



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO. 678 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 16th September, 2020)

TAILORS AND TEXTILES WORKERS UNION.....CLAIMANT

VERSUS

GLOBAL APPARELS EPZ LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant, Global Apparels (EPZ) Limited filed a Notice of Motion application dated 10th July 2020 seeking to be heard for Orders that pending hearing and determination of this application inter partes and/or further orders of the Court, there be stay of the Ruling delivered on 21st May 2020 and any order issued pursuant thereto.

2. Further, that the said Ruling which was delivered virtually be reviewed to take into account the fact that the Respondent remitted union dues in respect of the Union members who are the Respondent's employees and that the Respondent also notified the Claimant Union of mass withdrawal of its members. The Respondent/Applicant also seeks for the Court to review and or set aside its orders finding the Respondent guilty of contempt.

3. The Application is premised on the grounds that there is an error apparent on the face of the record as:-

a) The Court made a finding that the Respondent failed to notify the Claimant Union of resignations from the Union yet the Respondent adduced its letter to the Union, G4S waybill and the letters of mass resignation.

b) The Court also made a finding that the Respondent has failed to deduct and remit union dues from the Claimant's members save for those who have resigned yet the Respondent adduced proof of remittance to the Union in respect of employees who are still members and receipts from the Union acknowledging the same.

4. Further, that there is no order staying the Ruling and orders of the Court and sentencing may proceed at any time thereby prejudicing the Respondent greatly. That the Respondent's Advocates sought for copies of the Ruling from the Court to no avail and only took notice of the same on 10th July 2020 when an online search revealed the substance of the Ruling. That the Application has been filed expeditiously upon notice of the substance, findings and reasoning of the Court and is thus necessary to do justice to both parties. That it is in the interests of justice and achieving the overriding objectives that the orders sought are granted.

5. The Application is supported by the Affidavit sworn by the Respondent's Advocate, Mary Bonyo who avers that at *paragraph 15 of the Replying Affidavit of Tom Mboya sworn on 16th September 2019* opposing the contempt application, it is stated that the Respondent has continued to submit union dues in respect of employees who are members of the Union. That the deponent even attached proof of remittance of deductions as well as receipts issued by the Union marked as 'TM9' to the *Replying Affidavit*. Further, that *paragraph 8 of the same Replying Affidavit by Tom Mboya* indicated the refusal by the Union to accept letters of resignation and their subsequent notification via a couriered letter attached as 'TM4' which also attached the G4S shipping waybill and via 'TM2' the mass letters of resignation.

6. Ms. Mary avers that the application is filed without inordinate delay and within a reasonable time and that unless stay is granted as prayed sentencing for contempt may proceed thereby rendering the application nugatory. Further, that unless the Ruling is reviewed to take into account the facts hereinabove, the Respondent will suffer irreparable damage for being sentenced for matters where it has complied with the law.

7. The Claimant/Respondent, Tailors & Textiles Workers Union filed a *Replying Affidavit* sworn on 20th July 2020 by its National General Secretary, Rev. Joel Kandie Chebii who avers that there is no error in the said ruling as alleged by the Applicant. That the Applicant's

attempt to introduce new evidence that was not produced at the hearing of this matter to support the alleged mass resignation of Union members is meant to mislead the Honourable Court into setting aside the contempt orders.

8. He avers that the alleged mass resignation was designed and made by the Respondent Manager as seen in annexure marked **JKC-2** and that he is aware the Respondent deliberately chose to continue deducting union dues from 11 unionized employees who were part of the 1644 employees that are the subject of the Court Order. That in the above premises they urge this Court to find the application as lacking in merit and dismiss the same forthwith.

Respondent/Applicant's Submissions

9. The Respondent/Applicant submits that the Claimant/Applicant has not denied that deduction and remittance has been made to the Union for the employees that were still members of the Claimant. That Rev. Chebii has acknowledged the mass resignations and the deductions at paragraphs 9 and 10 of his affidavit and the Applicant submits that they seek review pursuant to **Rule 33 (1) (b) of the Employment and Labour Relations Court (Procedure) Rules, 2016**. It cites the case of **Francis Njoroge v Stephen Maina Kamore [2018] eKLR** where L. Njuguna J cited the case of **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] IE A 243** in trying to define what an error apparent on the face of the record entails as follows:-

"In Nyamogo & Nyamogo vs Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two options, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn processes of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter for us. (Emphasis mine)".

