



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2103 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

VERSUS

STEEL STRUCTURES LIMITED.....RESPONDENT

AND

KENYA BUILDING, CONSTRUCTION, TIMBER AND

FURNITURE INDUSTRIES EMPLOYEES UNION.....INTERESTED PARTY

RULING

The Applicant filed a Notice of Motion dated 4th May, 2020 seeking the following orders:

1. Spent.
2. That the Court deem fit to hear this Application on priority basis and or allow parties to proceed by way of written submissions.
3. That the Court deem fit to review her Judgment delivered on 23rd day of April 2020.
4. That the money deducted (union dues) as per Section 48 of the Labour Relations Act, 2007 should be kept by the Respondent and not remitted to either the union herein being the Claimant or the Interested Party herein pending the hearing and determination of this Application.
5. That the Court deem fit and grant the Orders as per the Applicant/Claimant prayers as per her Memorandum of claim dated 3rd October 2016 and filed in Court on 12th October 2016.
6. That the costs of this Application be met by the Respondent herein.
7. That any other prayer the Court may deem fit to grant.

The application is premised on grounds that:

1. The Court delivered Judgment on 23rd April, 2020 dismissing the claim. The Court did not take into account the sworn affidavit of Mr. John Thiong'o authorised by 249 of his colleagues being employees of the Respondent distancing their knowledge of the withdrawal letters filed in Court by the Interested Party and the new check off forms requesting for balloting.
2. The Respondent's employees who are members of the Applicant are pushing for industrial action which might ruin the business and the Applicant would not wish to be blame. If industrial action is the only way to protect the interest of their members then they might take that route so as the Interest Party can use her influence over her members, if she has any.
3. The sworn affidavit by the Respondent's employees and the withdrawal forms are clear evidence that they distance themselves

with the Interested Party and the reason they do not wish their deduction to be remitted to the Interested Party as the same is taking away their freedom of association and being forced to associate with a party they do not want.

4. The Court did not take into account the freedom of association as held in **Amalgamated Union of Kenya Metal Workers v Dock Workers Union & another [2019] eKLR**.

5. The Court did not take into account that section 48 and 54 of the Labour Relations Act are distinct and section 19 of the Employment Act.

The application is supported by the affidavit of Wycliffe A. Nyamwata the General Secretary of the Applicant sworn on 4th May, 2020 in which he reiterates the grounds set out in the application.

Respondent's Case

The Respondent filed a Replying Affidavit sworn by Francis Kibiru Njenga, the Respondent's Divisional Director Human Resource and Administration on 10th June, 2020 opposing the application. The affiant deposes that the application takes the nature of an appeal and that no new matters have been discovered since entry of judgment to warrant orders of review.

The affiant deposes that the sworn affidavit of John Thiong'o is not a new discovery and the same affidavit was before court at the time of hearing and determination. He avers that the Applicant has no new members, as all unionisable employees are members of the Interested Party. He avers that the Applicant is not entitled to the orders sought and the application should be dismissed with costs.

Interested Party's Case

In response to the application, the Interested Party filed a Replying Affidavit sworn by Francis Karimi Murage, its General Secretary on 9th June 2020. The affiant deposes that the rules for reviewing a judgment are very clear and applicable only where new material facts have been discovered after judgment. He also avers that no new matter has been discovered and the affidavit of John Thiong'o is not a new discovery.

He avers that the Court is *functus officio* and that the Interested Party has recruited nearly all the unionisable employees of the Respondent and that there is harmony at the Respondent's workplace.

The application was canvassed by way of written submissions.

Applicant's submissions

The Applicant cited Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and submitted that it is on this ground that the application is within the law. It submitted that allowing the deduction and remittance of union dues to the interested party from workers who have denied their membership amounts to forced association hence taking away their fundamental constitutional rights on freedom of association.

It submitted that the Court of Appeal has had a contrary decision from this Court's decision in **Petition 405 of 2009 Fairmont the Norfolk v The Industrial Court of Kenya**, thus the authorities relied upon by the Respondent before the Judgment are inapplicable. It urged the Court to allow its application.

Respondent's Submissions

The Respondent submitted that Section 16 of the Employment and Labour Relations Court Act provides for review according to Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

It submitted that the affidavit of John Thiong'o was annexed to the applicant's response to the Memorandum of Response. Therefore, there is no new discovery. It argued that the Applicant was not satisfied with the decision of the Court but chose to file an application for review.

It submitted that the test to be applied is whether the Applicant has met the threshold for grant of orders of review under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. It urged the Court to hold that the Applicant has not satisfied any of the set grounds for review as held in **Munir Abubakar Masoud & Others v Registrar of Trade Union Banking, Insurance and Finance (Interested Party) [2020] eKLR**. It further urged the Court to dismiss the application with costs to the Respondent.

Interested Party's Submissions

The Interested Party submitted that Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 is explicit on the grounds that must exist for an application for review to succeed. It argued that the Applicant does not base its application for review on new or important matter that was not within its knowledge. It argued that the Applicant does not address itself to the specific conditions set for review of the judgment and no details are furthering except that the Court failed to take into account some of the evidence on record during trial.

It argued that the position of what constitutes a true error apparent on the face of the record was set out in **Francis Njoroge v Stephen Maina Kamore [2018] eKLR** where the Court cited the case of **Muyondi v Industrial and Commercial Development Corporation & another [2006] 1 EA 243**. It further relied on the case of **Mary Wambui Njuguna v William Ole Nabala & 9 Others [2018] eKLR** that a

court sitting on review does not sit on appeal of its own decision. It further submitted that alleged errors must be apparent on the face of the record without inviting any interrogation or protracted arguments.

It submitted that the applicant does not establish any of the specified ground to warrant review of the Judgment delivered on 24th April, 2020.

Determination

The issue for determination is whether the Applicant's application for review has merit. Rule 33(1)(d) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:

(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

(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 was passed or the order made;

(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.

As submitted by the Respondent and Interested Party, the affidavit sworn by John Thiong'o does not amount to a discovery of new evidence that was not within the knowledge of the Applicant. Further, I do not find that this is sufficient reason for review. In **Nasibwa Wakenya Moses v University of Nairobi & another [2019] eKLR** the Court held:

*“An application for review may be allowed on any other “sufficient reason.” The phrase ‘sufficient reason’ within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in **Sadar Mohamed vs Charan Singh and Another** where the Court held that: -*

“Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).”

The issues in the application refer to evidence that the Applicant avers the court did not consider. The Affidavit of John Thiongó states that the affiant and 249 of his colleagues withdrew from the Interested Party for lack of proper representation and joined the Applicant Union. At Page 5 of the Judgment delivered on 23rd April, 2020, the Court held:

“The Claimant produced resignation letters by its members indicating that they had withdrawn from the Interested Party.”

This was evidence from the affidavit and proof that the Court took the same into account.

Even if the said evidence was not taken into account, this would not have been a good ground for review but rather a ground for appeal. In **Francis Origo & another v Jacob Kumali Mungala [2005] eKLR** the Court of Appeal held:

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal. They were proceeding in the wrong direction. They have now come to a dead end.”

From the foregoing, I find that the applicant's notice of motion is unmerited as it does not meet the threshold for review under Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

The result is that the application is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF NOVEMBER 2020.

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires

that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE