



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 526 OF 2014**

(Before Hon. Justice Hellen S. Wasilwa on 15<sup>th</sup> March, 2018)

**KENYA UNION OF COMMERCIAL FOOD &  
ALLIED WORKERS UNION.....APPLICANT**

VERSUS

**JADE COLLECTION LIMITED...RESPONDENT/CLAIMANT**

**RULING**

1. The Application before the Court is dated 28.2.2017 brought by way of Memorandum under Section 16 of the Industrial Court Act No. 20 of 2011, Rule 20 of the Industrial Court (Procedure) Rules 2010, Sections 4(1) (a) and (b), 5(1)(a), 54(1), 55(1) and 57(1) of the Labour Relations Act 2007 and all other enabling provisions of the law seeking orders:

- 1. That the Applicant's Application for review and setting aside of the Honourable Court's judgment dated 18.1.2017 be allowed.*
- 2. That the Judgment dated 18.1.2017, be set aside and discharged in its entirety.*
- 3. That a declaration do issue against the Respondent to the effect that it has not met the threshold for Recognition by the Applicant.*
- 4. That in the alternative, the Respondent be ordered to carry out a fresh recruitment process capable of being enforceable with the precepts of the law pertaining to recruitment of Union Members.*
- 5. That the costs of the Application be in the cause.*
- 6. That the Honourable Court be pleased to give such other relief it may deem apt and fitting in the circumstances.*

2. The application is based on the grounds:-

- 1. That the Court entered a judgment dated 18.2.2017 in the absence of material facts that were unknown to it at the time which will adversely affect the legality of the said judgement and ostensibly have a fatal effect in observance of the rule of the law.*
- 2. That if the orders sought are not granted the Respondent's directors being held in contempt of Court and committed to civil jail for noncompliance with the judgement entered on 18.1.2017 based on a misrepresentation of facts and forgery allegations on the part of the Respondent.*
- 3. That the Application should be allowed to allow the Court to make a determination on the Application raising grave issues pertaining to the recognition of the Respondent Union which facts do not resonate well with the rule of law.*
- 4. That Clause 2(a) of the Recognition Agreement given by the Respondent to the Applicant for signing lays the basis for such recognition on the Constitution of the Respondent as the sole labour organisation capable of such recognition taking into account the principle of Industrial Trade Unionism which principle the Applicant is challenging as having not been met by the Respondent herewith.*

5. *That the judgment issued by the Court is unwarranted and unmerited as the Respondent does not have membership within the employ of the Applicant within the strict sense of the law.*
6. *That it is only fair and just that this Court fully scrutinises the illegality that may set dangerous precedent in matters of recognition of a trade union where the legal threshold has not been met.*
7. *That a Trade Union should not depend on Court to push for recognition but should carry its mandate in following the set procedures pertaining to matters of recruitment in order to push for recognition.*
8. *That the Respondent is not opposed to having its employees as members of the Union and is actually agreeable to a fresh recruitment process taking place which process should be free and fair to its employees so that a harmonious working environment is achieved within its workforce as pertains employer – employee relationship devoid of rumours and victimisation of forcibly being recruited to a trade union without the employees knowledge and consent.*
9. *That the Respondent will not suffer any prejudice should the said judgment be stayed and/or reviewed as it will only be accorded a fresh opportunity to follow the correct channels of the law in recruitment of its membership which may assist it in attaining the legal recognition threshold capable of laying the mandate of the Respondent to call for recognition.*
10. *That on the other hand the Applicant stands to suffer prejudice if the said judgment is not stayed, varied and/or reviewed.*
11. *That should the orders sought not be granted the doctrine of frustration will be visited upon the relationship between the Applicant and the Respondent as the next question bound to come is the authenticity of negotiating a Collective Bargaining Agreement delete and only the Respondent Union has no membership within the Applicant.*
12. *That an industrial relationship is one that stems from willingness of parties involved to form a relationship based on mutual trust and good will and should not be forcibly imposed on one party to the detriment of another where it is clear and apparent that the rule of law has not been followed by the party set to benefit from such imposition.*

3. The Claimant/Respondent filed a Replying Affidavit wherein they raise a Preliminary Objection based on the following grounds:

- (i) *This Honourable Court cannot be called upon to sit in an appeal against its own judgment as the purpose and content of the Respondent's Application is an appeal disguised as a Review Application.*
- (ii) *There in no Notice of Motion filed as required under Rule No. 33 of he Rules of this Court, the Respondent/Applicant having filed a Memorandum and Verifying Affidavit.*
- (iii) *The Review Application is not hinged on any grounds allowed by Rule No. 33 of the Rules of this Court.*
- (iv) *The Industrial Court (Procedure) Rules 2010 on which this Application is brought before the court is obsolete, the same having been revoked and replaced by the Employment and Labour Relations Court (Procedure) Rules, 2016.*

4. In Response to the Review Application the Respondent Union stated that the Applicant was afforded full opportunity to argue their case having filed a Replying affidavit dated 23.4.2014, written submissions dated 5.10.2016 and list of documents of even date and at no time did they raise any issue touching on membership withdrawal, forged signatures or the simplistic argument of their employees having been duped to join the Union for reasons of “merry-go-round” and “chamas”.

5. They further aver that the Order of the Court of 18.1.2017 was that the Respondent/Applicant do recognise the Claimant Union as the Claimants had established their case as required in order for the Respondent to proceed to recognise the Claimant within 30 days. The Respondent/Applicant was also prohibited from victimising and harassing any employee on account of their union dues.

