Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules* of this court require that a party who wishes to apply for review of judgment, decree or ruling must do so within a reasonable time and one year after the delivery of judgment cannot be construed to be within reasonable time such that it is safe to conclude that the application is meant to prejudice the claimant and its members.
16. That from the documents served upon the claimant on June 11, 2021 there is no notice terminating the contract between the applicant and East African Breweries Limited neither is there a date upon which the said labour supply agreement was terminated. That in any event the applicant has admitted at paragraph 17(i) of the supporting affidavit that the said labour supply agreement is under review.
17. That the allegation that the claimant shall not have the capacity to represent the applicant's employees working in other industrial sectors such as Bakery, Agriculture and Shipping was meant to mislead the court for the following reasons:
 - i. The employer of such employees shall and will always remain Sheer Logic Management Consultants Limited, the applicant herein.



- ii. The applicant is engaged in employing workers and making them available to their clients and that the said clients are not the principle employer as the contract of employment is between the said employees and the applicant and not between the said employees and the clients of the applicant.
 - iii. The said "clients" consuming the services of workers availed by the respondent/ applicant are not the substantive employers of the said employees so that it does not matter the sector in which they supply their workers to as they remain the employer in all respects.
 - iv. It is submitted that the applicant is therefore an outsourcing agent with no specific industrial sector attached to it for purposes of trade union representation. The claimant is the right union and in any event, no union has approached the applicant's employees for purposes of trade union representation.
 - v. The said "clients" are not responsible for the terms and conditions of service for the outsourced labour who squarely and without any doubt are employed by the agent, in this case, the applicant.
18. That the only relationship between a casual or contract worker and the applicant's client is the service provided at a cost payable to the agent who then manages terms and conditions of service including wages for the said employees.
 19. That the East African Breweries Limited or any other client or user enterprise of the applicant do not have any financial obligation to employees directly employed by the agent neither are such clients or user enterprises responsible for such employees' terms of service.
 20. That the issue of simple majority membership under section 54 of the [Labour Relations Act, 2007](#) was exhaustively covered during the trial leading to the judgment on this matter. That there is no evidence availed in court to prove that the claimant does not control simple majority membership.
 21. That there is no new evidence or important matter discovered to warrant this review application that has been placed before the court or in the entire body of the application.
 22. That out of a total of 378 workforce, there are 250 unionisable employees and the claimant recruited 142 members which accounts to 56.8% or 57% membership which was not controverted by the applicant.
 23. The applicant has already declared interest to move to the court of appeal by:-
 - i. Lodging a Notice of Appeal and;
 - ii. Applying for certified copies of judgment, decree and proceedings.
 24. The rules of this court do not allow a review where an appeal has been preferred.
 25. That order 45 rule 1 of the [Civil Procedure Rules 2010](#) endorses this position. That an appeal having been preferred, the applicant lost the right to seek a review.
 26. That the respondent intends to attack the judgment from two different angles by preferring an appeal by way of a notice of appeal and by attempting a review of the said judgment which should not be allowed as they must choose, within the law, which of the two they intend to explore and pursue.
 27. That the prayer for review is therefore an appeal in disguise where the court is being asked to sit in an appeal against its own judgment.



28. In the submissions filed on behalf of the claimant, it repeats the averments in the replying affidavit. It is further submitted that the applicant's workers do have their inherent right of freedom of association and the right to join and participate in the activities and programmes of a trade union. Article 41(1) and (2) of the constitution of Kenya provides as follows: -

1. Every person has the right to fair labour practices.
2. Every worker has the right—
 - a. to fair remuneration;
 - b. to reasonable working conditions;
 - c. to form, join or participate in the activities and programmes of a trade union; and
 - d. to go on strike.

29. It is further submitted that The International Labour Organization's Private Employment Agencies Convention no 181 of 1997 provides under article 11 and 12 as follows: -

“ Article 11.

A member shall, in accordance with national law and practice, take the necessary measures to ensure adequate protection for the workers employed by private employment agencies as described in article 1, paragraph 1(b) above, in relation to:

- a. freedom of association;
- b. collective bargaining;
- c. minimum wages;
- d. working time and other working conditions;
- e. statutory social security benefits;
- f. access to training;
- g. occupational safety and health;
- h. compensation in case of occupational accidents or diseases;
- i. compensation in case of insolvency and protection of workers claims;
- j. maternity protection and benefits, and parental protection and benefits.

Article 12.

A Member shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies providing the services referred to in paragraph 1(b) of Article 1 and of user enterprises in relation to:

- a. collective bargaining;
- b. minimum wages;
- c. working time and other working conditions;
- d. statutory social security benefits;



- e. access to training;
 - f. protection in the field of occupational safety and health;
 - g. compensation in case of occupational accidents or diseases;
 - h. compensation in case of insolvency and protection of workers claims;
 - i. maternity protection and benefits, and parental protection and benefits.”
30. This application is brought under rules 26, 27, 28, 30(3) and 38 of the rules of this court and the claimant returns that these rules are not applicable to a review application.
31. The claimant relies on the decision in *Kimani Njibia v Francis Mwangi Kimani & another* [2015] eKLR and *Michael Mungai v Housing Finance Co. (K) Limited & 5 others* [2017] eKLR, the court held that the extraordinary standing of that court demand that litigants must be clear on the jurisdiction they are invoking, especially by invoking the correct provision of the constitution or statute. The court went on to hold that an omission in that regard is not a mere procedural technicality, to be cured under article 159 of *the constitution*.
32. The claimant submits that there is no new evidence or important matter discovered to invoke the favour of this court to allow the orders sought in the application and that such evidence is not placed before the court and is not brought out in the entire body of the application.
33. The claimant further submits that this matter was filed in court on September 6, 2020 and that by this date, the claimant, arising from the check off sheets which date back to 2016, had satisfied the threshold for recognition, facts which gave rise to the judgment delivered and dated May 15, 2020.
34. It is submitted that the applicant has already declared interest to move to the court of appeal having: -
- i. Lodged a Notice of Appeal dated May 26, 2020 and;
 - ii. Applied for certified copies of judgment, decree and proceedings.
35. That order 45 rule 1 of the Civil Procedure Rules 2010 endorse this position that an appeal having been preferred by way of notice of appeal, the applicant lost the right to seek a review.
36. That the court has a wide discretion to grant stay of execution of judgment and decree but such discretion has to be exercised judicially as not to prejudice the respondent.
37. The claimant submits that the length of time which now stands at one year after the judgment date is inordinate delay all meant to deny the claimant/applicant's members their right of freedom of association and the right to enjoy the benefit of the judgment.
38. The claimant prays that the application be dismissed.

