REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 695 (N) OF 2009

(Before Hon. Lady Justice Hellen S. Wasilwa on 22nd February, 2019)

KENYA CHEMICAL AND

ALLIED WORKERS UNION.....CLAIMANT/RESPONDENT

VERSUS

KENYA TANNING EXTRACT CO. LTD.....RESPONDENT/APPLICANT

RULING

1. The Application before this Honourable Court for determination is the one dated 14th July 2017 and filed under the provisions of Sections 12 (2), (3) (vii) of the Industrial Court Act No. 20 of 2011 and any other enabling provisions of the law.

2. The Applicant seeks the following orders:-

a. Spent.

b. THAT this Honourable Court do stay its judgment delivered by Hon. Lady Justice Hellen Wasilwa on 29th June 2017, pending the hearing and determination of this Application or further directions of this court.

c. THAT this Honourable Court be pleased to review, vary, set aside and/or discharge the judgment delivered by the Hon. Lady Justice Hellen Wasilwa on the 29th June 2017.

d. THAT the costs of this Application be provided for.

3. The Application is based on the grounds that on 29th June 2017, the Claimant obtained judgment in its favour and is in the process of commencing its execution. However, the Applicant is dissatisfied with the judgment and wants the same reviewed, varied, set aside or discharged.

4. The Applicant avers that the Honourable Court failed to consider the Applicant's written submissions dated 1st March 2016 and filed on 17th March 2016. It is the Applicant's case that in failing to take its submissions into consideration, the said judgment failed to consider the principle of the overriding objective.

5. The Applicant avers that the Honourable Court failed to consider the fact that it had already paid 15 of the grievants and not 9 as recorded in the Court's judgment. As such, the Applicant is exposed to the risk of being condemned to pay claims it had already settled and further discharged from any obligations.

6. It is the Applicant's case that this Honourable Court has residual powers to correct the error. Further, the Applicant avers that if the order for stay of execution is not granted and the judgment of the court not reviewed, the Claimant will execute the judgment rendering the Application nugatory.

7. The Application is supported by the Affidavit of Benjamin Ongeri sworn on 14th July 2017, and based on the grounds on the face of the motion.

8. The Court granted the first and second orders as prayed, in its Order issued on 26th July 2017.

9. The Claimant has opposed this Application vide the Replying Affidavit of Were Dibo Ogutu, sworn on 2nd November 2017 and filed on even date.

10. The Claimant avers that the Application is frivolous, lacks merit, is an abuse of Court process and ought to be dismissed with costs.

11. It is the Claimant's case that the Applicant admitted the Claim in its Replying Affidavit filed on 12th August 2012 and that the judgment of this Honourable Court was delivered based on the averments by the Applicant's General Manager in the said Affidavit and the CBA between the parties.

12. The Claimant avers that the presiding Judge was guided by the pleadings filed herein and the oral testimony by the witnesses and that it was mischievous to urge the court to refer to evidence, which was never produced during trial. The Claimant further avers that the submissions referred to in the Application is aimed to mischievously misguide the Honourable Court as the submissions vary from the Defence/Replying Affidavit dated 10th August 2012.

13. The Claimants contend that paragraphs 26 and 27 of the judgment are a replica of the Applicant's Replying Affidavit. The Claimant avers that parties entered into a consent agreement on 15th May 2012, where the Respondent undertook to pay all employees their terminal dues before 30th June 2012. However, there was non-appearance from the Respondent and the suit proceeded *ex parte*. The Respondent failed to make payments thus the judgment herein.

Submissions by the Parties

14. On 2nd October 2018, the Applicant informed the Court that they had settled the entire claim, a fact which was disputed by the Claimant. Nevertheless, the Applicant informed the Court that it would not wish to file any submissions and the Court issued a ruling date.

15. The Claimant in its written submissions dated 1st October 2018 and filed in court on 2nd October 2018, confined its argument to the following issues: whether the Honourable Court failed to consider the Respondent's submissions dated 1st March 2016, whether the Honourable Court was justified to order that only 9 of the grievants had been paid and whether the Court should vary the judgment in accordance with the Application.

16. It is the Claimants submission that the Applicant's submissions ought to have been a summary of the contents in the Replying Affidavit, as it did not call any witnesses. The Claimant further submits that parties cannot file new evidence in their submissions hence the court was right in relying on the evidence produced by the parties.

17. The Claimant submits that paragraphs 26 and 27 of the judgment are a replica of paragraph 18 and 19 of the Applicant's Replying Affidavit where the Court confirmed that 9 unionisable employees had accepted payment for redundancy and the other 15 declined. As such this Honourable Court was justified in rendering its judgment as it was based on the pleadings filed before it, the evidence produced and the admissions by the parties.

18. The Claimant submits that after the Application herein was filed, the Respondent misled this Honourable Court that it was willing to comply with the Judgment yet no payment has been made to date.

19. The Claimant submits that the Judgment should not be reviewed and the Application be dismissed with costs.

20. I have considered the averments of both parties. The Applicants contend that there is a mistake on record as this Court failed to consider their submissions.

21. In determining this claim, this Court considered the pleadings before this Court. Paragraph 18 of the Respondent's Replying Affidavit filed in Court on 10/8/2012, states as follows:-

> ***"That to further demonstrate goodwill on its part, the Respondent in good faith approached all the twenty five unionisable employees and made a concrete offer in respect to payment of their redundancy but unfortunately only nine (9) of the unionisable employees accepted the redundancy pay tabled by the Respondent with the remaining sixteen unionisable employees adamantly declining their settlement dues in the sum of Kshs.2,260,534/= and which was adequate to cushion the affected employees against severe hardship as they scouted for alternative employment opportunities and generally adjusted to their new environment…".***

22. This position is reiterated in paragraph 5 of the Memorandum of Reply. The Respondent even urged Court to allow it settle the 2,260,534 in 10 equal monthly instalments.

23. In their submissions before Court however, the Respondents shifted their position as pleaded and now insist that 15 employees accepted the redundancy pay and 10 declined.

24. Indeed this Court considered the parties pleadings before it and a party cannot purport to change their pleadings through submissions.

25. The Applicants are trying albeit in a cunning manner to appeal this Court's judgement through this application. There is however, no error on record and indeed this Court was in its opinion well guided with the pleadings on record before arriving at its judgement.

26. I therefore find the application for review not merited. I dismiss it accordingly with costs to the Claimant/Respondent.

Dated and delivered in open Court this 22nd day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Gachangwa holding brief Miss Oluoch Wambi for Claimant – Present

No appearance for Respondent