



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

ELRC. CAUSE NO. 2472 OF 2017

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

-VERSUS-

KENYA MEDICAL RESEARCH INSTITUTE.....1ST RESPONDENT

UNION OF NATIONAL RESEARCH INSTITUTE.....2ND RESPONDENT

CABINET SECRETARY FOR EAST AFRICA COMMUNITY

LABOUR & SOCIAL SERVICES.....3RD RESPONDENT

RULING

1. On 21.2.2020 I delivered judgment in this suit in which I struck out the suit on ground that the person who initiated it and represented the Claimant was not the authorised person within the meaning of section 2(a) and (e) of the Labour Relations Act. In the judgment, I also made observations that if a trade union chooses to recruit members from an employer, it should target the simple majority of the entire unionisable workforce and not just a simple majority of a fraction thereof like the claimant herein.

2. By the Notice of Motion dated 22.9.2020 the Claimant approached this court seeking the following orders:

- a. Vacation and/or setting aside the judgment delivered by this court on 21.2.2020.
- b. The suit be determined on merit.
- c. Any other order that the court deems fit in the interest of justice.

3. The application is supported by the Affidavit sworn by the Claimant's General Secretary Mr. Seth Panyako on 22.9.2020. The application is opposed by all the Respondents vide the grounds of opposition dated 16.2.2021 and the Replying Affidavit sworn by Mr. Zachariah Achacha on 19.11.2020.

APPLICANT'S CASE

4. The Claimant contends that Mr. Odongo Okatch, who filed the suit had the authority to represent the Claimant and the court had been informed of the same vide a letter dated 24.5.2017 to the Deputy Registrar. The Claimant further contends that despite being duly authorised to represent it in Court, Mr. Odongo deliberately failed to file copy of the authority because he was compromised and was acting in his own interest.

5. The Claimant also contends that it is not to blame for the failure by Mr. Odongo to file the authority to represent it in the suit and contends that this is a sufficient reason to warrant the review order sought. It contends that the suit was not determined on merits and unless the application is allowed, it will be prejudiced by the impugned judgment.

6. Finally, the Claimant argues that the application has been brought without unreasonable delay considering that Mr. Odongo concealed the judgment in order to sabotage the union.

RESPONDENT'S CASE

7. The Respondents unanimously contend that the Applicant has not established any of the grounds for review set out under Rule 33(1) of the ELRC Rules. They further argued that the court made final determination on the issue of recognition and the same cannot be reopened.

ISSUES FOR DETERMINATION

8. The issues for determination are:

a. Whether the application was made without unreasonable delay.

b. Whether the Claimant has established any of the grounds for review set out under Rule 33(1) of the ELRC Procedure Rules

Was there unreasonable delay?

9. Rule 33 (1) provides that:-

“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 review of the judgment or ruling.

a. . . .”

8. The judgment herein was delivered on 21.2.2020 and the application for review was made on 22.9.2020 about 7 months after delivery. The Claimant explained the cause of the delay as the concealment of the judgment by Mr. Odongo who was in conduct of the matter.

11. I have carefully considered the evidence tabled by the Applicant and noted that as at 15.7.2020, the Claimant was already aware of the impugned judgment. According to the letter dated 22.7.2020, the Claimant stated in paragraph 8 as follows:-

“During your suspension, the union received other allegations levelled against you, which you were notified via a letter Ref : NBI/KNUN/OE.5/211/20 dated 15th July 2020 to defend yourself from the following –

i. In cause 2472 of 2017 Kemri v/s. Knun

You failed to file authority to act for the General Secretary in the matter, even when the issue was raised by the Respondent you failed to file a further affidavit to counteract the allegation leading to dismissal of the suit.”

b. . . .

12. The delay to file the application from at least 15.7.2020 to 22.9.2020 was not explained. The period is in excess of 2 months and in the circumstance I find the delay to be unreasonable. The Claimant chose to ignore the right to seek review and swiftly pursued disciplinary action against Mr. Odongo.

Ground for Review

14. The Claimant sought review on ground that there is a sufficient cause for review. It contended that its representative who referred the dispute to the court failed to file the authority to act after conspiring with the Respondents to sabotage the union. In the Claimants view its right to fair trial under Article 50 of the Constitution will be denied due to the said conduct of its representative Mr. Odongo. Consequently, according to the Claimant that state of affairs constitutes sufficient cause for review of the impugned judgment so that the concerned union members’ right to join a union of their choice is not denied.

14. I have carefully considered the material presented by the two sides and it is now clear as the day that the Claimant had indeed notified the court through the Deputy Registrar vide the letter dated 22.5.2017 and as such Mr. Odongo Okatch had been authorised to represent the union in the court within the meaning of section 2(e), 73 (3) and section 22 of the ELRC Act.

15. The letter was received by the Deputy Registrar on 14.5.2017 according to the official stamp appearing on the face of the letter. Had the court been shown the said letter of authority to represent the union the suit would not have been struck out.

16. The failure to show the authority letter to the court cannot be blamed on the Claimant but the negligence on the part of Mr. Odongo who despite objection that the suit was incompetent for want of capacity to refer the suit to court, he failed to show the same to the court before the impugned judgment.

17. In the circumstance, I find that the rights of the members of the Claimant in the 1st Respondent will be prejudiced since the judgment if left to stand in the face of such a procedural lapse will deny them the opportunity to agitate for their rights to join a trade union of their choice. Consequently, despite the unreasonable delay in filing application, I find that there is a sufficient cause to grant review.

18. In making the foregoing finding I have considered the contention by all the Respondents and find that they have not shown that they will suffer prejudice which cannot be remedied by cost.

19. Consequently I allow the application in the following terms:

- a. **The judgment delivered on 21.2.2020 is hereby reviewed and set aside.**
- b. **The suit shall start *de novo***
- c. **The claimant will pay throw away costs of Kshs. 10,000 to each Respondent before the hearing date.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF AUGUST, 2021

ONESMUS N. MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE