



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
APPEAL NO. 2 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: AN APPLICATION FOR REVIEW OF JUDGMENT

BETWEEN

1. MUNIR ABUBAKAR MASOUD

2. PAUL K. MWANGI

3. IROSE MUSUNGU

4. GEORGE OPANGA

5. SAID RUWA

6. DAVID CHEROP

7. YUVENALIS GESORA

PROPOSERS AND PROMOTERS OF TAX COLLECTORS UNION APPLICANTS

VERSUS

THE REGISTRAR OF TRADE UNIONS.....RESPONDENT

AND

BANKING, INSURANCE AND FINANCE UNION.....INTERESTED PARTY

RULING

The application before me for determination is dated 6th October 2016 and is filed by the 1st applicant MUNIR MASOUD ABUBAKAR on behalf of the all the seven applicants. The application seeks the following orders –

- a. That this application for review of the judgment of the court be certified as urgent;
- b. That the Applicants be represented in person by their Interim General Secretary; and
- c. That the application for review of judgment be transferred to Mombasa, Employment and Labour Relations Court.

The grounds in support of the application as expressed on the face thereof are the following –

1. That the root cause of these disputes has been the denial of trade union representation for over eighteen (18) years to the

employees of Kenya Revenue Authority.

2. That the establishment of Kenya Revenue Authority is over 4000 workers and their duties have great bearing of the country's economic, social and security activities such that denying the workers their fundamental rights may be harmful to the country.
3. That the Applicants' lawyer hitherto on record returned the case file back to the Applicants on 15th September, 2016 having voluntarily excused himself from the case.
4. That when the application for registration of the Tax Collectors Union was filed on 10th September 2009 the Interim General Secretary was staying in Nairobi but now has translocated to Mombasa where there is an Employment and Labour Relations Court.

The application is further supported by the affidavit of MUNIR MASOUD and the Memorandum in Support of the Review of Judgment. In the Memorandum the applicant lists the following grounds –

- i. The learned Judge in the decision made in Appeal No. 2 of 2011 acted excessively harshly and overlooked the documentary evidence presented by the Appellants.
- ii. The learned Judge considered issues that had not been raised by the Appellants.
- iii. The learned Judge may have overlooked the fact that the documents presented to court by the Appellants were sufficient to prove their appeal.
- iv. The learned Judge may have overlooked the fact that the provisions of the Constitution of 2010 do indeed apply to the Appellants' application for registration.
- v. The learned Judge may have overlooked the fact that the authorities presented to court by the Appellants were relevant *in the determination of the case*.
- vi. The learned Judge may have overlooked the fact that the refusal by the Respondent to register the Appellants Union did not have any justification.
- vii. The learned Judge may have overlooked the submissions made by the Appellants.
- viii. The learned Judge has overlooked law and fact in dismissing the Appellants Appeal.

The respondent filed grounds of opposition through the Attorney General's office. The grounds of opposition are that –

1. That there has been inordinate delay in filing the present Application for review as three (3) years have lapsed since judgment was passed by this Court and the Appellants have not explained or advanced any good reason for the inordinate delay.
2. That the Court considered each and every issue in dispute and made a conclusive and considered decision.
3. That there is no new evidence that has been adduced in support of the review of judgment.
4. That the Application should be disallowed for failing to comply with Rule 32(3) of the Employment and Labour Relations Court (Procedure Rules) which provides that an application for review shall be submitted in Form 6 of the First Schedule.
5. That the Application has been overtaken by events as the employees that the Appellant seeks to represent are in Court in Appeal No. 15 of 2014 and the matter is awaiting judgment.
6. That there is also Appeal No. 255 of 2010 at the Court of Appeal between the Interested Party and the Kenya Revenue Authority on employee representation arising from a judgment made in Misc. Application No. 1683 of 2004 and the same is awaiting judgment.
7. That the Court should disallow the Application in light of Appeal No. 15 of 2014 and No. 255 of 2010 as hearing the present Application will be a duplication of matters already in Court.
8. That the Application should not be transferred to Mombasa as Rule 32(2) of the Employment and Labour Relations Court (Procedure Rules) provides that an application for review of a court order shall be made to the Judge who passed the order sought to be reviewed and as such, the application should be heard by the Judge who made the order.
9. That the Appellants have not demonstrated any reasonable and justifiable cause to warrant issuance of the orders sought.
10. That the Application lacks merit and should be dismissed with costs.

I have not seen any grounds of opposition or replying affidavit of the Interested Party on record nor is any referred to in its submissions on

record.

When the parties appeared before the court on 31st January 2017 the court directed that the application be disposed of by way of written submissions.

The applicant filed submissions on 10th February 2017, the respondent on 17th March 2017 and the Interested Party on 30th March 2017.

