



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1081 OF 2015
CONSOLIDATED WITH CAUSE 1986 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

THE PANARI HOTEL.....1ST RESPONDENT

THE JACARANDA HOTEL.....2ND RESPONDENT

THE SUNSET HOTEL.....3RD RESPONDENT

SOUTHERN SUN HOTEL.....4TH RESPONDENT

SIANA SPRINGS HOTEL.....5TH RESPONDENT

THE FAIRMONT GROUP OF HOTELS.....6TH RESPONDENT

SERENA GROUP OF HOTELS.....7TH RESPONDENT

THE SAFARI PARK HOTEL.....8TH RESPONDENT

THE BOMA HOTEL.....9TH RESPONDENT

SUN AFRICA HOTEL.....10TH RESPONDENT

NAIROBI HILTON HOTEL.....11TH RESPONDENT

AND

KUDHEIHA WORKERS.....1ST INTERESTED PARTY

KENYA HOTEL KEEPERS

AND CATERERS ASSOCIATION.....2ND INTERESTED PARTY

RULING

Notice of Motion Application dated 16th November 2018

The 4th Respondent filed the Notice of Motion Application dated 16th November 2018, seeking to review the Ruling of this Court delivered on 26th October 2018 where the 4th Respondent was directed to pay the sum of Kshs.15,191,105.26. In particular, the 4th Respondent seeks the following orders-

a. Spent.

b. That pending the hearing and determination of this Application *inter partes* the Court be pleased to stay execution of the Ruling delivered on 26th October 2018 by Onyango J. and all and/or any consequential Orders therein is (sic) so far as the same pertains to the 4th Respondent.

c. That the Court be pleased to review and/or set aside the Ruling delivered on 26th October 2018 by Onyango J. and all and/or any consequential Orders therein is (sic) so far as the same pertains to the 4th Respondent.

d. That the Court be pleased to issue such further Orders as it may deem in the interests of justice.

e. That the costs of this Application be awarded to the 4th Respondent/Applicant.

The Application is based on the grounds set out in the Application, the

Affidavit of Solomon Mugwe sworn on 16th November 2018 and the Supplementary Affidavit of Felix Tanga sworn on 20th December 2018.

The Respondent avers the Claimant has no *locus standi* to represent its employees. It is the 4th Respondent's position that the Ruling of 26th October 2018 was delivered in the absence of material evidence demonstrating that it had recovered VAT from its employees as alleged. They did not present the material facts and evidence due to the assumption that the 2nd Interested Party had represented its interests, which had always been the case. As a result, there was no appearance on its part.

The Respondent avers that its customers were charged VAT on account of the room, food and beverages supplied together with service charge. That VAT was duly remitted to KRA while service charge deductions were applied as provided in the CBA and the net distributable service charge was equally distributed amongst its employees.

It is therefore the 4th Respondent's assertion that the facts in the claim are contrived, misleading and made in bad faith. That it is unjust to subject it to pay sums which were never charged having been condemned unheard. It stands to suffer irreparable loss if the judgment is executed.

The Application has been opposed vide the Replying Affidavit of Wycliffe Sava Mundu sworn on 10th December 2018. It is the Claimant's case that the claim was filed pursuant to Article 22 of the Constitution to stop and reclaim the erroneous 16% VAT levied on the 4th Respondent's employees' emoluments. The Claimant avers that the said employees are entitled to service as they work in the hotel industry and pay agency fee to enjoy the benefits of the CBA.

It is the Claimant's case that the 4th Respondent's employees had complained to the Commissioner for Domestic Taxes that their employer was levying 16% VAT from source before distributing the same to the employees to pay. A memo had been circulated indicating that 16% VAT would be deducted which position was confirmed by the 2nd Interested Party, to the 1st Interested Party. As such, the 4th Respondent's denial is tantamount to fraud and unfair labour practices.

The Claimant's contend that the 4th Respondent is mandated to collect VAT within the provision of section 5 (4) of the VAT Act 2013. The Claimant avers that all the Respondents were served with the claim and the 4th Respondent came on record.

It is her case that the impugned Ruling was just hence this Application is misleading and should be dismissed.

The Application was disposed of by way of written submissions where the 4th Respondent and the Claimant filed their submissions regarding the same.

The 4th Respondent in its submissions dated 14th May 2019 submits that the Claimant has not disputed that VAT on service charge was paid by its customers, duly remitted to KRA and the net distributable service charge equally distributed to all the employees. Further, that the Claimant has not proved that the 4th Respondent retained any monies paid as service charge.

The 4th Respondent submits that pursuant to Rule 33(1) of the Employment and Labour Relations Court Rules, this court has the discretion to grant the orders sought. They submit that they are deserving of the orders sought as they have satisfied the conditions set out in Rule 33(1) (a). It relies on the case of **Stephen Gathua Kimani vs. Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** and **Pacreas T. Swai vs. Kenya Breweries Limited [2014] eKLR**.

