REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 46 OF 2020

KENYA AVIATION WORKERS UNION.....CLAIMANT

VERSUS

AGS WORLDWIDE MOVERS LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 8th February 2021 seeking for Orders that the Court be pleased to vary, review and/or set aside the Ruling/orders made by the Honourable Court on 16th December 2020, and to further stay the execution of the said Ruling pending the hearing and determination of this Application. The Application is premised on the grounds that the Claimant union had reported a dispute to the Cabinet Secretary for purposes of appointing a Conciliator and when the Cabinet Secretary did not respond, it filed a claim against the Respondent for purposes of securing a recognition agreement having acquired a simple majority of the Respondent's unionisable members. That the Honourable Court was satisfied with the said argument and proceeded to hear the suit under Section 62 and 65(4) of the Labour Relations Act but that mid-way the proceedings, the Cabinet Secretary appointed a Conciliator and a report filed in Court. That the Applicant filed a reconciliation report and notified the Court of the same and that the Court was to give directions on the report vis-à-vis the submissions filed by both parties. That despite the foregoing, the Judge notes at paragraph 5 of the Ruling that there is no matter that was reported to the ministry of labour, or any report before court yet the same was filed and would have helped the Court at arriving at a different decision all together. Further, that although the Respondent deals in a different sector, majority of its employees at the Airport work within the jurisdiction of the Claimant and who thus ought to be given chance to choose the union of their choice from the airport. That if the Honourable Court had considered the conciliator's report and/or looked at the pleadings in detail in terms of the circumstances under which the Respondent's unionisable members were recruited, it would have granted the prayers sought by the Applicant. That the suit raised several triable issues and the Claimant/Applicant will be frustrated and prejudiced if this Application is not allowed and that the Respondent will not suffer any prejudice if the application is allowed. The Application is supported by the Affidavit sworn by the Applicant's Secretary General Moss K Ndiema who avers that he attached the letter reporting the dispute to the main application dated 28th January 2020.

2. The Respondent filed a Replying Affidavit sworn on 22nd February 2021 by its Human Resource Officer, Jacob Mulatya who avers that the Applicant took the matter herein to court because of impatience and not waiting for a conciliator to be appointed. He further avers that the said paragraph 5 of the Ruling is quite clear in its import and meaning in that if there was a conciliation prior to coming to court, there would have been no need to file the suit and wasting court's time as the conciliator would have helped the Applicant understand the same thing the Court said. That the appointment of a conciliator after the suit had been placed before court does not oust the jurisdiction and superiority of the court to determine the dispute and that unless specifically referred back to conciliation by the court, the conciliator's opinion lacks judicial authority and is not binding on the court. He further avers that the decision of the Court is based on law and fact and not on sentiments and that the Court would have arrived at the same decision whether the conciliator's report was present or not. He urges the Claimant/Applicant to pay more attention to the Court's Rulings, its import based on existing law and to understand that having operations at the airport does not transform the Respondent's business to that of air services or change the substance of the suit. He asserts that the suit was struck off for lacking a cause of action and the conciliator's report would not miraculously inject a cause of action or otherwise breathe life into the suit. He also avers that the application should be dismissed with costs for being a waste of this Honourable Court's time.

3. The Claimant/Applicant submitted that this Court's failure to consider the conciliator's report dated 5th October 2020 in making the orders dated 16th December 2020 amounts to the erroneous omission of critical evidence to warrant the review of its Ruling as per Rule 33(1)(b) of the Employment and Labour Relations Court (Procedure) 2016. The Claimant/Applicant contends that this Honourable Court thus made an error apparent on the face of the record by inadvertently failing to consider the conciliator's report and that the Application for review is without unreasonable delay. Further, that even without this Honourable Court delving into the conciliator's report's substance, its very existence and presence in the Court's record before the delivery of the Ruling means that there was an error apparent whose only redress is allowing this Application. The Claimant submitted that the standard of proof for review of a Court order on the ground of mistake or error apparent on the face of the record was discussed in the case of **Philip Muoki Kilonzo *v* Simon Makau Ngui; Attorney General (Interested Party) [2021] eKLR** where the Court held that: *"The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter"*. The Claimant submitted that the Court further relied on Justice Warsame's decision in **Sara Lee Household & Body Care (K) Ltd *v* Damji Pramji Mandavia, Kisumu HCCC No. 114 of 2004** (unreported) to the effect that the essence of a review must ordinarily be to deal with straight forward issues which would not fundamentally and radically change the judgement intended to be reviewed. It further submitted that the conciliator's report which gave evidence on the fulfilment of Section 54(6) of the Labour Relations Act contradicts the Ruling as Mr Nelson Kimeu, the appointed conciliator, stated in his findings that: *"Kenya Aviation Workers Union has recruited into its membership a simple majority of the company's unionisable employees. There is no rival union claiming to represent the worker's interests."* The Claimant/Applicant urges the Court to be guided by the holding in the case of **Julie Kariuki *v* Dyer & Blair Investment Bank [2020] eKLR** where this Honourable Court in determining a similar matter held that:

