



Bakery Confectionary Food Manufacturing & Allied Workers Union (K) v United Millers Limited (Cause 43 of 2017) [2022] KEELRC 1612 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1612 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 43 OF 2017**

**CN BAARI, J
JULY 28, 2022**

BETWEEN

**BAKERY CONFECTIONARY FOOD MANUFACTURING & ALLIED
WORKERS UNION (K) CLAIMANT**

AND

UNITED MILLERS LIMITED RESPONDENT

RULING

1. Before court is a notice of motion application dated February 2, 2022, expressed to be brought pursuant to section 16 of the *Employment and Labour Relations Court Act, 2011*, rule 33 (1)(c) and (d) and 2 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*. The applicant seeks orders:
 - i. That this honourable court be pleased to review its orders arising from its judgment dated the April 4, 2019 directing that tabulation of service pay commences from the effective date of parties first collective bargaining agreement being May 1, 2007.
 - ii. That in place of such orders, the honourable court be pleased to make such orders as alternatively prayed for in the memorandum of claim upon such evaluation of evidence.
 - iii. That there be no orders for costs of this application.
2. The application is supported by the grounds on the face thereof and the affidavit sworn by one Simon Ukokhe Egesa on February 2, 2022. The basis of the application is that the respondent and the applicant entered into a recognition agreement on September 4, 2006, and thereafter negotiated, executed, and eventually registered their first ever collective bargaining agreement with effective date fixed on the May 1, 2007.



3. The applicant contends that prior to May 1, 2007, there was no legal regime providing for mandatory service pay, nor was this provided for in the respondent members' contracts of employment. The Applicant further avers that pursuant to section 59(5) of the [Labour Relations Act, 2007](#), a collective bargaining agreement becomes enforceable upon its registration in the Employment and Labour Relation Court, and is effective from the date agreed upon by the parties.
4. The applicant states that the interpretation of the contested clause 5(2) (ii) of the parties collective bargaining agreement has contributed to a breakdown of parties industrial relations and led to non-payment of terminal dues to existing employees who insist on tabulation of final dues on the actual date of their employment and not when the first collective bargaining agreement was registered.
5. The claimant/respondent opposed the application through grounds of opposition dated and filed on February 22, 2022, and a replying affidavit sworn by Danchael Mwangure on February 24, 2022.
6. The claimant/respondent states that a dispute between the parties herein arose over the computation of terminal dues and benefits of employees where the respondent/applicant sought to effect payment of service pay based on an employee's service benefits from the effective date of the collective agreement as opposed to the years of service of an employee. The claimant/respondent further contends that it was mutually agreed between the parties that the issue of interpretation of the disputed clause of the collective agreement, be subjected to judicial intervention for a proper interpretation to be rendered by the court.
7. The claimant/respondent avers that she moved this honourable court for an interpretation of the aforesaid clause of the CBA which dispute culminated in the judgment of the court delivered on the May 14, 2019, and now sought to be reviewed.
8. The claimant/respondent avers that despite guidance by this honourable court in the interpretation of clause 5 of the collective agreement through the judgment subject of review, the respondent has insisted on paying employee's service benefits from the effective date of the collective agreement as opposed to from the date an employee was first employed as per the interpretation rendered by the court hence, disgruntled employees have always declined to collect their terminal dues as offered by the respondent which robs them of substantial entitlements.
9. The claimant/respondent contends that there is no dispute between the parties herein as the earlier dispute was resolved by the judgment of the court.
10. Parties sought to canvass the application through written submissions. Both parties filed their submissions.

The Applicant/Respondent's Submissions

11. It is submitted for applicant that the claimant union can only negotiate a prospective and progressive benefit to its members from the time of being accorded recognition and concluding a CBA as that is the time it had the locus stadi to represent its members.
12. The applicant further submits that the effective date of the collective bargaining agreement is the date of registration per section 59 (5) of the [Labour Relations Act, 2007](#). They sought to rely on holding in ELRC Cause No 34 of 2019, [Kenya Chemical and Allied Workers Union v Kabuti Water and Sanitation Company Limited](#) to buttress this position.
13. The applicant/respondent further submits that the effect of the judgment of the court and the import in its implementation amounts to giving the claimant what they did not plead for and burdening the



applicant with terminal benefits that it did not contemplate when it concluded the 1st cba with the claimant.

The Claimant/Respondent's submissions

14. The claimant/respondent submits that for reason that the application for review before the court was filed after a period of 2 years and 9 months and which delay remains unexplained is singularly sufficient reason to decline to grant the orders sought. The claimant avers that an order for review of judgment is a discretionary order and the applicant is underserving of the exercise of the court's discretion in view of the undue delay. The claimant had reliance in *Ferrotech Industries Limited v Mwadziwe Ali Hare* [2021] eKLR, for the holding that an application for review must be filed without unreasonable delay and the delay must be explained.
15. The claimant further submits that there are no sufficient reasons to review the judgment. The claimant submits that grounds upon which a review application are premises must be expressly set out in the application. The claimant sought to rely in *National Bank of Kenya v Ndungu Njau* [1997] eKLR to support this position.

Analysis and Determination

16. I have considered the application herein, the grounds, the affidavits and the rival submissions. The issue for determination is whether the application meets the threshold for grant of review orders.
17. Rule 33 (1) of the *Employment and Labour Relations Court (Procedure) Rules*, provide as follows in respect of review:
 - “ 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;...”
18. The applicant's contention is that the implementation of the judgment rendered on May 14, 2019, has the effect of giving the claimant what they did not plead for and burdening the applicant with terminal benefits that it did not contemplate when it concluded the CBA with the claimant. In essence, the applicant/respondent is challenging the interpretation given by the court of clause 5(2)(ii) of the CBA between the parties herein.
19. Rule 33 of the *Employment and Labour Relations Court Rules, 2016* identifies 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 (See *Sergi Gergel v Arfa Afra Limited t/a Imax Africa Limited* [2020] eKLR)
20. The applicant has based its application on the interpretation of the CBA vis-a-vis section 59(5) of *Labour Relations Act, 2007*, which confirms the applicant's argument to be that the court failed to correctly apply the law. This in my opinion makes the issue subject of the instant application an issue



for appeal rather than one for review. In the case of *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR, also cited by the claimant, the Court of Appeal stated:

“It seems clear to us that the appellant, in basing his review application on the failure by the court to apply the law correctly faulted the decision on point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *functus officio* and have no appellate jurisdiction.”

21. Further, an application for review must relate to a discovery of new matters or evidence or there being a mistake or error which needs clarification. The law on review further bases grant of such orders on existence of sufficient reason(s) to justify the order of review.
22. The application herein is not based on the discovery of new evidence to warrant a review of the orders issued on May 14, 2019. Further, no evidence has been led to suggest that there is a mistake or error that justify correction and/or clarification of the earlier orders of the court.
23. The court finds and holds that the application has not satisfied the threshold for grant of review orders, and is hereby dismissed.
24. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28TH DAY OF JULY, 2022.

CHRISTINE N BAARI

JUDGE

Appearance:

Mr. Amalemba present for the claimant

Mr. Ombokh present for the respondent

Christine Omollo – C/A

