



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

**CAUSE NO. 421 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA CHEMICALS AND ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**MILLY GLASS WORKS LIMITED.....RESPONDENT**

**RULING**

1. The Claimant and Respondent have a valid agreement relative to Recognition and negotiating procedure signed and dated 16<sup>th</sup> December 2013 following a Court Order of 15<sup>th</sup> March 2013 under Cause No. 117 of 2012.

2. Pursuant to the said Recognition Agreement, the parties engaged in collective bargaining negotiations and agreed on all issues except two clauses; hours of work and effective date of the CBA.

3. The Claimant reported a trade dispute to the Ministry of Labour on the two items and after conciliation process failed, the suit ended up in Court under Cause No. 421 of 2017. Judgment in the claim was delivered on 8<sup>th</sup> February 2019. The Court maintained working hours at 48 hours per week and set effective date of the Agreement at 1<sup>st</sup> January 2019.

4. The Respondent failed to sign the Collective Bargaining Agreement and the Claimant approached the Court yet again with an application dated 24<sup>th</sup> January 2020 in which the following Orders against the Respondent were sought:

*i) Spent.*

*ii) That the Court do issue an Order compelling the Respondent to sign and ratify the Collective Bargaining Agreement as judged by this Court on 8<sup>th</sup> February 2019.*

*iii) That in failure of compliance by the Respondent in observance of the aforesaid prayer sought in clause 2 above within seven (7) days from the date hereof the Court be pleased to issue an Order execution for Notice to show Cause why execution should not issue by committing the Directors and/or authorized concerned agents and assigns of the Respondent to Civil Jail.*

*iv) That costs of this application be provided for.*

5. This Court on 1<sup>st</sup> December 2020 delivered a Ruling and issued the following orders:-

*a) The Respondent is directed to sign the Collective Bargaining Agreement as negotiated between it and the Claimant and as determined by the Court in this suit within 30 days from the date hereof.*

*b) Should the Respondent fail to do so the Applicant is free to move the Court in terms of Section 20 of the Employments and Labour Relation Act for orders summoning the Managing Director of the Respondent MR. MOHAMED RASHID to appear before this Court to show cause why he should not be punished for disobedience of orders of this Court.*

6. Following the Ruling of the Court, the Claimant forwarded the CBA to the Respondent by a letter dated 8<sup>th</sup> December 2020 attaching draft CBA and proposed a meeting on 15<sup>th</sup> December 2020, for the purpose of signing the CBA.

7. The Respondent once again declined to sign the CBA. It is after this that the two applications now before the Court were filed.

8. The Claimant approached this Court with an application dated 18<sup>th</sup> January 2021 seeking the following orders: -

*(i) Spent.*

*(ii) That, pending hearing and determination of this application, the Honourable Court be pleased to issue summons to appear against Mr. Mohamed Rashid before this Honourable Court to show cause why he should not be punished and or committed to Civil Jail for disobedient of the Orders of this Honourable Court issued on 7th December 2020 directing him to sign the CBA as negotiated between it and the Claimant in this suit within 30 days from the date of Ruling and the Order of this Court.*

*(iii) That, Mr. Mohamed Rashid be compelled to sign the said Collective Bargaining Agreement as negotiated on the date he appears in Court and the said CBA be slotted for registration in the normal way from the registry.*

*(iv) That, this Honourable Court do and hereby Orders the OCS Mombasa Central Police Station to arrest and produce in Court Mr. Mohamed Rashid should he fail to honour the summon.*

*(v) That, the cost of this Application be provided for.*

9. The Respondent on its part filed an application dated 23<sup>rd</sup> December 2020 seeking the following orders:-

*(i) Spent.*

*(ii) There be stay of execution of the Judgment delivered on 8<sup>th</sup> February 2019 and subsequent Ruling delivered on 1<sup>st</sup> December 2020 pending the inter parties hearing and determination of this Application.*

*(iii) The Court be pleased to review and set aside its judgment delivered on 8<sup>th</sup> February 2019.*

*(iv) Consequent upon (3) above, the Court be pleased to set aside its Ruling delivered on 1<sup>st</sup> December 2020.*

*(v) In the alternative to (3) above, there be a stay of the execution of the Ruling delivered on 1<sup>st</sup> December 2020, pending the lodging, hearing and determination of an intended Appeal to the Court of Appeal.*

*(vi) The cost of this Application be provided for as the Court deems just.*

10. The Claimant filed its Replying affidavit sworn by one Peter Ouko Onyango on 27<sup>th</sup> January 2021 while the Respondent filed a replying affidavit of MOHAMED RASHID sworn on 19<sup>th</sup> April 2021. The two applications were disposed of together by way of written submissions.

11. The issues for determination are whether the Respondent meets the threshold for grant of the orders sought and whether the Claimant is entitled to the orders sought in its application.

12. Review is provided for under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 as follows: **33. Review**

**(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.**

**(2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.**

**(3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.**

**(4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.**

**(5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.**

**(6) An order made for a review of a decree or order shall not be subject to further review.**

13. In the affidavit and grounds in support of its application the Respondent pleads that following the delivery of the judgment herein on 8<sup>th</sup> February 2019, the Respondent discovered new and important matters being that the Claimant had only 92 members against 486 unionisable employees, which number had by 3<sup>rd</sup> January 2020 reduced to 80.

14. That the Respondent subsequently applied to the National Labour Board for revocation of the recognition agreement by letter dated 18<sup>th</sup> May 2020. That the National Labour Board directed the parties to file written submissions which the Respondent did on 25<sup>th</sup> June 2020 while the Claimant did not file any.

15. The Respondent further states that it was aggrieved by the said judgment and has filed a notice of appeal dated 7<sup>th</sup> December 2020.

