



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 120 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 11th December, 2019)

KENYA ENGINEERING

WORKERS UNION LIMITED.....CLAIMANT

VERSUS

FINE ENGINEERING WORKS LIMITED....RESPONDENT

RULING

1. Before this Court, is the Respondent's Application dated 25th June 2019 wherein the Respondent seeks the following orders:-

a. THAT this Honourable court be pleased to review its judgment delivered on 14th October 2015.

b. THAT this Honourable court be pleased to set aside its judgment delivered on 14th October 2015.

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

2. The Application is based on the grounds set out in the motion and the averments made in the Supporting Affidavit of Christine Ojiambo sworn on 25th June 2019.

3. The Applicant avers that this Court delivered a judgment on 14th October 2015 wherein the Applicant was ordered to recognize the Claimant. The Applicant avers that the decision was based on the finding that the Claimant had a simple majority.

4. It is the Applicant's case that since the signatures contained in the check-off forms formed the basis upon which the Court made its decision; the Applicant avers that it has discovered new and compelling evidence, being, a Forensic Document Examination Report from the Director of Criminal Investigations confirming the forgery of the signatures.

5. The Applicant avers that the report could not be produced at the time the decree was made, despite the Applicant's effort to obtain the same. In addition to there being discovery of new evidence, the check-off forms contained double registration of employees while some of the members withdrew their membership and abandoned the Claimant union. Further, the Applicant has since restructured and even released most of its employees.

6. The Claimant opposed this Application vide the Replying Affidavit of Wycliffe A. Nyamwata sworn on 29th August 2019. In response to paragraph 5 of the Supporting Affidavit, the Affiant contends that it did not receive any withdrawals from its members.

7. It is the Claimant's position that neither the Claimant nor its members were given the opportunity to be heard before the impugned report was made. It is its further position that the author of the report and the members alleging that their signatures were forged, ought to be brought before Court as witnesses.

8. In response to paragraph 11 of the Supporting Affidavit, the Claimant avers that the 3 names that were allegedly repeated, will not affect its simple majority. Further, that what should be considered is the simple majority at the time of filing the cause and at the time of the judgment; and not the number of its members currently under the Applicant's employment.

9. The Affiant is of the position that the Application has been brought in bad faith, after the Applicant received notice over its contempt.

10. The Application was disposed of by way of written submissions where the Applicant filed its written submissions on 15th October 2019 while the Claimant filed theirs on 23rd October 2019.

Submissions by the Parties

11. The Applicant submits that the Claimant does not have simple majority because the number of its members will go down to 68 if the forensic report regarding the forged signatures and the number of the individuals registered twice, is taken into consideration.

12. The Applicant relies on the case of *Kenya National Private Union vs. Security Guard Service Limited [2015]* where the Court in making an order that fresh signatures be presented to it, held as follows:-

“... The form is the instrument which the Claimant used to prove that it had the requisite numbers in terms of section 54 of the Labour Relations Act 2007. The fact that the form has errors means that though the Union has prima facie sufficient numbers, the forms cannot be used as a basis for a consent or dedication of union dues.”

13. The Applicant submits that it only has 19 employees as evidenced in its payroll, contrary to the number that had been relied on by the Claimant, to file this cause. The Applicant urges this Court to order for preparation of fresh check off forms so as to establish whether the Claimant indeed has the simple majority.

14. The Applicant submits that they delayed in filing the Application because the court file disappeared and could not be traced, a fact that has been confirmed by the Claimant in its letter dated 7th October 2016 and marked as CO7 of the Applicant's annexures.

15. On the other hand, the Claimant submits that the Application is time barred as it has been filed out of the time required for a cause to be filed, being 3 years. The Claimant further submits that the forensic report cannot be relied upon as its author did not testify in court, neither did the owners of the signatures authorize the interrogation of their signatures.

16. The Claimant submits that the Applicant has not met the threshold set out in rule 33 of the Employment and Labour Relations (Procedure) Rules 2016. Additionally, this court should only consider the membership percentage at the time of filing this cause.

17. I have considered the averments of the Parties herein. This Court has authority to review its orders and judgments as per rule 33 of the employment & Labour Relations Court Rules.

18. The Applicant herein wants this Court to review its judgement of 2015 through an application filed 4 years later indicating that they have new evidence, which could not be available at the time of judgement.

19. The Applicants wish to rely on an alleged forensic report which report has not been tested by Court though the author testifying on its authenticity and how he prepared it. It is indeed a report this Court cannot rely on as being new evidence.

20. Other than the alleged forensic report, the delay in filing this application is inordinate and inexcusable and the Applicants have not explained what action they took to find the 'missing file'.

21. In this Court's assessment, this application is not merited and the same is denied and dismissed.

Dated and delivered in open Court this 11th day of December, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Aringa holding brief for Oronga for the Applicant

Araka for Respondents – Present