



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**CAUSE NO. 272 OF 2019**

**KENYA UNION OF COMMERCIAL FOOD AND**

**ALLIED WORKERS.....CLAIMANT**

**-VERSUS-**

**KENYA CREDIT TRADERS LIMITED.....RESPONDENT**

**RULING**

1. On 20.9.2019, I delivered a ruling by which I struck out the suit herein for being filed prematurely while there is pending conciliation proceedings pending before the Minister of Labour. The claimant was aggrieved and brought the Notice of Motion dated 1.11.2019 seeking the following orders:

(a) That this application be certified urgent and heard exparte in the first instance.

(b) That pending the hearing determination of this application, this Honourable Court be pleased to grant a stay of the taxation proceedings of the Bill of Costs dated and filed on 1st October, 2019, seeking Kshs. 1,090,385 from the Applicant union in costs for hearing of a preliminary objection.

(c) That the Applicant's Review Application and setting aside of the Honourable Court's Ruling dated and delivered on 20th September, 2019 be allowed.

(d) That this court do make a clarification of its Ruling as pertains the legal requirement for Urgent Referrals to court by Trade Unions within the ambit of Section 73(2) & 74 (a) of the Labour Relations Act, 2007.

(e) That the Honorable Court do proceed to quash its ruling due to the reason that the Claimant/Applicant acted as required of it under section 73 (2) & 74 (a) of the Labour Relations Act, 2007 by referring the dispute to the Ministry of Labour under section 62 of the Labour Relations Act, 2007 and to this Honourable Court for hearing and determination, the issue in dispute being Recognition Agreement.

(f) That a declaration do issue to the effect that the Claimant/Applicant did not offend section 62-69 of the Labour Relations Act, 2007 and that the dispute is not prematurely filed in court.

(g) That an order do issue reinstating cause no. 272 of 2019 for hearing and determination on priority basis.

(h) That in the alternative the conciliator be ordered to file a conciliation report together with a certificate of conciliation under section 69(a) of the Labour Relations Act, 2007 to form part of the Court records and in the event there is no agreement between the parties, the suit as filed to progress to full hearing and determination.

(i) That this court be pleased to make any such further orders that are in the interest of meeting the ends of justice in the matter.

(j) That this Honourable court do grant costs of this Application to the Claimant.

2. The application is brought under section 16 of the ELRC. Act, section 73(2) & 74(a) of the Labour Relations Act and Rule 28(1) (b),(g) and 33 (1) (c)s & (d) of the ELRC Procedure Rules and it stands on 19 grounds set out on the body of the motion and the supporting affidavit sworn by Mr. Boniface M. Kavuvi sworn on 1.11.2019.

3. The application is opposed by the respondent who has filed a Replying Affidavit sworn by Mr. Alphonse O. Nyamrer on 22.11.2019.

#### **Applicants case**

4. The claimant averred that the impugned ruling ostensibly ignored section 73 (2) & 74 (9) of the Labour Relations Act which allows trade unions to refer disputes to court under certificate of urgency; that if the impugned ruling is not reviewed and/or discharged, the fundamental right and freedom of association will be denied and violated; that the ruling is prejudicial as it denies the claimant the opportunity to ventilate their case for signing of Recognition Agreement and remittance of union dues; and that the ruling prejudices unionizable employees who are at the risk of victimization on account of union membership.

#### **Respondent's submission**

5. The respondent contended that the impugned ruling was right because their suit was brought while there was conciliation proceedings pending before the Labour Cabinet Secretary; that a party cannot refer a dispute for conciliation at the same time file suit in court; that under section 73 of the Labour Relations Act, a party who refers a dispute for conciliation can only bring it to court after the conciliation process has been exhausted; and that the dispute herein does not fall within the exception under section 73 of the Act.

6. The respondent further contended that the instant application must fail because it does not meet the threshold for review spelt under Rule 33 of the ELRC Procedure Rules. She contended that there is no discovery of a new matter or evidence; there is no mistake or error apparent on the face of the record; and there is no sufficient cause shown to warrant review of the impugned ruling.

7. I have carefully considered the application, affidavits, and the written submissions filed. The only issues for consideration is whether the application meets the threshold for review and setting aside of the impugned ruling.

8. The discretion of this court to review and set aside its own decision is wide and unfettered. Rule 33 of the ELRC Procedure Rules provides that a person who is aggrieved by decision of this court may within reasonable time seek review for any or all of the following grounds:

*“(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 or order was passed;*

*(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.”*

9. As correctly submitted by the respondent, the applicant has not cited any of the above grounds for review herein. She has also not deposited or submitted any of the said grounds and as such, it does not satisfy or meet the threshold for review as set out under Rule 33(1) of the ELRC Procedure Rules.

10. On the contrary, the applicant raised grounds which are best suited for an appeal. In my view, the gist of the applicant’s case is that the court made a wrong decision by ignoring or misinterpreting the relevant law, that is, section 73(2) and 74 (a) of the Labour Relations Act. The alleged error on wrong decision does not constitute a ground for review but appeal.

11. Having found that the applicant has not set out and proved any ground for review as required by Rule 33(1) above, I return that the application lacks any legs to stand on and as such I dismiss it with costs.

**Dated, signed and delivered in Nairobi this 26<sup>th</sup> of June, 2020**

**ONESMUS N. MAKAU**

**JUDGE**