10. The Applicant submits that the application is filed within a reasonable time as envisaged under Rule 33 and that while the same was read out on 21/05/2020, it was imperative that the reasoning be appreciated prior to any such application as the same would amount to groping in the dark. That there is no time cap for such an application and reasonability is dependent on each individual case.

11. It is submitted by the Respondent/Applicant that the letter of 15th March 2019 annexed to the Replying Affidavit of Rev. Chebii is in fact being introduced for the first time without affording the Respondent's officer a chance to reply and they urge the Court to expunge the same and or disregard the same as it is immensely clear that the same is designed to introduce mischief and confuse the matter before Court. It contends that the same goes against rules of natural justice and the Constitution of Kenya 2010 and presupposes to condemn one unheard. It urges the Honourable Court to allow the application as prayed and review its decision accordingly.

Claimant/Respondent Submissions

12. The Claimant/Respondent submits that notably up to date the Respondent/Applicant has never remitted the Union dues as directed by this Honourable Court's Order of 30th April, 2019, more than 1 ½ years ago and have therefore not purged the contempt. Further, that the Applicant has disguised an appeal as an application for review on issues that the Honourable Court dealt with in its ruling and it prays that the Court dismisses the same with costs and proceeds to sentence the contemnors. That with the Respondent/Applicant having failed to meet the required threshold for review, the Court cannot set aside the ruling given on 21st May 2020.

13. It submits that the Respondent/Applicant has not met the threshold required under **Order 42 Rule 6(2) of the Civil Procedure Rules, 2010** which provides:-

(2) No order for stay of execution shall be made under sub-rule (1) unless:-

The Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made with unreasonable delay; and ii. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on given by the Applicant.

14. That there is no substantial loss that the Respondent/Applicant will suffer since the Union dues are funds deducted from the employee's salary and remitted to the Union and the same are not deducted out of the Respondent/Applicant's personal funds. That the Respondent is merely holding the funds for purposes of remittance. Further, that since the Respondent/Applicant has not offered any security for purposes of **Order 42 Rule 6 (2)(b)**, it prays that the Application is dismissed with costs to the Claimant.

15. The Claimant/Respondent submits that there has been delay in filing the application as the same was filed on 13th July, 2020 when the ruling was delivered on 21/05/2020 in the presence of the Respondent's Counsel and that a record of 53 days have lapsed. That the Respondent/Applicant has annexed copies of correspondences but has not indicated when they received a copy of the ruling which demonstrates that they come before this Honourable Court with unclean hands for concealing this crucial fact.

16. In opposing the application, the Claimant/Respondent refers to **ELRC Cause 546 of 2017, Julius Mbaluka Michael v Thosa Petroleum (K) Ltd** where the court dismissed an application for review and stated in obiter dictum that the applicant sought to open a pandora's box in the case because the Court would be forced not only to consider a portion of the letter in question but the whole including other information. It also cites **Cause No. 1017 of 2014, James Otieno & 4 Others v Spring Fushion (Africa) International Company Ltd** where the Court in an application for review on grounds of an error apparent on the face of the record, dismissed the same on the basis that the Applicants wanted the Court to sit on Judgment on its case which is not a review issue and that the only recourse the claimants had is

an appeal.

17. I have examined the averments of the Parties and submissions filed herein.

18. The Applicant sought stay of execution and review of this Court's orders made on 21st May, 2020 on the ground that there is an error on the face of the record.

19. Order 42 rule 6(2) provides as follows:-

“(2) No order for stay of execution shall be made under subrule (1) unless:-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

20. The circumstances under which the Court can grant stay are given and this is a circumstance where an appeal is envisaged.

21. The Applicant has not indicated that they have sought to file an appeal. The stay sought is to prevent sentencing of the Applicants who this Court found in contempt of Court. The Applicants point out that there is an error on record which error relates to the matter this Court has already determined and addressed in its ruling.

22. In my view, the issue should be handled as an appeal instead of a review. The application for review is therefore rejected.

23. That being the position, there is no any other reason contingent upon which stay can be granted. I therefore also find no reason for stay. I dismiss the entire application accordingly.

Dated and delivered in open Court this 16th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Weru holding brief Bonyo for Respondent /Applicant – Present

Guserwa & Company for Claimants