Analysis and determination

39. Having considered the pleadings and submissions together with the legal and judicial authorities cited the issues arising for determination are whether the application meets the threshold for review and whether the Applicant is entitled to the orders sought.
40. Section 33(1) of the *Employment and Labour Relations Court (Procedure) Rules* provides for review as follows:



1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - 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.
41. Further, order 45 rule of the Civil Procedure Rules provides as follows:

[Order 45, rule 1.] Application for review of decree or order

 1. Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
42. Thus, for an application to meet the threshold set out in the law for review of judgment or order, the grounds for review must fall under one or more of the grounds set out in Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules or order 45 rule 1 of the Civil procedure Rules.
43. In addition, there must be no appeal that has been preferred against the judgment or order sought to be reviewed and the application for review must be filed within a reasonable time.
44. In the instant case, the claimant avers that there is an appeal, that there is inordinate delay in filing the application and that there is no valid ground for review as set out in the rules.
45. It is evident from the record that indeed the applicant lodged a notice of appeal dated May 26, 2020. However there is no copy of a received and stamped notice of appeal on record even though the applicant by letters dated May 26, 2002 and August 4, 2020 makes reference to the same. In view of the fact that there is no stamped copy, it is my view that there is no valid notice of appeal on record.
46. On the issue of delay, Rule 33 of the Employment and Labour Relations Court (Procedure) Rules refers to filing of an application for review within a reasonable time. In this case judgment was delivered on May 15, 2020. The application herein was filed originally on November 18, 2020 and the amended application filed on or about May 18, 2021.



47. From May 15 to November 18 is just over six months. Delay having not been defined in the law, what constitutes “reasonable time” is dependent on the circumstances of each case.
48. In the judgment herein, the applicant was ordered to sign recognition agreement within 60 days. Delay herein is therefore to be determined within the context of the period given in the judgment. Going by the 60 days given in the judgment, six months would in my view constitute unreasonable delay.
49. The application should have been made before the 60 days lapsed. After 60 days the applicant was in contempt of this court’s orders. Such a person out not to have audience before the court.
50. Delay may also be determined in the context of the conduct of the applicant. The claimant has submitted and also deponed in the replying affidavit that by letter dated October 30, 2020, the applicant through its advocates informed the claimant that the directors of the respondent were bereaved and sought two weeks to sign the CBA. This was after the claimant had sought compliance with the judgment by letters dated July 2, 2020, August 26, 2020 and September 24, 2020.
51. By letter dated October 27, 2020 the claimant threatened to commence contempt proceedings should the applicant not sign and return the recognition agreement within seven days. It is after this, on November 18, 2020 that the application herein was originally filed.
52. Indeed, one of the grounds in the application is that the claimant had threatened to file contempt proceedings against the respondent.
53. None of the reasons advanced by the respondent as grounds for review had by this time been raised.
54. From this context, I would again find the delay to be unreasonable.
55. The final issue for consideration is whether the grounds for review fall within the threshold as set out in the law.
56. The applicant has prayed for review on grounds that there is discovery of new and important evidence which was not within the knowledge of the applicant at the time of delivery of judgment.
57. That new and important evidence is given to be the expiry of the labour supply agreement with East African Breweries, the lack of a simple majority membership and the sector in which the applicant operates with respect to the jurisdiction of the claimant.
58. Of course, none of these would qualify as new and important evidence as all this information was within the knowledge of the applicant at the time of recruitment by the claimant even before the suit herein was instituted. It w aware of the date of expiry of the labour contract with East African Breweries, the sector in which the claimant operates and the number of members recruited by the claimant.
59. Further, as pointed out by the claimant, the applicant did not mention the date of the expiry of the labour contract with the East African Brewers Limited. This failure to disclose the date of the labour supply agreement may be interpreted to constitute withholding of material evidence from the court, especially after this was pointed out in the replying affidavit by the claimant.
60. The other issues raised being the simple majority and the sector in which the applicant operates are matters that would not qualify as grounds for review and in any event were addressed in the judgment.
61. The claimant has clearly explained in the replying affidavit and in the submissions, that the recognition agreement is with the applicant, an employer whose main business is the supply of labour and that the



applicant's clients are not subject of the recognition agreement and therefore are irrelevant for purposes of negotiation of the CBA.

62. All the grounds raised in the submissions of the applicant are not grounds for review but grounds that may qualify for appeal as the applicant obviously disagrees with the court's findings in the judgment.
63. For the foregoing reasons, I find that there are no valid grounds for review, that the review was filed after inordinate delay and that the applicant does not qualify for grant of the orders sought.
64. The application for review is accordingly dismissed with costs which the court assesses at kshs.50,000/=.
65. The Applicant is directed to sign the recognition agreement within 14 days from the date hereof.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF MAY 2022

MAUREEN ONYANGO

JUDGE

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 has 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.

MAUREEN ONYANGO

JUDGE