As regards rule 33(1)(d), they submit that the Court ought to exercise its discretion so as to accord the 4th Respondent an opportunity to be heard. It is their further submissions that they reasonably believed that they were being represented in the proceedings hence it was an innocent mistake. They rely on the cases of **Belinda Murai & Others vs. Amos Wainaina [1978] LLR 2782 (CALL)** and **Suleiman vs. Ambrose Resort Limited [2004] 2 KLR 589**. They submit that the Application was brought without any undue delay.

In its submissions dated 18th June 2019, the Claimant submits that the 4th Respondent has admitted to being served with the Memorandum of Claim but chose not to enter appearance. The 3rd, 5th, 6th, 7th and 11th Respondents entered appearance through their Advocates despite the fact that they were members of the 2nd Interested Party. The 2nd Interested Party did not disclose to this Court that it was on record for the 4th

Respondent and never responded to the main claim or the subsequent applications. It is the Claimant's submissions that the errors alluded to by the 4th Respondent in its Application are errors attributable to the 4th Respondent and not errors on the face of the record.

The Claimant also submits that the Application defeats the cause of justice and the Court's discretion should not be exercised to aid the 4th Respondent in delaying justice. The Claimant relies on the case of **Francis Njoroge vs. Stephen Maina Kamore Civil Appeal 181 of 2017**.

The 1st Interested Party in its submissions dated 26th June 2019, submits

that the 4th Respondent having admitted to not being aggrieved by the Judgment of Lady Justice Linnet Ndolo delivered on 27th January 2017, ought to comply. It is their position that although the 4th Respondent's did not enter appearance, its interests were represented by the 2nd Interested Party. Further, having followed the proceedings with due diligence, the 4th Respondent was aware of the proceedings and pleadings filed in Court and had the opportunity to intervene at the time but acquiesced on its rights. As such, the Application should be dismissed.

Application dated 8th January 2019

The other Application before this Court for determination is the 4th Respondent's employees' dated 8th January 2019, seeking the following Orders-

- a. Spent.
- b. That upon hearing and determination of this Application *ex parte* this Court be pleased to issue an order that the 4th Respondent (sic) General Manager Solomon Mugwe be arrested and detained in prison for a period of not less than six months for disobedience of the Court Order and/or Ruling issued on 26th October 2018.
- c. That upon hearing and determination of this Application *inter partes* the Court be pleased to issue an order that the 4th Respondent (sic) General Manager Solomon Mugwe be arrested and detained in prison for a period of not less than six months for disobedience of the court order and/or ruling issued on the 26th October 2018.
- d. That the Court be pleased to issue an order directing the Officer Commanding Parklands Police Station (OCS) to effect the arrest of the 4th Respondent General Manager Solomon Mugwe.
- e. That the 4th Respondent Application for review dated 16th November 2018 be stayed until the 4th Respondent complies with the Ruling delivered on 26th October 2018 by Onyango J.
- f. That the 4th Respondents pay for the costs of this Application.

The Application supported by the grounds on the face thereof and the Supporting Affidavit of Fred Nyongesa sworn on 8th January 2019. The employees aver that the 4th Respondent has failed to obey the Ruling of this Court delivered on 26th October 2018 requiring it to pay the sum of Kshs.15,191,105.26 despite being served with the same. It is their position that Court orders ought to be obeyed so as to uphold the dignity of the Courts.

The 4th Respondent has opposed the Application vide its Notice of Preliminary Objection filed on 5th February 2019. The 4th Respondent's position is that the Application is unlawful and irregular and that the firm of Messrs Mwangi Njenga & Company Advocates are irregularly on record for representing an entity that is not a party to the proceedings. Further, that the Application is incompetent and fatally defective as it contravenes mandatory provisions of law and disregards the statutory provisions regarding execution of decrees. It also the 4th respondent's position that the Application has been made in bad faith.

The Court was supposed to deliver its Ruling on the Applications dated 16th November 2018, 23rd November 2018, 11th December 2018 and 8th January 2019. However, the Applications dated 23rd November 2018 and 11th December 2018 are not in the Court file hence this Court has not rendered itself on the same. As such, the delivery of the Ruling regarding the said Applications is postponed until this Court is furnished with copies of the same. The 1st and 2nd Interested Parties are directed to furnish this Court with copies of their Applications within 14 days.

Determination

The issues for determination are-

- a. Whether the 4th Respondent has met the legal threshold warranting grant of the orders for review.
- b. Whether Claimant's Application to hold the 4th Respondent's General Manager in contempt of Court has merit.

