



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.132 OF 2018

JOHN OBONYO & 5 OTHERSAPPLICANTS

VERSUS

KENYA ENGINEERING WORKERS UNION.....RESPONDENT

RULING

The ruling herein relates to application dated 25th February, 2021 under the provisions of Rule 33(1)(e), 33(2) of the Employment and Labour Relations Court Rules, 2016 and section 80, 1A, 1B and 3A of the Civil Procedure Act and Order 12 rule 7, order 45 rule 1, 2, and 3 of the Civil Procedure Rules and seeking for orders that orders made on 11th February, 2021 dismissing application dated 26th November, 2020 be reviewed, varied or set aside and the application dismissed be reinstated.

The application is supported by the affidavit of John Obonyo and on the grounds that on 11th February, 2021 the court dismissed application through no fault or wrongdoing of the part of the applicants but due to the fault of the Advocates on record. The applicants are keen to prosecute the application dated 6th November, 2020 and the court has been moved without delay and seek the same be reinstated and heard on the merits.

Mr Obonyo avers in his affidavit that application dated 6th November, 2020 was scheduled for hearing on 11th February, 2021 but advocates instructed over the matter failed to attend court and the court dismissed the application with costs for want of prosecution. The dismissal was not due to the fault of the applicants but the advocate and in the interests of justice the same be reinstated and heard on the merits.

The respondent filed Grounds of Opposition and that the application is supported by the affidavit of John Obonyo an agent of the claimants who lacks authority to swear the same. The application is defective in so far as it is brought under Rule 33(1) (e) of the Employment and Labour Relations Court (Procedure) Rules, 2016 when such rule does not exist. The application is bad in law and should be dismissed with costs.

Both parties filed written submissions.

The applicants submitted that the application is properly before court and based on correct provisions of Rule 33(1) (e) of the court Rule and in the interests of justice should be allowed.

The respondent submitted that the applicants filed application dated 6th November, 2020 and obtained hearing date but failed to attend. The application was dismissed for good cause for failure to attend and prosecute it. There was no interest shown in the application. No reason is given as to why their advocate failed to attend court on two occasions.

The application is filed under non-existent rule and there exists no sufficient cause to justify a review for the order dismissing the application dated 6th November, 2020 and the instant application should be dismissed with costs.

The application and order sought to be reviewed has not been attached as required under Rule 33. The deponent in support of the application has not obtained authority from other applicants to file the instant application should be dismissed.

Determination

The gist of the application before court is that the court order issued on 11th February, 2021 be reviewed, varied and or set aside and application dated 26th November, 2020 be reinstated for hearing.

An applicant seeking for a review, variation of an order of this court is guided by principles outlined under Rule 33 of the Employment and Labour Relations Court (Procedure) rules, 2016 (Court Rules).

The Court Rules requires that;

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.

There must exist an order upon which the review is sought. the review must relates to a discovery of new matter or evidence. there must be a mistake or error. There is need for clarification. And there must be a sufficient reason(s) to justify the order of review.

Indeed as submitted by the respondent, the applicants have relied on Rule 33(1) (e) of the Court Rules which Rule does not exist.

Even though this is not fatal, the substance of the orders sought must be based on sufficient reasons and conditions which justify for a review.

The review sought is with regard to orders issued on 11th February, 2021 dismissing the application filed herein dated 26th November, 2020 together with all consequential orders be reviewed varied and/or set aside.

On 26th November, 2020 the court heard the respondent in the absence of the applicant with regard to application dated 6th November, 2020. No hearing directions were issued as the applicants remained absent.

The matter was fixed for hearing on 11th February, 2021. The applicants remained absent. The court issued the following orders;

Application dated 6th November, 2020 served and applicants absent is hereby dismissed for want of prosecution and attendance. Costs to the respondent. [underline added].

The underline to application dated 6th November, 2020 is important.

The applicants are seeking for a review of orders dismissing application dated 26th November, 2020. No such order or application issued herein. There is no application of such date.

The applicants have not stated what new evidence has been discovered to warrant a review of the orders issued on 11th February, 2021. There is no material that the is a mistake or error that justify for correction of the orders and no clarification of the orders sought is addressed. Intimately, a reasonable cause is not established.

Where the application dated 6th November, 2020 was dismissed for non-attendance and want of prosecution, which is not the case here as the application relates to a non-existent application of 26th November, 2020 the applicable rules and provisions of the law and the rule thereto are fundamentally different as herein applied with regard to a review. A review of any court order is addressed and the court finds no matter to justify such review, variation, or setting aside of the orders issued on 11th February, 2021.

The application before court is without good foundation and is hereby dismissed. costs to the respondent.

Delivered in open court at Nairobi this 11th day of May, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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