REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E643 OF 2020

FIDELIS OMWAMBA ONSONGO & 1648 OTHERS…..…….APPLICANTS

VERSUS

TAILORS & TEXTILE WORKERS UNION…….....….1ST RESPONDENT

GLOBAL APPAREL (EPZ) LIMITED…….....…..2ND RESPONDENT

RULING

1. On 18· 3. 2021, I delivered a ruling on the Claimants' Notice of Motion dated 12.10.2020 but they were dissatisfied and brought the instant Notice of Motion dated 8.4.2021 seeking the following orders:

> **a. THAT pending the hearing and determination of this application, the 2nd Respondent be restrained from effecting any deduction on the Claimants' salaries on account of union dues or agency fees.**
>
> **b. THAT the court be pleased to review its decision made vide the ruling delivered on 18.3.2021 and allow the claimants' application dated 12.10.2020.**
>
> **c. The costs of this application be in the cause.**

2. The application is premised on grounds that the claimants have discovered new and important evidence which was not within their knowledge and which could not be produced before the impugned ruling was delivered despite exercise of due diligence.

3. The Application is supported by the Affidavit of Fidelis Omwamba Onsongo the 1st Applicant, on behalf of the other applicants, sworn on 8.4.2021 in which he reiterated that they discovered a new evidence after the impugned document was rendered. The affiant annexed copy of a letter from the 2nd respondent indicating that it had discovered that there is no Collective Agreement (CBA) concluded between itself and the 1st respondent union.

4. The 1st Respondent opposed the application vide a Replying Affidavit sworn by Rev. Joel Kandie Chebii its General Secretary sworn on 20.4.2021 in which he deposed that the applicant never requested for the CBA from the union before the impugned ruling was rendered. He attached a copy of the CBA in force between it and the EPZ Apparel Manufacturers and Exporters Group of FKE signed on 17.10.2003,and urged that the Application is misleading, lacks merit and should be dismissed.

5. The 2nd Respondent opposed the application vide a Replying Affidavit sworn on 21.4.2021 by its Administrative Manager, Mr. Tom Mboya in which he deposed that the 2nd Respondent was initially a member of the EPZ Apparel Manufacturers and Exporters Group of the Federation of Kenya Employers (FKE) which had signed a Recognition Agreement with the 1st respondent and concluded a CBA for 2003/2005 to govern the terms and conditions of service for the 2nd respondent's unionisable employees who are members of the 1st respondent.

6. He further contended that the said employers' organization disintegrated and most of its members closed shop living the 2nd respondent as the only surviving member; that after the CBA expired, the respondents failed to agree on a new CBA, leading to filing of Cause No. 168 of 2014 and a Judgment delivered on 28.2.2018 directing the them to conclude a CBA; that the CBA has not yet been concluded due to a plethora of claims and applications; and that it is against that background that the letter dated 26.3.2021 was issued to the claimants.

7. In a further Affidavit sworn by the 1st claimant on 15.5.2016[sic], the applicants contended that the CBA relied upon by the 1st respondent

expired on 30.92005 even before most of them joined the union. They further averred that the 2nd respondent has confirmed in its replying Affidavit that there is no CBA signed and registered between the two respondents.

Submissions

8. The Applicant basically reiterated the averrements contained in the affidavits to urge that court to allow the application. The relied on **Khalif Sheikh Adan v the Honourable Attorney General[2019] eKLR** where the Court held that a letter issued by the Director of Lands after the impugned decision constituted a new and important matter or evidence and proceeded to allow the application for review.

9. The 1st respondent submitted that the allegation that there is discovery of a new evidence is not true since the relationship between the claimants and the respondents herein have been grounded on the Recognition Agreement and CBA. It further submitted that the expiry of the CBA did not mean that it ceased to exist since it was intended to remain in force until a new CBA was negotiated and finalized. Consequently, it contended that the application has no basis and ought to be dismissed with costs.

