



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.890 OF 2019

BANKING INSURANCE AND FINANCE UNION.....CLAIMANT

VERSUS

SMEP MICROFINANCE BANK LIMITED.....RESPONDENT

RULING

The respondent, SMEP Microfinance Bank Limited through the Federation of Kenya Employers filed application dated 6th November, 2020 under the provisions of Rule 33 (1)(d), 17 and 28 of the Employment and Labour Relations Court (Procedure) Rules, and seeking for orders that;

1. Spent.
2. Spent.
3. *The ruling delivered on 27th October 2020 by Lady Justice Wasilwa be reviewed to a finding that the respondent is not in contempt of court.*
4. *Costs in the cause.*

The application is supported by the annexed affidavit of Rose Chepkemboi Bii and on the grounds that the claimant filed a contempt application dated 10th July, 2020 alleging disobedience by the respondent of an earlier order issued on 28th May, 2020 and which directed the respondent to remit union dues of all employees of the respondent who are members of the union. The contempt alleged by the claimant is with regard to 35 employees of the respondent who were no longer members of the union and the union had alleged that they had not been notified by the respondent as required under section 54(8) of the Labour Relations Act that these employees were no longer members thereof.

The respondent demonstrated how it had notified the union that the 35 members were no longer members of the union.

In the ruling on the contempt application the court held that the respondent was in contempt by failing to remit union dues for all its employees who were members of the union and directed that the managing director appear in court on 29th October, 2020 for sentencing.

When the managing director appeared in court on 29th October, 2020 it was demonstrated to the court that there was no contempt of court. The complaint was failure to remit union dues of 35 employees who have since left the union and there is no failure to remit all union dues.

The court was only to determine whether or not the union was aware that the 35 members were no longer claimant union members. The court concurred with these submissions and directed the respondent to file application for review and therefore did not sentence the managing director and gave a mention date on 10th November, 2020 to allow the respondent to file the present application.

The claimant union was absent from court on the date of sentencing and despite being aware about the date and that there shall be no prejudice if the review application is allowed because the committal of the managing director will serve no purpose. To sentence an innocent party will only prejudice industrial relations between the parties.

There is no way to purge the alleged contempt because the respondent cannot remit union dues for employees who are not members of the claimant. Some have also left the service of the respondent.

In the affidavit of Ms Bii she avers that she is the head of human resources and administration with authority to reply herein and that the

order of 28th May, 2020 directed the respondent to remit union dues of all employees of the respondent who are members of the union. The contempt alleged by the claimant with regard to 35 employees relates to employees who are no longer members of the union.

The allegations by the union that they had not been informed as required under section 54(8) of the Labour Relations Act is not correct. Such employees are no longer in the union membership.

Following the court finding the respondent was in contempt the respondent chief executive officer attended court on 29th October, 2020 and demonstrated there was no contempt. Prayer 3 of the contempt application was specific to alleged failure to remit union dues of 35 employees who have since left the employment of the respondent and there is no failure to remit their union dues as such employees are no longer members of the claimant. There is no disobedience of court orders.

The Judge presiding concurred with the submissions that the matter for contempt only related to the alleged failure to submit union dues for 35 employees who are no longer members of the union and thus directed the respondent to file application for review. The court cannot sentence an innocent party and the orders sought should issue.

In reply, the claimant filed the **Replying Affidavit of Isaiah Munoru Mucheke** and who avers that on 28th May, 2020 the court issued an order directing the respondent to henceforth deduct and remit union dues for members who have freely joined the union pending the hearing and determination of the claim.

That the 35 union members allegedly withdrew from the union is not in accordance with section 48 of the Labour Relations Court Act and the ruling of the court took into account there was no withdrawal.

Mr Munoru also avers that the authority of the court is being challenged and must be protected at all time and court orders should not be issued in vain.

On 1st December, 2020 both parties attended for the hearing of the instant application and the court allocated the hearing date for 8th December, 2020.

There was no attendance by the claimant at the hearing.

The respondent as the applicant made oral submissions in support of the application.

Determination

By ruling delivered on 27th October, 2020 the court found the respondent in contempt of court orders and liable to punishment.

The court allocated the matter for sentencing and required the respondent to attend physically on 29th October, 2020.

On the due date, 29th October, 2020 the respondent was present by the attendance of the Chief executive officer and whereupon there were submissions that there are 35 members of the claimant who have resigned.

The court directed as follows;

The respondent should then proceed to file an application for review this court has already made a determination.

I will therefore proceed and finalise the matter and will stay the sentencing pending any application to be filed in 7 days mention in 7 days on 10/11/20 before PJ for further directions.

The instant application was filed.

On the contempt and sentencing of the respondent, the court addressed and on good grounds directed the filing of application for review.

Such application is allowed under Rule 33 of the Court Rules where there exists sufficient cause;

(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.

A review can therefore be allowed upon discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; on account of some mistake or error apparent on the face of the record, or for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay. See **Republic versus Public Procurement Administrative Review Board & 2 others [2018] eKLR**.

In the case of **Republic versus Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad [2019] eKLR** the court held as follows;

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In this case, upon the attendance of the respondent for sentencing on 29th October, 2020 it became apparent to the court that there was an error apparent on the record, there was an omission of material facts which had such been addressed before the contempt application was heard and a ruling rendered, it would have been apparent that 35 employee of the respondent were not members of the claimant and the requirement and direction to remit union dues for them was in error.

Accordingly, application dated 6th November, 2020 is hereby allowed and the ruling delivered on 27th October, 2020 hereby reviewed and the respondent found not in contempt of court. Costs shall be in the cause.

DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2020.

M. MBARU

JUDGE