



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 57 OF 2019

APPEAL UNDER SECTION 30 OF THE LABOUR RELATIONS ACT, SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, RULES 8 AND 27 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES

AND

IN THE MATTER OF: ARTICLE 36(3)(A) & (B) AND ARTICLE 47 OF THE CONSTITUTION

IN THE MATTER OF: APPEAL AGAINST THE DECISION OF THE REGISTRAR OF TRADE UNIONS

AND

IN THE MATTER OF: SECTION 4(3)(2)(B) OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

IN THE MATTER OF: THE PROPOSED KENYA NATIONAL UNION OF PUBLIC HEALTH OFFICERS (KNUPHO)

BETWEEN

MOHAMED BAGAJO.....1ST APPELLANT

DANIEL ANDATI OKWARA.....2ND APPELLANT

V

REGISTRAR OF TRADE UNIONSRESPONDENT

RULING

1. In a judgment delivered on 6 March 2020, the Court found no merit in the Appeal by Mohamed Bagajo and Daniel Andati Okwara (applicants) against the decision of the Registrar of Trade Unions (Respondent) refusing the registration of the proposed Kenya National Union of Public Health Officers and ordered it dismissed with no order on costs.

2. Undeterred, the applicants moved the Court through a Motion dated 12 August 2020 seeking orders

(a). ...

(b) ...

(c) The Honourable Court be pleased to admit the new and important evidence as evinced in the body of this motion and supporting affidavit.

(d) The judgment and decree of this Honourable Court made on the 6th day of March 2020 be and is hereby reviewed and varied by substituting it with the prayers in the Memorandum of Appeal dated 14th November 2019 hence allowing the Appeal.

(e) The costs of this application be borne by the Respondent.

3. When the Motion was placed before the Court on 29 September 2020, the parties suggested and the Court agreed that it be determined on the basis of the record and submissions to be filed.
4. The Respondent filed on 10 September 2020 a replying affidavit in opposition to the Motion and this prompted the applicants' to file a further affidavit on 16 September 2020.
5. The applicants filed their submissions on 6 October 2020 while the Respondent filed her submissions on 13 October 2020.
6. Urging the Court to review its judgments, the applicants asserted that they had discovered new and important evidence which they could not have come upon with the exercise of due diligence.
7. The new and important evidence discovered by the applicants were in brief that since the onset of COVID19 public health pandemic, public health officers had become exposed as they lacked basic personal protective equipment and this had led to the death of several of the officers; that public health officers had not been represented during stakeholder engagements with the relevant government organs despite their COVID19 exposure and it is only the public health officers who did not have a trade union registered to represent their interests.
8. According to the applicants, these evidentiary materials had only arisen subsequent to the delivery of the judgment of the Court on 6 March 2020.
9. The Respondent was however of the view that the applicants had not met the threshold for review as contemplated by Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016.
10. According to the Respondent, the applicants were asking the Court to sit on appeal over its Judgment delivered on 6 March 2020 as the *new evidence* sought to be relied on did not exist before the judgment of the Court.
11. The new evidence, the Respondent submitted should be the anchor to a distinct cause of action and not as a re-litigation of the action afresh.
12. The Court has considered the Motion, affidavits and submissions.
13. The *new evidence* sought to be relied on by the applicants in seeking a review of the judgment delivered on 6 March 2020 were precipitated by the declaration of COVID19 public health pandemic.
14. The evidence did not exist at the time the applicants moved the Court, nor by the time did the Court render itself on the cause of action presented to it through the Appeal.
15. In the view of the Court, therefore, the *new evidence* emerging from the applicants' affidavits is not the type of *new and important matter of evidence* contemplated by Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 nor the case-law cited.
16. Such evidence was not foreseeable nor in existence at the material time and cannot form the subject of a review application otherwise the Court risks sitting on appeal of its own decisions or re-opening the hearing after a merit determination.
17. Since the applicants had preferred an appeal against the judgment of 6 March 2020, they should pursue the Appeal to its logical conclusion so that the Appellate Court may make a determination as to whether this Court was in error of law and/or fact.
18. The Motion dated 12 August 2020 is dismissed with costs to the Respondent.

Delivered through Microsoft teams, dated and signed in Kisumu on this 18th day of November 2020.

Radido Stephen

Judge

Appearances

For Appellants Mr. Abdirizak instructed by Roba & Odero Advocates

For Respondent Mr. Kioko, Senior State Counsel, Office of the Hon Attorney General.

Court

Assistant

Judy

Maina/Chrispo

Aura