10. The 2nd respondent submitted that Rule 33(1) (a) of the ELRC Procedure Rules sets out the test to be met by the applicant when relying on the ground of discovery of new evidence like in the instance case. It argued that the applicant must show that the evidence is new and that despite due diligence, such evidence was not within his/her reach. It contended that the issue of the expiry of the 2003/2005 was fully disclosed in the Replying Affidavit sworn on its behalf on 28.10.2020 and as such it submitted that the allegation of a discovery of new evidence is untrue.

11. As regards, the test of due diligence, the 2nd respondent submitted that the applicant never sought for the said information before filing the aforesaid application. It relied on **Nasibwa Wakenya Moses v University of Nairobi & another [2019] eKLR** and **Furcon limited v Kenya Commercial Bank ltd [2001] eKLR** to support its case.

Issues for determination

12. The only issue for determination is whether the applicant has established any ground upon which the court can review the impugned decision.

13. The claimants have contended that they have discovered a new evidence which was not within their reach before the impugned decision was passed. The piece of evidence discovered is the lack of a CBA between the respondents upon which the court made the impugned ruling.

14. The 2nd respondent contended that the non-existence of a CBA is not a new matter or evidence because it had already been raised in the Replying Affidavit sworn on 28.10.2020. The 1st respondent agrees that the said issue is not new and the expiry of the CBA did not mean that it ceased to exist since it was to remain in force until a new CBA was negotiated and fully concluded.

15. I have carefully considered the said affidavits and submissions by the parties and noted that the issue of expiry of the CBA was never raised in the Replying Affidavit sworn on 28.10.2020 as alleged by the 2nd respondent. What was deposed in paragraph 4 of the Affidavit is that it was a member of EPZ Apparel Manufacturers and Exporters Group of the FKE for purposes of collective bargaining but the group disintegrated and as such the two respondents had a Recognition Agreement and a CBA between them. Thereafter, the 2nd respondent vide the letter dated 26.3.2021 wrote to the claimant confirming that it had discovered that there is no CBA concluded between it and the 1st respondent.

16. In my view, the said letter brought in a new evidence as alleged by the applicant. Whether the new evidence would have made the court arrive at a different decision is a different matter altogether. I will come back to that shortly.

17. As regards the issue of diligence, I would quickly agree with the claimants that they acted diligently by writing to the 2nd respondent to ask for a copy of the CBA in force. I would also add that they did their best by writing a reminder to the 2nd respondent prompting the said respondent to reply after the delivery of the impugned ruling. The question that arises and has not been answered is why they did not ask for the same from their trade union directly or even copy the said letters to the union.

18. Turning back to the issue of the relevance of the new evidence discovered, I wish to say that the said new evidence could not have made the court arrive at a different decision from the impugned decision because the respondents and indeed the members of the union continued to be bound be the CBA for 2003/2005 until another one was fully concluded between them. Clause 36 of the said CBA, which was incorporated into the employment contract between the claimants and the 2nd respondent pursuant to section 59(3) of the Labour relations Act, stated that:

> ***"This agreement shall remain in force for a period of two years upto 30th September, 2005. Thereafter it shall continue in force until it is amended by mutual agreement between the two parties, provided that the party wishing to amend it gives the other party one months' notice of such intention giving in writing the details of the amendment required."***

19. The foregoing clause is in consonance with the said provision of section 59(2) and (3) of the said Act which provides as follows:

> ***"(2) A collective agreement shall continue to be binding on an employer or employee who are parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employers association.***

(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement."

20. In view of the foregoing vivid Clause and provision of the law, I reiterate that the discovery of the said new evidence would not have led me to reach any different decision from the impugned ruling. It is correct, in my view, to hold that the rights and obligation of the parties under a CBA do not lapse with the expiry of the CBA's term. Consequently, the claimant's application dated 8.4.2021 stands dismissed with costs.

Dated, signed and delivered at Nairobi this 30th day September, 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 judgment 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