16. It is the Respondent's position that the application was filed barely 22 days after the Court rendered its decision thus there was no inordinate delay.

17. All these facts raised by the Respondent are issues that were the subject of the ruling of this Court delivered on 1<sup>st</sup> December 2020. In the ruling this Court stated as follows –

*“Its reasons for noncompliance are that there have been intervening events since this court handed down its judgment which have made it impossible for the respondent to comply with the judgment. It cites the fact that the claimant's membership has reduced to 16% as one reason and the fact that it has applied to the National Labour Board for revocation of the Recognition Agreement between the parties as the second reason. The final reason is that should the recognition agreement be revoked it would not be possible to revoke the CBA.*

*The court is alive to the fact that the judgment herein which the Respondent admits it has never complied with, was delivered on 8<sup>th</sup> February 2019, about one year before the instant application was filed. All the issues raised by the Respondent to have prevented it from complying with the decision of this court arose long after the delivery of the judgment, and it is not even clear how these reasons could have prevented the Respondent from implementing the decision of this court. Further, the issue of membership was only raised by the Respondent in May 2020, long after this application was filed and just days before the replying affidavit of the Respondent was filed in court. The letter to the National Labour Board which incidentally there is no proof that the same was received by the National Labour Board and which is curiously not copied to the Applicant herein although it is a party to the recognition agreement sought to be revoked, is dated 18<sup>th</sup> May 2020, just two days before the date of the replying affidavit. It is not farfetched to assume that the letter was strategically written to provide evidence to be attached to the replying affidavit.*

*Further at the time of negotiation of the CBA, the issue of the number of members of the union was not an issue. It would appear as if the Respondent's intention is to frustrate the members of the union by denying them the benefits in the negotiated CBA to make them despair and leave the union. Waiting from 2013 to 2020 is indeed a very long time. This amounts to unfair labour practice.*

*The respondent further refers to the refusal of the Applicant to discuss review of the CBA. The Respondent is aware there is provision for review of judgments and orders which it has not taken advantage of.*

*The foregoing notwithstanding, the revocation of the Recognition agreement would have no effect on the CBA. As is provided in Section 59 of the Labour Relations Act, the terms of a Collective Bargaining Agreement once registered are incorporated into and become part of the terms of employment of the employees for whose benefit it has been negotiated. This would not be affected by the termination of either the collective agreement or the recognition agreement. In fact, all CBAs contain a clause that the terms would be in force until amended.*

*Further, Section 26(2) of the Employment Act recognise the terms of employment as either decreed in a judgment or award of the court or as negotiated in a collective bargaining agreement.*

*It is further important to note that a dispute over the revocation of a recognition agreement would constitute a different and independent cause of action from negotiation or implementation of a collective bargaining agreement and cannot therefore prevent the Respondent from implementing a concluded CBA.*

18. These are therefore issues that are *res judicata* having already been raised by the Respondent and subjected to determination by this Court. The Respondent is thus barred by issue estoppel from raising the same grounds, disguised as an application for review.

19. Secondly, review is only available where there is no appeal. The opening words of Rule 33 are that “person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred...”

20. In the affidavit in support of the application, Mr Mohamed Rashid has pleaded at paragraph 12 that –

*“12. THAT the Respondent has filed a Notice of Appeal dated 7<sup>th</sup> December 2020 evincing its intention to appeal to the Court of Appeal.”*

21. In *Feisal Mohamed Ali Alias Feisal Shahbal v Republic* [2015] eKLR, the Court of Appeal observed that –

*“It is by lodging a notice of appeal that a party evinces intention to invoke the appellate jurisdiction of the Court under Article 164(3) of the Constitution. A person who has duly lodged a notice of appeal is an intended appellant and a duly lodged notice of appeal constitutes an intended appeal. By dint of rule 2 of the Court of Appeal Rules, “appeal” in relation to appeals to the Court, includes an intended appeal. It is for the above reason that rule 5(1) provides that a sentence of death cannot be carried out before expiry of the time for lodging the notice of appeal, or where the notice of appeal has been lodged, before the appeal is heard and determined. On similar terms, under Rule 5(2)(a), before a party can apply to this Court to be released on bail pending appeal or for suspension of execution of any warrant of distress pending appeal, such party must have filed a notice of appeal. As regards civil matters, Rule 5(2)(b) similarly requires a party who moves this Court for stay of execution of an order of the High Court, for an injunction or for an order staying further proceedings in the High Court, to have first lodged a notice of appeal.”*

22. The Court of Appeal Rules, 2010 defines appeals as “*appeal*” in relation to appeals to this Court includes an intended appeal ...

23. The Respondent has not withdrawn its notice of appeal. Indeed prayer 5 of the application seeks “stay of execution of the ruling delivered on 1<sup>st</sup> December 2020 pending the lodging, hearing and determination of an intended appeal to the Court of Appeal.

24. By virtue of the foregoing, the application for review cannot lie. An application for review is not available to a party who intends or has lodged an appeal by filing a notice of appeal. The application for review thus accordingly fails and is dismissed.

Is the Claimant entitled to the prayers in its application?

25. In the ruling of this Court dated 1<sup>st</sup> December 2020, the Court directed the Respondent to sign the collective bargaining agreement within 30 days. It has not done so.

26. The Court further directed that should the Respondent fail to comply, the Claimant was at liberty to move this Court in terms of Section 20 of the Employment and Labour Relations Court Act for orders which are now sought in its application dated 18<sup>th</sup> January 2021.

27. MR. MOHAMED RASHID is accordingly directed to appear in Court on 1<sup>st</sup> February 2022 to show cause why he should not be punished for disobedience of this Court’s orders requiring him to sign the CBA within 30 days from 1<sup>st</sup> December 2020.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF DECEMBER 2021**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**