



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 387 OF 2018**

(Before Hon. Justice Hellen S. Wasilwa 27<sup>th</sup> February, 2020)

**KENYA NATIONAL UNION OF NURSES.....CLAIMANT**

**VERSUS**

**NATIONAL INDUSTRIAL**

**CREDIT (NIC BANK).....1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF TRADE UNIONS....2<sup>ND</sup> RESPONDENT**

**SIMON KIBIL.....3<sup>RD</sup> RESPONDENT**

**JOHN BIY.....4<sup>TH</sup> RESPONDENT**

**LYDIA TANUI.....5<sup>TH</sup> RESPONDENT**

**ALICE YAHUMA.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. Before this Court is the Claimant's Application dated 25/4/2019 wherein the following orders have been sought:-

*a. Spent.*

*b. THAT pending inter partes hearing of this Application this Honourable Court be pleased to reinstate the injunctive order issued on 22/3/2018 freezing the bank account number [...] being operated in the 1<sup>st</sup> Respondent's Eldoret branch.*

*c. THAT pending the hearing and determination of this application this Honourable Court be pleased to reinstate the injunctive order issued on 22/3/2018 freezing the bank account number [...] being operated in the 1<sup>st</sup> Respondent's Eldoret branch.*

*d. THAT pending the hearing and determination of this suit this Honourable Court be pleased to reinstate the injunctive order issued on 22/3/2018 freezing the bank account number [...] being operated in the 1<sup>st</sup> Respondent's Eldoret branch.*

*e. THAT this Honourable Court be pleased to confirm that the Claimant filed an Amended Memorandum of Claim, Amended Notice of Motion and submissions and accordingly were to be considered.*

*f. THAT this Honourable Court be pleased to re-write its ruling and deliver the same in consideration of the Claimant's Amended Statement of Claim, Amended Notice of Motion and its written submissions.*

*g. THAT the costs of this application be provided for.*

2. The application is supported by the grounds set out therein and the supporting affidavit of Seth Ambusini Panyako sworn on 25/4/2019. The application has been opposed by the 1<sup>st</sup> Respondent vide the Replying Affidavit of Stephen Atenya sworn on 26/6/2019.

**The Claimant's Case**

3. The Applicant avers that this suit was instituted on 22/3/2018 vide a Statement of Claim and a Notice of Motion filed under a certificate of urgency. An *ex parte* injunction order freezing the bank account number [...] being operated in the 1<sup>st</sup> Respondent's Eldoret Branch was issued pending the hearing and determination of the application.

4. Further, pursuant to the order of 7/5/2018, the Claimant amended its memorandum of claim to include the signatories of the impugned bank account.

5. The Applicant avers that the 1<sup>st</sup> Respondent filed a preliminary objection contesting the jurisdiction of this Court, which was upheld and the claim struck out vide the ruling delivered on 3/4/2019 for the reason that the Applicant had not amended its claim to include the union members who had opened a bank account.

6. It is averred that there is an error apparent on the face of record, since the Court failed to consider the Applicant's amended pleadings and written submissions filed on 27/3/2019 and served upon the 1<sup>st</sup> Respondent on the same date.

7. The Applicant avers that the application has been brought timeously hence it is just and equitable that the impugned order be reviewed.

#### **The Respondent's Case**

8. The Affiant avers that the grounds raised in the application are a sham and lack any basis in law and in facts hence not sufficient to warrant granting of the orders sought in the Claimant's Application.

9. It is averred that the Applicant was granted leave on 7/5/2018 to file and serve an amended memorandum of claim enjoining the signatories of the account but failed to do so and has not complied with the said directions to date. As such, the allegations that an amended memorandum was filed and served are false.

10. The Affiant further avers that the amended notice of motion is defective as the Applicant was never granted leave to file an amended notice of motion. It is also averred that the grounds relied upon by the Applicant do not show an error apparent on the face of record.

11. The Affiant is of the view that the Applicant ought to have filed an appeal if it was dissatisfied with the said ruling. Further, the Applicant's act of filing a Notice of Appeal defeats the whole purpose of the intended review.

#### **The Applicant's Rejoinder**

12. The Applicant filed a rejoinder through the Supplementary Affidavit of Seth Ambusini Panyako sworn 28/11/2019, who relied on the Supplementary Affidavit of Brown Malanga sworn on 28/11/2019 as part of his rejoinder.

13. The Affiant avers that the Applicant complied with the order to file an amended claim by amending the motion as well as the claim and the same was filed on 27/3/2019. Further, that the Applicant filed its submissions to the 1<sup>st</sup> Respondent's preliminary objection. It is averred that the filed documents were duly received and stamped.

#### **The Applicant's Submissions**

14. The Applicant in its submissions filed on 28/11/2019, submits that its Advocates' clerk filed and served the amended pleadings and submissions and urges that Mr. Brown Malanga is willing to be cross examined on this aspect.

15. The Applicant submits that a party does not lose the right to seek a review of a decision, by filing a Notice of Appeal.

16. The Applicant further submits that the appeal has not been acted upon and that the time for filing the appeal has lapsed. The case of **Paul Obonyo vs. Kenya Revenue Authority & 2 Others [2019] eKLR** has been cited, where the Court held that a party does not lose the right to file an application for review by filing a notice of appeal.

17. The Applicant submits that it has produced before this court, documents bearing the original official court stamp confirming that indeed pleadings had been filed. Further, that the 1<sup>st</sup> Respondent has failed to adduce evidence rebutting this position.

18. The Applicant submits that there is an error apparent on the face of record and that it has demonstrated that there is sufficient reason to warrant the court to review its ruling delivered on 3/4/2019.

#### **1<sup>st</sup> Respondent's Submissions**

19. In its submissions filed on 4/12/2019, the Respondent submits that this Court should strike out the Applicant's documents and dismiss the Application with costs.

20. It is submitted that the Applicant has not justified the delay or given any sufficient reasons for the delay. The case of **Ukwala Supermarket vs. Kenindia Insurance Company Limited [2016] eKLR** and **Headways Investments Limited vs. Abhiishek Investments Limited & Another [2019] eKLR** have been cited to fortify the 1<sup>st</sup> Respondent's position.

21. It is submitted that the Applicant has not set out any grounds as outlined in section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules.

22. Further, that the circumstances of this case do not reveal any error apparent on the face of record. The 1<sup>st</sup> Respondent relies on the case of **Pancras T. Swai vs. Kenya Breweries Limited [2014] eKLR** where the court relied on the Court of Appeal case of **National Bank of Kenya Limited vs. Ndungu Njau; Civil Appeal 221 of 1996** to opine that an error or omission must be self-evident and should not require an elaborate argument to be established.

23. It is submitted that the Applicant should pursue the appeal rather than the review. As such, this Court should not grant the orders sought.

24. I have examined all the averments of both Parties. I note that the official bank account of the union whose details have been given is clear. It is also established that the Respondents herein are running a parallel bank account without recourse to the union, which is an illegality.

25. This information had not been brought to this Court's attention at the time the order of 3/4/2019 were made. This was in error as the Claimant had amended their claim earlier on which information the Court did not put into consideration in its judgment.

26. I therefore find the orders sought herein are merited. I review my earlier orders and reinstate the claim for hearing. I also reinstate the orders of 22/3/2018 freezing the bank account No. [...] being operated in the 1<sup>st</sup> Respondent's bank.

27. Costs in the cause.

**Dated and delivered in open Court this 27<sup>th</sup> day of February, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kalume holding brief Gachoka for 1<sup>st</sup> Respondent – Present

Busiega for Claimant – Present