



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NUMBER 28 OF 2016

JOSEPH OTIENO ORUOCHPETITIONER

VERSUS

KENYA MEDICAL PRACTITIONERS PHARMACISTS

AND DENTISTS UNION1ST RESPONDENT/APPLICANT

KENYA NATIONAL UNION OF NURSES2ND RESPONDENT

RULING

Introduction

1. The applicant/respondent's application is dated 23rd August, 2021 and filed in court on the 27th of August, 2021, under certificate of urgency. The application is brought under the provisions of Section 16 of the Employment and Labour Relations Court Act, 2011 and Rules 17 and 33 of the Employment and Labour Relations Court Procedure Rules, 2016.
2. The application was placed before the duty Judge on 30th August, 2021, and the matter was certified as urgent and set for interparties hearing on the 21st of September, 2021 before the trial court at Kisumu.

The application

3. The application was listed for hearing interparties on the 21st of September, 2021 as ordered by the court on 30th August, 2021.
4. The petitioner and the 2nd respondent did not appear for the matter on the hearing date, nor did they file any replies/grounds of opposition to the instant application and for reason that prove of service was before court, the hearing proceeded as scheduled.
5. Mr. Museve holding brief for J. A. Guserwa & Co. advocates for the applicant/1st respondent urged the court to allow the application as prayed as the same is not opposed.

Analysis and Determination

6. The applicant's prayers at the interparties hearing are:

- i. That the honourable court be pleased to grant the applicant an order of stay of the orders issued herein on the 30th of July, 2021.
- ii. The honourable court be pleased to grant the applicant an order of review, variation and/or setting aside the orders issued herein on the 30th of July, 2021
- iii. The 1st respondent be granted leave to defend the instant suit before its final determination is made on merit
- iv. That there be an order for costs.

7. The application is premised on the following grounds:

- i. That the Honourable Court issued Orders herein on the 30th of July, 2021 against the 1st Respondent without them having been

served nor participated in the hearing of the matter.

- ii. the aforesaid judgment and Orders of 30th of July, 2021 have serious repercussions on the 1st Respondent's members and activities.
- iii. the Honourable Judges of this Honourable Court granted Orders that violates the Applicant's Constitutional rights that should be reviewed and/or varied
- iv. the 1st Respondent stands to suffer greatly if the aforesaid Judgment and/or Orders of the Court are not set aside and/or reviewed.
- v. the 1st Respondent was not aware of the existence of the present suit until the 30th of the July, 2021.

8. The prayers in the application are distinct and I will analysis and decide on each prayer separately.

1. An order of stay of the orders issued herein on the 30th of July, 2021.

9. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42, Rule 6(2), of the civil procedure rules, namely:

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant (**see Lily Yeko Ngwenye –vs- World Vision Kenya [2020] eKLR**)

10. Arising from the wording of Order 42, Rule 6, it is clear that an application for stay is intended to protect a party who has lodged or intends to lodge an appeal against a decree or order against which an order for stay is sought.

11. The instant application does not make reference to an appeal against the decree issued by the court in this matter on 30th July, 2021, for which stay is sought. It would then mean that were such an order to be issued, the same will operate in perpetuity as no appeal is preferred against the said decree, thus unjustifiably barring the implementation of the decree. For this reason, the prayer for stay fails and is hereby dismissed.

2. An order of review, variation and/or setting aside the orders issued herein on the 30th of July, 2021

12. The Employment and Labour Relations Court (Procedure) Rules, 2016, provide as follows as regards review:

“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.

13. The ground upon which this order is sought, is that the petition herein was heard and determined and a decree issued without the participation of the applicant who is the 1st respondent in the petition.

14. it is further argued that the applicant herein was not aware of the existence of the petition and that they only got to know about it after a judgment had been delivered.

15. Arising from the provisions of the ELRC practice rules quoted above, review lies where a party ***discovers 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.***

16. The applicant herein discovering the existence of a decision of the court in a matter it did not participate in, does not fall within the provisions of this rule. The applicant made no discovery of new evidence, it just did not render evidence at all during trial and what it seeks is a fresh hearing and which is not available in an application for review. Moreover, the judgment subject of this application clearly states at paragraph 8 ***“that inspite service, the 1st respondent did not respond to the petition”.*** The Court follows the decision by the Supreme Court of India in the case of **Ajit Kumar Rath –Versus- State of Orisa and Others on 02.11.1999**, where the court stated as follow:

“...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 stabling it.”

17. Secondly, the prayer for review or variation in this application is not premised on there being some mistake or error in the impugned judgment or that the judgment requires clarification as espoused in rule 33(1)(b) &(c) of the Employment and Labour Relations Court procedure rules.

18. Thirdly, although rule 33(1)(d) of the rules envisages a court allowing an application for review for other sufficient reasons, the court is not convinced that a petition on issues of important public interest could be in court for 5 years and proceed to conclusion without the knowledge of the applicant/1st respondent, being the party for whom the final decree is directed.

19. The grounds for review/variation put across by the applicant fall short of establishing any other sufficient reason to justify the review or variation as prayed for and the prayer fails and is dismissed.

20. In conclusion the application for Stay and Review or variation of the decree of the court issued on 30th July, 2021 filed for the 1strespondent on 23rd August, 2021, is hereby dismissed with no orders as to costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24TH DAY OF SEPTEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Museve for the Applicant/1st respondent

No appearance for Petitioner

No appearance for 2nd Respondent

Christine: Court Assistant