



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBIA**

**CAUSE NO. 24 OF 2001**

**(Before Hon. Justice Hellen S. Wasilwa on 27<sup>th</sup> April, 2018)**

**KENYA UNION OF DOMESTIC, HOTELS,**

**EDUCATIONAL INSTITUTIONS, HOSPITALS**

**AND ALLIED WORKERS (KUDHEIHA WORKERS).....CLAIMANT**

**-VERSUS-**

**WINDSOR GOLF & COUNTRY CLUB .....RESPONDENT**

**ALEXANDER MWANGI GICHIA & 21 OTHERS....INTERESTED PARTY**

**RULING**

1. The application before Court is one dated 2<sup>nd</sup> October 2017 brought under Section 12 of the Employment and Labour Relations Court Act, Section 1A,1B and 3A of the Court Procedure Act and Rule 17 of the Industrial Court Rules 2016 seeking orders that:

- a. The Application be certified as urgent, be heard exparte and service be dispensed with in the first instance.***
- b. The Court be pleased to vary, review or set aside the orders of 10<sup>th</sup> July 2017 by the Honourable Lady Justice Helen Wasilwa by vacating the scheduled date of the judgement of 9<sup>th</sup> October 2017 to enable the Respondent to re-open its case pending inter parties hearing of his application.***
- c. The Court be pleased to vary, review or set aside the orders of 10<sup>th</sup> July 2017 to enable the Respondent to re-open its case prior to the determination of this matter.***
- d. The Court grant any other order they mat deem fit to grant.***
- e. Cost be in the cause.***

2. The Application is supported by the Affidavit of one Marcella Oloo and premised on the grounds that:

- 1. The Respondent has participated in these proceedings all along but owing to inadvertent error there was no attendance on the part of Counsel for the Respondent on 10<sup>th</sup> July 2017 and as a result a judgement date was given based on inaccurate information presented to the Court.***
- 2. The Respondent ought not to suffer as a result of human error on the part of the Counsel.***
- 3. In the interest of Justice that the same be allowed.***

3. The Claimant has opposed the Application by filling a Replying Affidavit wherein he avers that the Court was not misled when the Applicant decided to absent themselves on 10<sup>th</sup> July 2017 since Counsel on record was present in Court when the date was taken and the Applicant/Respondent admits that this suit was indeed conversed inter-parties with both Claimant and Respondent's witness giving viva voce

evidence before Justice Chemuttut as he was then and a ruling was issued on 10<sup>th</sup> December 2003 for filing written submissions if any to enable final disposal of the matter.

4. The Claimant further avers that if it is true that the Applicant filed an application for recusal of Justice Chemuttut as he was by then in High Court Misc Application 1689 of 2003 and failed to prosecute to date 14 years down the line then it would be gross abuse of legal process to entertain this Application as equity does not aid the indolent, the intent of this application is to further delay dispensation of justice as and subject the Claimant member to further suffering which they have endured for unreasonably long duration and urge the Court to dismiss this application with cost to the Claimant/Respondent.

5. The Claimant/Respondent in their submissions submit that the Respondent/Applicant was present in Court on 2<sup>nd</sup> March 2017 when the Court issued direction to have the Interested Party be served with the claim and matter be mentioned for directions on 10<sup>th</sup> July 2017, but unfortunately the Respondent/Applicant willfully elected to absent herself from attending the Court on the said date hence the Court proceeded with directions for submission and consequent judgement.

6. They also submit that the parties settled the Judicial Review out of Court on 4<sup>th</sup> October 2006 which is not misleading, but that the Applicant has not presented an iota of evidence to prove the averment as to why the Applicant did not attend Court on 4<sup>th</sup> July 2017. They submit that the Court relies on the doctrine of *Vigilantibus, non dormientibus, jua subveniunt* which presupposes that equity aids the vigilant and not the indolent and therefore not to entertain a stale demand by the Applicant.

7. They cited the case of **Ephrain Kanuthu Mwangi vs Esther Wangari Kariuki (2005) CA 333**, where the Court of Appeal at Nakuru found that the dispute which had been in Court for 12 years need to be brought to rest. Thus this therefore means that granting the Applicant prayers would only mean further delay after the inordinate delay on their part and they humbly submit that the Claimant will not be prejudiced in any way by the delivery of the judgement since they did not cross-examine the expert witness called by the Claimant, which was deliberate and intentional and there are no any compelling reasons for their failure.

8. In their submissions, the Respondent/Applicant stated that the Court's power to grant a review is pursuant to Rule 33 of the Employment and Labour Relations Rules. They aver that in determining whether sufficient grounds have been raised the Court should look at the issue of non-attendance on 10<sup>th</sup> July 2017 as it was a genuine mistake on the part of the advocate and the consequences therefore ought not be visited upon the Respondent.

9. They submit that re-opening of the case is a discretionary matter and that it trite law, that these powers are enshrined in Section 3A of the Civil Procedure Act which empowers Courts to do all that is necessary to prevent abuse of the process of the Court and in doing so allow the Applicant/Respondent to bring in testimony and information that is crucial in the determination of this matter on its merits.

10. I have examined the submissions of both parties. The reason the Applicant/Respondent seeks for review of the order closing its case and setting it for judgement is that of mistake on their part.

11. This is as provided for under Rule 33 of the Employment & Labour Relations Court (Procedure) Rules, which gives grounds upon which the Court can grant orders for review.

12. It is however worth noting that on 2/3/2017, some Interested Parties were enjoined in this claim. The Interested Parties have never participated in the case and the Respondent confirmed that they had not been served on 19.6.2017. For this reason, proceeding to deliver a judgment in this case without taking into consideration the interests of the Interested Parties would be an error. I therefore allow the application by the Respondent and allow the re-opening of this case for hearing.

13. Costs in the cause.

**Dated and delivered in open Court this 27<sup>th</sup> day of April, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Maina holding brief for Tonge for Claimants- Present

Mutembei holding brief for Oloo for Respondent