6. That in 2013 and 2014 and upto 18.1.2017 when the Court read its judgment, no evidence of membership withdrawal was availed to the Court and nothing was filed to show that the Claimant did not have simple majority. That even in the instant application, nothing has been filed to show that the Claimant did not have a simple majority.

7. The Respondent Union also avers that there is no error apparent on the face of the Record which would warrant the orders sought and no issue has been pointed out that requires clarification.

8. It is also contended that the Respondent obtained stay orders in the instant application in order to deny its employees their freedom of association as awarded by the Court. That some employees of the Respondent have been sacked for joining the Union thus intimidating the remaining employees. It is further contended that some employees are being coerced to revoke their membership to the Claimant also in breach of the freedom of association.

9. That the Respondent/Applicant is in breach of the Court's Orders of 18.1.2017, and a Contempt Application has been filed in that respect. They pray for the Application to be dismissed with costs.

10. The Application was disposed of by way of written submissions.

11. It is submitted on behalf of the Applicant that the instant application meets the test for sufficient reason under Rule 33(1) of the

Employment and Labour Relations Court (Procedure) Rules 2016 as there is emergence of new evidence touching on matters of the recruitment process.

12. The Applicant's Counsel submits that the Applicants have averred that they were not aware there were employees being recruited but were under the impression they were joining "merry-go-round" or "chama". It is submitted that this deception of employees is new and important evidence for consideration by the Court.

13. The Applicant Counsel submits that the said deception is not denied by the Respondent Union and it is an unfair labour practice contrary to Article 41(1) of the Constitution of Kenya 2010.

14. It is submitted that the Applicant seeks clarification of the Court's judgment as pertains the legal threshold for recognition within the ambit of Section 55(1) of the said Act. Counsel urges that it is recognition that the Applicant is disputing due to the new evidence which is that the Claimant did not adhere to fair labour practices.

15. As to the issue that the Applicant does not have union members within its employment they state that due to the unfair labour practices cited above, the Union does not have members within the Applicant.

16. That the Applicant is dissatisfied with the wording of paragraph 2(a) of the model recognition agreement which has been attached as Exhibit "BM4" in the supporting affidavit of Banice Mburu sworn on 23.6.2017 which is to the effect that:

***"The Company (Applicant) affords full recognition to the Union as a properly constituted and representative body and the sole organisation representing the interest of workers who are in the employment of the Company in all negotiable matters...." Such recognition should take the account of the principal of industrial trade unionism."***

17. That the Applicant holds issue with the above provision for the reasons that:

***a. The said recognition is premised solely on the current employees present in the employment of the Applicant.***

***b. The said employees are deemed to have been fairly recruited hence the recognition of the Claimant as the sole labour organisation representing their interest.***

***c. There is also the presence of a disconnect connotation between the wording of the Judgment of your ladyship as delivered on 18.1.2017 with what is being fronted under this paragraph 2(a) of the model recognition.***

18. The Counsel for the Applicant submits that there has not been any contempt of Court for the reasons stated in the application as in their view the doctrine of frustration will be visited upon the relationship between the Applicant and the Respondent, as the next question bound to come is the authenticity of negotiating a Collective Bargaining Agreement. They pray for the Application to be allowed as drawn.

19. On behalf of the Respondent Union it is submitted that the grounds relied on do not form new and important matter which after the exercise of due diligence was not within the Respondent's knowledge or which they could not produce at the time the order was made.

20. That the Applicant claimed that they were not aware that recruitment was ongoing to which the Respondent Union states that they did not require permission to conduct a recruitment exercise. Further that the Respondent/Applicant has not cited any law or any evidence that compelled the Claimant to notify them of the recruitment exercise.

21. It is also submitted that the allegation that the Applicant's employees were duped into joining "merry-go-round" and "chamas" is untrue as the check off sheets clearly indicated the Respondent union's name and as such there was no deception.

22. The Respondent Union submits that the alleged revocation of union membership happened long after the Court's judgment and the instant application is therefore an afterthought.

23. It is also submitted that the judgment does not cause injustice to the Applicant as the employees in the check off sheets are not disputed as members of the applicant and due process was followed showing that the Recognition agreement was signed wilfully. They pray for the application to be dismissed with costs.

24. The Respondent Union prays for the Contempt Application dated 6<sup>th</sup> March, 2017, be allowed as Courts orders have been disobeyed and the Court does not pronounce itself in vain.

25. I have examined the submissions and averments of both parties. Under Rule 33 of the Employment & Labour Relations Court (Procedure) Rules 2016, this Court can review its own orders and judgements under the following circumstances:-

***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.*

*2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.*

*3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.*

*4) The Court shall, upon hearing 0an application for review, deliver a ruling allowing or dismissing the application.*

*5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.*

*6) An order made for a review of a decree or order shall not be subject to further review”.*

26. The Applicant/Respondents aver that they are relying on new and important matter upon which this Court should consider to review its Judgement of 18/1/2017. The new matter is the fact that the employees were cheated to join the union on the pretext that they were joining a merry-go round or “chama”.

27. This is a fact deponed to by the Respondents. The employees who were allegedly lied to into joining the union have not submitted any affidavits to that effect. The submissions by the Respondent is tantamount to making evidence from the bar which is not allowed.

28. From the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules I do not find any new matter or fact which is presented to me and for this reason there is no ground that warrants review of this Court’s judgement.

29. I decline to allow the application as prayed and I dismiss it accordingly.

30. Costs to the Claimant Respondents.

Dated and delivered in open Court this 15<sup>th</sup> day of March, 2018.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Mureithi for Applicant – Present

Respondents – Absent