



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.1625 OF 2017**

**RIFT VALLEY RAILWAYS WORKERS UNION (K).....CLAIMANT**

**VERSUS**

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME.....1ST RESPONDENT**

**KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> RESPONDENT**

**THE CORPORATE TRUSTEES.....3<sup>RD</sup> RESPONDENT**

**AND**

**RETIREMENT BENEFITS AUTHORITY.....INTERESTED PARTY**

**RULING**

The claimant filed application and Notice of Motion dated 14<sup>th</sup> January, 2020 and under the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules and seeking for orders that;

- 1. The court review its earlier decision in the matter, in order to conform to the findings of the review; OR*
- 2. The court quashes its earlier decision in the matter and directs that the matter be heard de novo;*
- 3. Costs be in the suit.*

The application is supported by the affidavit Munayi Isaac Opondo and on the grounds that there is discovery of an important matter and which has come to the knowledge of the claimant and was not available at the time of the hearing. The alleged lack of standing by the claimant to file the instant suit to represent pensioners should be reviewed.

Other grounds are that there is nexus between the applicant and the pensioners herein which has been addressed by this court previously and in several other suits.

Other grounds in support of the application are that Rule 9(2) of this Court Rules allow recognised agents eligible to represent litigants in this court in class actions. Section 2 of the Labour Relations Act delineates the Secretary General as the authorised person and with mandate to act for a party before this court. Article 22 of the Constitution on the enforcement of the Bill of Rights does not require there be a nexus between the litigant and the cause of action in a class suit. Any person has a constitutional right to institute suit for and on behalf of others as buttressed under article 258 of the constitution.

There are statements of the pensioners and affidavit to verify the claims made. These comprise over 8000 pensioners who as a result of the improprieties at the scheme and the inconsistencies in the collection of rent from the said subject property are now 9 months in arrears of their pensions not having been paid.

In his affidavit, Mr Munayi avers that he is the Secretary General of the claimant union and with representative authority to support the application herein. On 21<sup>st</sup> August, 2017 the claimant filed suit with regard to property of *Muthurwa Estate LN/209/6502* in which it sought to have rent that is supposed to be collected and which had not been collected for 9 months and which application was disallowed vides ruling dated 31<sup>st</sup> May, 2018 on the grounds that there was no nexus between the claimant and the pensioners as to claim any rights in the subject property. That the claimant did not establish its relationship with the pensioners to justify the interest therefrom so as to file suit on

their behalf and there was no affidavit signed by either of the pensioners in verification of the issues as may have been raised by the claimant and that the members of the union are not known.

Mr Munayi also avers that the reasons given by the court in disallowing the application were not anywhere related to the subject matter and based on technicalities and not at all in the substratum of the matter.

The applicant/claimant is a trade union representing the interests of the workers who did not abdicate their rights after their retirement and did not discontinue relationship with the employer as the stage of retirement. There are retirement benefits and pension to be paid every month. These are union members and the claimant has standing to articulate their issues on their behalf as members.

1<sup>st</sup> respondent

In response, The 1<sup>st</sup> respondent filed Grounds of Opposition that the claimants application is incompetent and in abuse of the court process as there is no discovery of new facts or error apparent on the record and therefore there is no sufficient cause to warrant a review and application for review not filed promptly should be dismissed with costs.

2<sup>nd</sup> respondent

The 2<sup>nd</sup> respondent filed **Grounds of Opposition** and on the basis that the instant application should be dismissed with costs on the basis that;

1. *The application is incompetent and a total abuse of the process of court the same having been filed over two (2) years after the impugned ruling was delivered.*
2. *The application being one seeking orders for review, the applicant has totally failed to satisfy the requirements set out in Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016.*
3. *The application has been couched as an application for review when in actual sense the matters raised therein indicate it is an appeal against the ruling of the court.*
4. *The purported authority relied upon by the applicant at pages 10 to 11 of the application is undated and therefore the authenticity of the same is in doubt.*
5. *The judicial decisions relied upon by the applicant in the application relates to a different matter with different issues and have no bearing in this matter.*
6. *In any event, the court have held severally that the mere fact that one judge reached a different conclusion from another, is not a ground for review but may be a ground for appeal.*
7. *The application in its entirety is brought in bad faith and should be dismissed with costs.*

The 2<sup>nd</sup> respondent filed a list of Authorities.

