



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1328 OF 2013

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT

- VERSUS -

HOMELAND SECURITY SERVICES LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th October, 2020)

RULING

The respondent filed a notice of motion dated 19.08.2020 through Katunga Mbuvi & Company Advocates. The application was under Rule 33 of the Employment and Labour Relations Court Act, 2011; and Order 9 rule 9 of the Civil Procedure Rules and Article 48 and 50 of the Constitution 2010 and all other enabling provisions of the Law. The applicant prayed for the following orders which are for determination in this ruling:

- 1) That the judgment delivered by the Honourable Court dated 25.02.2015 be discharged.
- 2) That the Court to review the ruling of the Court dated 25.05.2017 directing the applicant to deposit Kshs.733, 680.00 as the same was obtained fraudulently by an unqualified person.
- 3) Costs of the application be provided for.

The application was based on the attached affidavit by Joe Musyimi Mutambu, the applicant's director, and upon the following grounds:

- a) The claimants are dishonest and the claim is construed maliciously against the applicant.
- b) The ruling of 25.05.2017 was obtained by an unqualified person one Joshua M. Makori who was the Advocate for the claimants but is not a member of the Law Society of Kenya and not a qualified advocate of the High Court of Kenya.
- c) The claimant's members came to Court alleging the respondent had failed to pay them salaries and benefits.
- d) By the letter dated 08.11.2016 the union withdrew from representing the claimants herein and refused to acknowledge them. The claimants ought to seek leave and follow the correct procedure to come on record.
- e) The claimants obtained ex-parte judgment in their favour dated 25.02.2015. They were represented by Cynthia Onyacha, an Advocate of the claimant union. The same were set aside by a ruling dated 25.05.2017. The ruling directed the applicant to deposit a sum of Kshs.733, 680.00 in Court. The said ruling of 25.05.2017 was obtained by unqualified person one Joshua M. Makori as advocate for the claimants but who is not a member of the Law Society of Kenya. All orders obtained by the said Joshua M. Makori should be set aside. He also never sought leave to come on record at a time judgment had already been entered. By the order of 13.05.2019 the Court directed the said Kshs. 733, 680.00 be deposited in an account in the joint names of parties' advocates.
- f) The applicant wrote a letter dated 05.07.2019 to the claimant's advocates seeking opening of the account which was accepted by the claimant's advocates. On 18.07.2020 the claimant's advocates did not show up at the bank to open the joint account. The same is due for execution which will paralyse the applicant's business.
- g) The applicant has no workers being members of the claimant union or signed a contract with the union or the claimants. The alleged employees have not attached any letter of appointment. The applicant's security business never took off and the claimants are

strangers.

h) It is just, fair and in the interest of justice that the application is allowed.

The claimant has opposed the application by filing the replying affidavit of Daniel Kilonzo (sworn on 4.09.2020) who states that he is one of the claimants or decree holders herein. The claimant also filed the preliminary objection dated 04.09.2020. The replying affidavit was filed through Maingi Kamau & Associates. The grounds of opposition are as follows:

- a) The application is incompetent, inaccurate, defective, unsustainable and lacking in merits.
- b) The applicant has been filing several applications seeking stay of execution.
- c) Judgment was entered on 25.02.2015 and the applicant filed an application for stay of execution on 26.05.2016.
- d) The respondent was granted stay of execution subject to deposit in Court of Kshs. 733, 680.00 within 7 days but to date there has been no compliance. Issue of Joshua M. Makori being counsel for the claimants.
- e) The orders of 13.05.2019 were given with Maingi Kamau & Company Advocates having been appointed to act for the claimants effective 14.02.2019 when the advocates filed a notice of appointment of advocates.
- f) There was no fraud in obtaining the orders through one Joshua M. Makori as alleged for the applicant.
- g) The Court has no powers to reverse the orders given on 13.05.2019 by consent of the parties.
- h) On 18.07.2019 the claimant's advocates were in the bank ready to open the joint account but the applicant's advocates were absent.
- i) The claimant's preliminary objection is that the applicant filed a similar application dated 20.01.2019 seeking the same orders and which was determined by the consent order of 13.05.2019. The consent order to open a joint bank account has not been complied with. The application of 19.08.2019 is therefore an abuse of Court process.

The Court has considered the material on record, the submissions and the respective parties' positions. The Court makes findings as follows:

1) Maingi Kamau & Company Advocates filed a notice of appointment on 14.02.2019 to act for the claimant. The claimant in the suit is the Kenya National Private Security Workers Union.

2) The application dated 28.01.2019 sought review of the Court order dated 25.05.2017. The application also sought orders that the suit proceeds to full hearing. On 02.01.2019 the parties' advocates appeared before the Court and submitted (as is apparent, erroneously so) that the application of 20.01.2019 (referring to the application of 28.01.2019) was for stay of execution pending appeal and the Court ordered thus, by consent,

1. That there be stay of execution of the decree subject to the applicant depositing the decretal sum of Kshs.733, 680.00 in an interest earning account in the joint names of parties' Advocates and not later than 17th June, 2019.

2. That costs of the application to abide the outcome of the intended appeal.

3) The present application seeks review of the ruling dated 25.05.2017. To the extent that the same prayer had been sought in the application dated 28.01.2019, the Court finds that the present application is an abuse of Court process. Even if the present application urges a ground that Joshua M. Makori acted for the claimant after judgment and without leave of Court as well as not being a qualified advocate, the information about the said Joshua was requested for from the Law Society of Kenya by the letter dated 28.01.2019 and the Law Society of Kenya replied by the letter dated 23.01.2019. The Court finds that when the parties compromised the review application of 28.01.2019 on 02.05.2019 and even as at the time the application was being filed, the applicant knew and ought to have raised the issue of the unqualified person, the said Joshua M. Makori. The issue having not been raised, the Court considers that the applicant has failed to establish the same issue as a valid ground for review as is not such information that with due diligence could not be raised in the earlier application for review.

4) The Court has noted the error in the order given on 02.05.2019 and issued on 13.05.2019 and directs that "**20.01.2019**" will be deleted wherever it appears and is hereby substituted with "**28.01.2019**".

5) The applicant seeks review of the ruling given on 25.05.2017 as the same was obtained fraudulently. The submission is based on the submission that one Joshua M. Makori who obtained the ruling was unqualified as an advocate. The Court has revisited the record of the proceedings. On 19.12.2016 Makori for Ongaro & Company Advocates appeared at the registry to fix a date for claimant. On 31.01.2017 Makori appeared for the claimant (Respondent). The name on the record is Makori. It is not clear to the Court that the said Makori is the same as Joshua M. Makori in the present application. Further the applicant has not exhibited the notice of appointment for the said Joshua M. Makori as acting for the claimant. The reason as raised will therefore fail.

6) The Court observes that there are several mix-ups apparent on the record such as the named claimant and others alleging to be claimants such as Daniel Kilonzo. There is also no clarity whether the applicant meant to appeal by reason of the consent order

given on 02.05.2019 and issued on 13.05.2019. The Court considers that parties should be able to apply or to compromise on the appropriate steps in the suit.

In conclusion, the application filed herein dated 19.08.2020 is hereby dismissed with orders:

- 1) Parties to apply or to compromise on the appropriate steps in the suit.
- 2) The order given on 02.05.2019 and issued on 13.05.2019 is corrected by deleting “**20.01.2019**” wherever it appears and inserting thereof with “**28.01.2019**” accordingly.
- 3) Costs of the application in the cause.

Signed, dated and delivered by the court at **Nairobi** by video-link this **Friday 16th October, 2020**.

BYRAM ONGAYA

JUDGE