Review and Setting Aside

Pursuant to the Judgment of the Ndolo J., the respondents did not comply

with the decree until the Claimant filed the particulars by the aggrieved employees. Consequently, the Claimant filed the Application dated 19th April 2017, seeking to have records of the 16% VAT allegedly charged on the employees of the 3rd, 5th to the 11th Respondents and 2 members of the Interested Party availed.

The 4th Respondent failed to avail its records and the Claimant applied its own resources to source for the information which it filed in Court tabulating the VAT erroneously charged on its employees' service charge at Kshs.15,191,105.26. As such, this Court issued orders directing the 4th Respondent to pay the said amount having failed to submit the records or comment on the records filed by the Claimant.

The 4th Respondent's case is that it reasonably believed that the Interested Party represented its interests as this had always been the case. The Claimant's Application of 19th April 2017 did not specifically call upon the 4th Respondent to produce its records. The prayers were directed at the 2nd Interested Party. The 4th Respondent was also not amongst the parties who were to be served with the Application. I am therefore persuaded by the 4th Respondent's explanation as it is very likely that it had no reason to believe that its interest in the proceedings had not been represented by the 2nd Interested Party. As such, there was no opportunity for it to present its records for consideration by the Court. The 2nd Interested has not denied the 4th Respondent's assertions.

The Respondent maintains that VAT was not charged on its employees' service charge. Instead, the service charge was only subjected to the deductions in the 1st Interested Party's CBA. Paragraph 21 of the CBA between the Interested Parties provides-

i. "The employer will operate a service charge on accommodation sales including accommodation sales arising from apartments and cottages serviced by the Organization's employees and on food sales covering all food outlets (including coffee shops and food sales on outside catering functions and all beverages) whether on cash or credit..."

ii. The money collected through service charge shall be distributed equally to all unionizable employees... A monthly reconciliation as to service charge shall be provided by the employer to the Shop Steward of an individual establishment.

iii. ...

iv. ...

v. A deduction equal to 0.5% of all service charge revenue so collected shall be paid to an account operated by the Secretary General of the union... to facilitate operation of both bodies and the members education as per annual budget and the balance disbursed as below-

A deduction of 10% will be retained by the employer from service charge collection for administrative purposes. The balance of 90% being distributed as per sub-clause (ii) above.

vi. ...

vii. A 5.5 service charge on beverages will be levied."

From the schedule of the 4th Respondent's service charge payments from January 2015 to January 2017, it is clear that from the revenue collected, its employees' service charge was not subjected to VAT deductions. If 16% of the revenue collected by the 4th Respondent is tabulated for each given month, then the value of VAT charged would be higher than the value of VAT quoted in the schedule for service charge payments. This makes it impossible for the 4th Respondent to have charged VAT from its employee's service charge because a calculation of the revenue is inclusive of service charge and ought to give the same figure quoted by the 4th Respondent as VAT chargeable on its revenue.

Further, if the amount of VAT tabulated in the schedules were to be deducted from the service charge, then a meagre sum would be left to distribute to the employees. Additionally, the service charge payable from the schedule of service charge payments, employees service charge is reflected in the 4th Respondent's employees' payroll for the respective months. Neither the Claimant nor the 1st Interested Party have challenged the authenticity of the schedules and payrolls relied upon by the Respondent.

Rule 33(1) of the Employment and Labour Relations Rules provides as follows-

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.

The issue of review was elaborated in the case of **Stephen Gathua Kimani vs. Nancy Wanjira Waruingi T/A Providence Auctioneers [SUPRA]** it was observed that-

“In an application for review an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time ... or that there was any sufficient reason and most importantly the applicant must make the application for review without unreasonable delay.”

I am satisfied that the circumstances of the 4th Respondent as set out above justify the exercise of this Court’s discretion in its favour so as not to occasion an injustice to the 4th Respondent. It would be unjust to subject the 4th Respondent to payment of VAT that was never deducted. In the case of **Phillip Chemwolo & Another vs. Augustine Kubede (1892-88) KAR 103** at 104 as cited in **Rajesh Rughani vs. Fifty Investments Limited & Another [2016] eKLR** the Court observed as follows-

“...because a mistake has been made a party should not suffer the penalty of not having his case heard on merit; that courts exist for the purpose of deciding rights of the parties and not the purpose of imposing discipline.”

Consequently, the order for review is granted to the extent of the Orders issued against the 4th Respondent are set aside.

Contempt of Court

I find that the Application for Contempt of Court lacks merit as the very orders that have allegedly been disobeyed by the 4th Respondent, are the same ones the 4th Respondent applied to be reviewed. Further, as submitted by the 4th respondent, the applicants are not parties to this suit and are therefore strangers to these proceedings. They have no locus standi to file the application having not applied to be enjoined to the proceedings.

The application dated 8th January 2019 which is against the said 4th respondent fails is thus bad in law and is accordingly dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2019

MAUREEN ONYANGO

JUDGE