REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. 2066 OF 2015

KENYA UNION OF ENTERTAINMENT AND MUSIC INDUSTRY EMPLOYEES.....CLAIMANT

-VERSUS-

BOMAS OF KENYA LIMITED.....RESPONDENT

RULING

Introduction

1. The application before the Court is the claimant's notice of motion dated 13.11.2018 seeking the following orders:-

(a) THAT this Honourable Court be pleased to deem fit to review her judgement delivered on 26th day of October, 2018.

(b) THAT Honourable Court allow the Claimant to allow her negotiate for her members as per the Memorandum of Claim filed in Court on 20th day of November, 2015.

(c) THAT the Honourable Court to issue any other Orders/Relief it deems fit to grant.

2. The application is based on the grounds on the body of the Notice and Motion and the supporting Affidavit sworn by Job Muchua on 13.11.2018. In brief the applicant contended that the Court did not determine the issue of whether a union can recruit members from sectors not covered by its constitution; that there is information which was not availed to the court before passing of the impugned judgement; that the only institution that can revoke recognition agreement is the National Labour Brand (NLB); that KUDHEIHA is encroaching the Entertainment and Music Industry; that the respondent never produced check of forms to prove that KUDHEIHA had recruited her staff as members; that the respondent did not produce the CBA signed with KUDHEIHA to prove that her (Applicant) members were catered for; and that her members who are not in the Hotel Industry will suffer irreparable damages.

3. The respondent has opposed the application by the Replying Affidavit sworn by her HR Mr. Jimmy Kodiangi on 20.12.2018. In brief the respondent contended that application is incompetent, fatally defective and devoid of merits; that the application does not disclose any of the grounds provided for review under rule 33 of the ELRC procedure Rules; that no new evidence was discovered after the judgement and as such the grounds upon which the review is sought ought to be grounds for appeal.

4. The application was disposed of by written submissions. The Applicant submitted that an employer can have recognize more than one trade union and cited several example of such employers including universities, Kenya Airways and Hospitals. She therefore urged that the respondent should be compelled to negotiate CBA with her. She further submitted that the court relied on theory and without any documentary evidence of check off forms to reach the impugned verdict. That the court should not interfere with her legal right to negotiate for her members. That the respondent is to blame for the existence of the two recognition agreements because she never applied for revocation by the NLB.

5. The respondent submitted that the application is only premised on rule 16 of the ELRC Procedure Rules but not Rule 33 thereof. That the applicant has not demonstrated any evidence that was discovered after the judgment, which was not within her knowledge after the exercise of due diligence. That all the issues raised in the application were raised in the main suit and canvassed and formed the basis of the impugned judgment.

6. The respondent further submitted that there is no mistake or error apparent on the face of the record. She therefore prayed for the application to be dismissed with costs since the matter was determined by the impugned judgement.

7. The issue for determination herein is whether the application herein meets the legal threshold for review of the impugned judgement. The

legal threshold for review is provided by Rule 33(1)of the ELRC Procedure Rules, thus:-

> ***"33(1) A persons 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 review of the judgement 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; or***
> >
> > ***(c) If the Judgment or Ruling requires clarification; or***
> >
> > ***(d) For any other sufficient reason."***

8. In the instant application, I must agree with the respondent that none of the said four grounds for review set out above has been cited as the basis for the review sought. All what the claimant has done is to make general statements that there was new information about revocation of Recognition Agreement which was not in place as at the time of filing the suit; and that the impugned judgment was reached on the basis of theory and without any documentary evidence about recruitment of union members from the respondents work force by the rival union.

9. After careful consideration of the said general statement and the submissions by the two sides, I make a finding that the applicant has failed to prove on a balance of probability any of the said grounds upon which the court can exercise discretion to review the impugned Judgment. The applicant has not demonstrated that the alleged information discovered after filing of the suit, was not in existence before the judgement or it could not be secured and produced even after exercise of due diligence before the judgement was passed.

10. On the other hand the contention that the verdict was reached without documentary evidence but based on theory, constitutes a good ground for appeal as opposed to review. In that case, I decline to sit on appeal over my own decision.

11. In conclusion, the court returns that the application has not met the threshold for review as set out under Rule 33(1) of the ELRC Procedure Rules. Consequently, the application is dismissed with costs to the respondent.

Dated, Signed and Delivered in Open Court at Nairobi this 20th day of September, 2019

ONESMUS N. MAKAU

JUDGE