REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1362 OF 2016

DANIEL NJUGUNA CHEGE.....1st CLAIMANT

CHARLES AKWAVA ANDREW.....2nd CLAIMANT

TIMOTHY MUTEGI.....3rd CLAIMANT

PETER THUVU.....4th CLAIMANT

VICTOR K KOGUDE.....5th CLAIMANT

v

TUSKER MATTRESSES LIMITED.....RESPONDENT

RULING

1. Before the Court is a motion filed by the Respondent on 4 March 2020 seeking orders

> 1. …
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> 2. …
>
> 3. **THAT** the Honourable Court be pleased to review its Judgment dated and delivered on 7th February 2020 as it relates to payment of gratuity to the 3rd, 4th and 5th Claimants.
>
> 4. **THAT** this Honourable Court be pleased to clarify whether the Respondent is entitled to deduct the pension received by the 1st and 2nd Claimants from any gratuity payable to the said 1st and 2nd Claimants in view of the need to avoid double social compensation as envisioned under section 35(6) of the Employment Act, 2007 and established by case law.
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> 5. **THAT** meanwhile there be a **STAY OF EXECUTION** of the Judgment of the Court dated and delivered on 7/2/2020 and any consequential decree.
>
> 6. **THAT** there be an extension of the 21 day grace period given under the Judgment dated and delivered on 7/02/2020 to allow the Respondent time to compute and pay the proper terminal benefits and gratuity payable to the Claimants subject to the clarification, orders and directions to be issued by the Court.
>
> 7. …

2. The main grounds advanced in support of the application were that there was an error on the face of the record when the Court found that the 3rd to 5th Claimants as supervisors were not members of the Kenya Union of Commercial, Food and Allied Workers (Union) but went ahead to award them gratuity, and that the 1st and 2nd Claimants had already been paid their pension under the Staff Pension Scheme and it amounted to double social compensation when they were awarded gratuity.

3. The Respondent filed its submissions on 19 June 2020 in which it reiterated the assertions on the face of the motion and the supporting affidavit.

4. In the 1st Claimant's replying affidavit filed on 18 May 2020, (but brought to the attention of the Court only on 1 July 2020) and the

submissions filed electronically on 1 July 2020, the Claimants asserted that they were all union members and were not in any case excluded from eligibility to gratuity under clause 24 of the collective agreement.

5. It was also contended that the application merely raised questions the Court had addressed its mind to.

6. Finally, it was urged that the review jurisdiction was not open to the Respondent and that it should have preferred an appeal.

7. The Court has considered the motion, affidavits and submissions and come to the conclusion that the application has no merit.

8. Firstly, the Respondent though moving the Court under the *Review Jurisdiction* is challenging the factual and legal findings by the Court such as whether the Claimants were unionisable and/or entitled to gratuity under the collective agreement between it and the Kenya Union of Commercial, Food and Allied Workers.

9. Such a challenge, in the view of this Court, touches on the appreciation of the evidence by the Court and ought to be attacked through an Appeal rather than under the guise of a review, or seeking *clarification*.

10. In reaching the conclusion, the Court finds comfort in the words of the Court of Appeal in *Francis Origo & another v Jacob Kumali Mungala* (2005) eKLR that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal.

11. Secondly, under Article 41(2) of the Constitution, every worker, without exception has the right to join and participate in the activities of a trade union unless expressly restricted (the right can be limited by dint of Article 24 of the Constitution).

12. The Constitution itself has not restricted or limited the right but left it to legislation and/or the agreement between the social partners.

13. The primary legislation governing the social partners, the Labour Relations Act has not out rightly limited the cadre of employees who cannot join a trade union, but at section 59(1)(b) and (3) leave no doubt that all unionisable employees are bound by and enjoy benefits and rights agreed in a collective agreement.

14. In this respect, the social partners agreed in the Industrial Relations Charter on the category of employees excluded from joining a trade union.

15. In determining the employees who are excluded, the Court does not merely look at the title or designation of the employee. The party asserting that an employee is excluded must show through evidence that the employee performs management and/or confidential functions.

16. Apart from a general statement that some of the Claimants had been promoted, there was no demonstration that they were not unionisable. Even the Industrial Relations Charter was not referred to by the Respondent.

17. Apart from the Industrial Relations Charter, unions and employers ordinarily agree on the categories of employees who are unionisable and/or excluded from membership of a union in a recognition agreement. The Respondent did not produce a copy of the recognition agreement to establish the category of unionisable employees.

18. The evidence before the Court was that the 3rd to 5th Claimants were section heads and supervisors, positions whose terms and conditions of employment were expressly covered at Part 1 of the collective agreement produced in Court.

19. Thirdly, although contending that the 1st and 2nd Claimants were paid their pensions, the Respondent did not present any records or evidence of payment during the hearing on the merits. It is only after Judgment that the Respondent exhibited pension pay records without even explaining why the records were not produced at the first instance while it was aware of the head of the claim. With the slightest due diligence, the Respondent could have produced the records.

20. Equally, the Respondent did not advance any arguments founded on the need to *avoid double social compensation* in the Response or during the hearing despite being put on notice that the Claimants were seeking gratuity after being paid pension. It is also telling that the parties mutually agreed in 2013 to clause 24 on gratuity fully aware of the existence of section 35(5) & (6) of the Employment Act, 2007 and they could have easily and simply excluded the one or the other. In any case, the Court did not award any of the Claimants *service pay* as contemplated under the section.

21. Lastly, in the humble opinion of the Court, the issues brought forth under the guise of Review jurisdiction were questions better left to appellate jurisdiction as the Court set out reasons at paragraphs 25 – 27 and 29 of the Judgment.

22. It appears like the Respondent wants to have a second go to fill the weaknesses which encumbered its presentation of the defence.

23. The Court declines to exercise its review jurisdiction and the motion is dismissed with costs to the Claimants.

Delivered through Microsoft teams/email, dated and signed in Nairobi on this 3rd day of July 2020.

Radido Stephen

Judge

Appearances

For Claimants Nyabena Nyakundi & Co. Advocates

For Respondent Kanchory & Co. Advocates

Court Assistant Judy Maina