Applicant's Submissions

The applicant submits that the trial court erred in allowing the Interested Party to be enjoined to the appeal on grounds that it failed to prove or justify its legal capacity which had not been regularised or legalised as required under the transitional provisions of the Labour Relations Act. To buttress this point, the applicant relied on the decision of Rika J. in **Appeal No. 1 of 2010 Patrick Olenda and 6 Others v The Registrar of Trade Unions** (unreported) where the Judge stated: -

“Genuine persons with genuine, legitimate and useful aspirations to form trade unions must however not be limited in the exercise of the basic right of association. There is a tendency among some of the established trade unions to unreasonably curtail the right of association of new players, for fear of competition. These trade unions do so with the aid of the government and employers with whom they are cozy owing to their long years of familiarity. The need to check proliferation and encourage real pluralism must not be a pretext by established social partners, to frustrate the legitimate endeavours of new players. Perceived rivalry need to be protected in the exercise of their basic right of association from established and apprehensive players. Although ILO Convention 87 is frequently invoked by many trade unions, there were many established trade unions which oppose its ratification on the ground that it would be invoked by new players to challenge the status quo. They were not comfortable with the opening of the door to easy registration for aspiring trade unions. It is not unlike today: many established trade unions were at the forefront for the entrenchment of trade union rights in the Constitution, but will not allow these rights to be freely enjoyed by viable new entrants.”

He further relied on the decision **Nairobi High Court Petition No. 324 of 2016 Yash Pal Ghai & Another v Judicial Service Commission & Another [2016] eKLR** where Odunga J. in discussing the role of Interested Parties stated –

“19. It is therefore clear that in determining whether or not to join a person as an interested party certain criterion must be met by the applicant and these include:

- a. Whether the Applicant has a ‘stake/interest’ directly in the case, in the sense that he or she is one who will be affected by the decision of the Court when it is made, either way.
- b. Whether the applicant’s interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

The applicant further relied on the decision in **Kericho High Court**

Petition No. 18 of 2014, Governor of Kericho County v Kenya Tea Development Agency & 30 Others Ex Parte KTDA Management Services Limited [2016] eKLR where the court quoted with approval the decision of the Supreme Court in **Communications Commission of Kenya & 4 Others vs Royal Media Services Ltd. & 7 Others (2014) eKLR** on the issue of joinder in the following words;

“An Interested Party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is the one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. A party could be enjoined in a matter for the reason that;

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- ii. Joinder to provide protection of the rights of a party who would otherwise be adversely affected in law;
- iii. Joinder to prevent a likely course of proliferated litigation.

In the rest of the submissions the applicant reiterated and expounded on the grounds on the Memorandum for Review of the Judgment.

Respondent's Submissions

It is the respondent’s submissions that the applicant does not meet the threshold under Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules. That the applicant has not presented any new evidence which was not presented previously in his knowledge. That at paragraph 5.04 the applicant concedes that he has always had the documents which were not brought before the court earlier.

The respondent further submits that the court considered all the evidence presented before it and made reasoned and conclusive judgment on the same without a mistake hence the applicant cannot rely on the second ground for review under Rule 33(1)(b) being a review on account of some mistake or apparent on the face of the record. The respondent relies on the decision of the Court of Appeal in **Mwihoko Housing**

Company Limited v Equity Building Society (2007) 2 KLR 171 where the court stated that;

“...The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been a sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review...”

the respondent submits that the error has to be such that is reasonable and does not require going over the evidence again as that would amount to an Appeal. The Respondent’s further submit that in fact, the Applicants seek to appeal against the Judgment of the Court which is camouflaged as an application for review whereas this Court is already *functus officio* in this regard. The Judge would be sitting in appeal on his own judgement which is not permissible in law.

The Court in **Abdullahi Mohamud v Muhammad Kahiye (2015) eKLR R.E.** held that;

“It seems clear to me that the plaintiff in his application for review is faulting the failure by the Hon. Waweru Judge to consider the evidence on record and in arriving at a decision that was not reasoned (Explanation) which, as I have stated, would be a good ground for appeal but not for an application for review.”

On the third ground for review where the judgment or ruling requires clarification, the respondent submits that the Applicant has not sought for clarification on any part of the Judgment. The respondent further avers that the Applicant has also not demonstrated any reasonable and justifiable cause to warrant a review of the judgment given.

The respondent further submits that the application for review is not properly before the court as the applicant seeks to have the application transferred to Mombasa to be heard before a different Judge from the Judge who made the decision contrary to the provisions of Rule 33(2) of the Rules.