> "*17. It cannot therefore be gainsaid that consideration of the evidence may have substantially influenced the outcome of the case*

(differently). The failure to consider the evidence, it can be argued is akin to a substantial procedural violation of the right to a fair hearing."

4. It is submitted by the Claimant/Applicant that this Court ought not to dismiss this Application on the ground of unreasonable delay since the Claimant/Applicant has demonstrated sufficient reason for review. That this Honourable Court should be guided by the overriding objective provided under Article 159(2)(d) of the Constitution of Kenya 2010, that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. That whereas it filed the Application 54 days after the issuance of the Ruling, this Court ought to consider that the main suit commenced in early 2020 and concerning the genesis of events that took place on 23rd April 2019. That moreover, it sent the letter to the Ministry seeking initiation of conciliatory proceedings on 20th October 2019, several months before institution of the main suit. That a 54-day delay is therefore not unreasonable to warrant dismissal of this Application as the subject of the suit is not of a liquidated demand. The Claimant/Applicant cited the case of **Adrian Kamotho Njenga *v* Cabinet Secretary, Ministry of Information, Communication and Technology & 8 Others [2017] eKLR** where the High Court held that the purpose of the rules of procedure are not to make the Court far bound rather courts should apply them in a manner that would not cause injustice in a particular case. The Court further held that the principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim and the financial situation of the parties. The Claimant/Applicant submitted that failure to allow this Application would result in a gross miscarriage of justice, prejudice the Claimant/Applicant and undermine the reputation of this Honourable Court.

5. The Respondent submitted that the Claimant/Applicant lodged this suit in court under a certificate of urgency as is provided for by Section 74(a) and (b)(i) of the Labour Relations Act, having reported a dispute at the labour office but conciliation having not taken place. The Respondent submitted that the Claimant was therefore within its right to refer the dispute to court and which reference to Court does not operate as a parallel judicial system where the outcome of the suit in court is premised on or dependent on the conciliation report issued by an employee of the Ministry of Labour. It further submitted that the conciliation report issued by the conciliator was indeed later filed in court by the Claimant but after the Court was already seized of the dispute. That this Honourable Court is clothed with inherent power to make a determination which has judicial force and authority superior to the conciliator and is not bound by the findings or recommendations of the conciliator. The Respondent submitted that the application herein is couched in terms of an appeal and the facts relied thereupon amount to asking this Honourable Court to sit on appeal against its own Ruling. That the best option for the Claimant/Applicant would have been to file an appeal being aggrieved by the Ruling of the Court and that the issues raised in the application do not meet the threshold of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. The Respondent submitted that the Court legitimately established that the Claimant/Applicant is the wrong union to recruit from the Respondent and laid down the principles considered in reaching that decision and that the conciliator's report cannot displace the fundamental position established by the said principles. The Respondent submitted that as the Claimant/Applicant has not demonstrated that the application meets the minimum requirements for consideration on review, the application remains frivolous, an embarrassment and a waste of the Court's time and should be dismissed with costs.

6. The grounds for review under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 are not what have prompted the purported review before me. The Claimant's grouse is that I did not consider the Conciliator's report in making my determination. That, as correctly pointed out by the Respondent is tantamount to asking the Court to sit on appeal over its own decision. If the Claimant was aggrieved by the determination as shown in the motion before me, the correct procedure would have been to prefer an appeal to the Court of Appeal against part or the whole decision made by this Court. Granted that I cannot sit on appeal over my own decision the motion is devoid of merit and is accordingly dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nairobi this 2nd day of June 2021

Nzioki wa Makau

JUDGE