The parties attended and agreed to address the application by way of written submissions.

The claimant as the applicant submitted that in the court ruling delivered on 31<sup>st</sup> May, 2018 the court allowed the respondents preliminary objections with a finding that the claimant had no *locus standi* to prosecute the matter herein. The court's finding were on the grounds that the claimant had failed to explain its relationship with the pensions on whose behalf the claimant was filed for; that there was no affidavit sworn by any pensioner to verify the issues alleged; that the members of the union the claimant represents were unknown; and the claim was disjointed and in abuse of court process.

The claimant submitted that the union is registered and the general secretary allowed to file suit. This is allowed under Order 9 Rule 2 where there is a class action and the findings by the court that there was no standing to file suit was in error. The court in **Cause No.2289 of 2015 – Rift Valley Railways Workers Union (K) versus Kenya Railways Staff Retirement Benefits Scheme & others** held the claimant had standing to represent its members. This court should review its ruling and allow the claimant to prosecute the suit herein.

The other parties did not file any written submissions. None are on the record.

#### Determination

The gist of the claimant's application is Rule 33 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and which provides as follows;

33. (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.

However, the matter sought to be reviewed relates to the reasoning, conclusions and findings of the court. The merits and demerits of the issue of the standing of the claimant to move the court herein. The findings on the *locus standi* of the claimant to file the proceedings herein.

In an application seeking review of the court orders, there must be discovery of new and important matter or evidence which was not within the knowledge of the applicant at the time the order was issued. The element of discovery is crucial. Such discovery must relate to a new and important matter. Such matter must come to the knowledge of the applicant after the issuance of the order sought to be reviewed.

It is therefore important to an applicant to apply these elements before moving the court.

Save for the above elements, for the court to apply and review its orders there must be a mistake or error or there is need for clarification or that there exists a sufficient cause to justify a review of a court order(s).

In the instant application, the claimant through the secretary general avers that;

*There was discovery and or arose a very critical yet important issue and or matter that was not within the applicants knowledge and or purview at the time the ruling in the matter was given and which issue is as well quite central to the matter at hand and the claimant yet to be canvassed.*

On the entire reasoning of the application, the grounds thereto and the Supporting Affidavit of Mr Munayi, he does not state what matter which is new and important and which was not within his knowledge at the time of filing suit and after the ruling dated 31<sup>st</sup> May, 2018.

The element of discovery is lost. It does not exist.

The applicant does not plead there was mistake, error, clarification of that there exists a sufficient cause to justify the application for review. See **Kithure M'Mwendwa Nyaga v Teacher Service Commission [2019] eKLR** and in the case of **Sergii Gergel v ARFA AFRA LTD t/a IMAX Africa Ltd [2020] eKLR** the court held that;

*... A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilising it. It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified there in ...*

An application seeking review is therefore regulated.

The court finds no matter for review in the instant application.

There exists a difference between an application seeking for a review and where a party should file an appeal. A review as analysed above must be made before the court whose order is sought to be reviewed. An appeal must relate to a question of law on the merits of the order issued and made to the appellate court. Therefore, before filing an application for review, an applicant must look at the matter sought to be addressed to consider whether such material is sufficient grounds for appeal or for a review.

The matters set out in the application and Affidavit of Mr Munayi relates to the merits and demerits of the court ruling. Such is not a matter for review. The trial court has already addressed expressed itself on the question of standing of the claimant/applicant. Such is not subject of review as done herein. The decisions relied upon by the claimant/applicant relates to a court of equal jurisdiction.

The matter fails the review rule pursuant to Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

In the case of **Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR** the Court of Appeal held that;

*One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling ... or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order. ...*

**Accordingly, the application dated 14<sup>th</sup> January, 2020 is hereby found without merit and is hereby dismissed. Costs to the respondents. The Interested Party shall bear own costs.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....