It is also the submission of the respondent that Rule 33(3) and (4) have not been complied with by the applicant and thus the application is defective. That the rules of procedure serve to make the process of judicial adjudication fair, just, certain and even-handed as was observed by the Supreme Court in **The Matter of the National Gender and Equality Commission, Reference No. 1 of 2013** at paragraph 28 that: -

“It is our position that parties should not endeavour, in their pursuit of creativity, to introduce ‘new pleadings’ unknown to the law. The rules of procedure are a handmaid to the course of justice, and should be followed with fidelity.”

The respondent submits further that there is inordinate delay in filing the instant application for review which was filed three years after the judgment, which delay have not been explained.

It is further the submissions of the respondent that the application has been overtaken by events as the subject matter of the review has been compromised by the Court of Appeal decisions in Appeal No. 255 of 2010 and Appeal No. 15 of 2014, both of which deal with matters similar to those in the instant suit. That the application is thus a duplication of matters already dealt with by the courts. The respondent relies on the decision of Chesoni J. (as he then was) in **Ivita v Kyumbu (1984) KLR 441**, Chesoni J. (as he then was) held as follows:-

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too...”

The respondent further relied on the decision of Gikonyo J. in **Mwangi S. Kimenyi v Attorney General & Another [2014] eKLR** expounded on what would amount to injustice to a party in case of inordinate delay;

“...where the plaintiff commits acts of inordinate delay in prosecuting his case, he occasions injustice on the Defendants.”

The respondent urged the court to dismiss the application.

Interested Party’s Submissions

The Interested Party submits that what the applicant has done is to rehash the arguments which were adequately considered by the court in arriving at its decision. That the applicant is asking the court to sit on appeal on its own decision. That the applicant is aggrieved by the decision and the proper action would be to lodge an appeal.

On the prayer to transfer the case to Mombasa, the Interested Party submits that both the respondent and Interested Party reside in Nairobi and that the applicant is forum shopping. The Interested Party relied on the decision in **Kimani Waweru and 28 Others v Law Society of Kenya and 12 Others (2014) eKLR** where the court stated that convenience of parties and witnesses is a primary consideration. It further relied on **National Bank of Kenya Limited v Ndungu Njau (1997)** where the Court of Appeal held that misconstruing a statute or other

provision of the law cannot be a ground for review. The Interested Party further relied on the decision of Nzioki Wa Makau J. in **John Kanganga Kuria v Kenya Broadcasting Corporation** that for the court to correct an error or omission, the error must be self evident and should not require elaborate arguments to be established. That it will not be a sufficient ground that another judge would have taken a different view on the matters, nor there the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion.

The Interested Party further submitted that litigation must come to an end. That the decision impugned was delivered on 5th December 2012. That in the case of **John Musakali v Speaker, County of Bungoma and 4 Others (2015) eKLR** the court discussed overriding objectives under Section 1A of the Civil Procedure Code and relying on the decision in **Safaricom Limited v Ocean View Beach Hotel Limited and 2 Others (2010) eKLR** pointed out that the court has a duty to interpret the Act and exercise the powers under the Act to attain the overriding objective.

The Interested Party urged the court to dismiss the application.

Determination

I have considered the application and grounds of opposition thereto as well as submissions of all the parties. The issues for determination is whether the application meets the threshold for review as set out under Rule 33 of the Rules of this court. Rule 33 provides 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.

The grounds raised in the application herein are issues of errors of law by the Judge. The applicant has taken issue first with the joinder of the Interested Party which was not the subject of the judgment that he seeks to be reviewed and which therefore cannot be a subject for the review.

The applicant further impugns the framing of issues which he argues were unprocedurally framed. Again this cannot be an issue for review.

The argument by the applicant in both the application and the appeal are that there were errors of fact and law on the part of the Judge leading to a wrong determination. These are not matters for review as clearly set out under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules but grounds of appeal.

Both the respondent and the Interested Party raised the issue of delay. The decision impugned by the applicant was delivered on 5th December 2012. The application for review was filed on 10th October 2016. This is a delay of almost 4 years. No justification was given by the applicant for the delay. Rule 33 specially states that an application for review may be made “*within a reasonable time*”. 4 years can by any standards not be a reasonable time. No valid explanation was given to the court to justify the inordinate delay. I therefore find that the application was not made within a reasonable time as required by the law.

The applicant also prayed for hearing of the application in Mombasa. As rightfully pointed out by the respondent and Interested Party, Rule 33 provides that the application for review is heard by the same Judge who passed the decree or made the order that is the subject of the review, unless the Judge is no longer attached to the station, meaning that the application can only be heard in the same station.

For the foregoing reasons, I find that the application does not meet the threshold for review as set out in Rule 33(1) as it does not seek to submit new evidence that was not available to the applicant at the time of hearing, does not refer to any mistake or error apparent on the face of the record, does not seek clarification of the judgment and does not give sufficient reason for review.

The application is accordingly dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MAY 2020

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 15th March 2020 and subsequent directions of 21st 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