



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1788 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 30th May, 2018)

KENYA POWER & LIGHTING

COMPANY LIMITED.....CLAIMANT

VERSUS

KENYA ELECTRICAL TRADES &

ALLIED WORKERS UNION.....RESPONDENT

RULING

1. The Application before Court is one dated 6th July 2017 brought by the Respondent/Applicant under Certificate of Urgency and filed under Section 16 of the Employment and Labour Relations Court, Rules 33 and 38 of the Employment and Labour Relations Court Rules, and all other enabling Provisions of the Law seeking orders as follows:-

a. That, this application be certified urgent and heard on priority in view of its urgent nature and service of the same be dispensed with in the first instance.

b. That, leave be and is hereby granted to the firm of M/s. KTK Advocates, to take over the conduct of this matter on behalf of the Claimant herein in place of Federation of Kenya Employers and the Notice of change of Advocates annexed hereto be deemed as duly filed and served upon the payment of requisite court fees.

c. That, this Honourable Court be pleased to review, vary and/or set aside the Judgement and Orders of hon. Justice M. Mbaru delivered on 24.04.2017.

d. That, this Honourable Court be pleased to order stay of execution of the Judgement and Orders of Hon. Justice M. Mbaru delivered on 20.04.2017 pending hearing and determination of this application, inter parties.

e. That, the Application be at liberty to apply for further orders and/or directions as the Honourable Court may deem just to grant.

f. That, the costs of this application be provided for.

2. The Application which is supported by the Affidavit of Dr. Francis Kangure, the Respondent's Manager for Human Resource Services and is premised on the grounds that:

1. Judgement was entered by this Honourable Court on 20.04.2017.

2. It is necessary and in the interest of justice that leave be granted by this Court to the firm of M/s. KTK Advocates to come on record for the Claimant to enable the further prosecution of this matter on behalf of the Claimant.

3. Being aggrieved by the Judgement of this Court, the Claimant is applying for a review of the Judgement of Hon. Justice M. Mbaru delivered on 20.04.2017.

4. The implementation of the said Judgement will be onerous and problematic in light of the fact that the parties have subsequently negotiated four other Collective Bargaining Agreements for the years 2011/2012, 2013/2014, 2015/2016, fully implemented and concluded the same, which raises sufficient and pertinent issues to review, vary and/or set aside the said judgement delivered on 20/04.2017.

5. Even after the year 2011, parties have negotiated various aspects in subsequent Collective Bargaining Agreements where the Claimant/Applicant has given numerous concessions to the Respondent.

6. The Judgement dated 20.04.2017 purports to re-write contracts entered into between the parties herein with respect to the Collective Bargaining Agreements and it further seeks to open up freely negotiated, implemented and already concluded agreements.

7. That it is in the best interests of justice that this Honourable Court review, vary and/or set aside the said Judgement delivered on 20.04.2017.

8. The Claimant/Applicant is ready to provide any reasonable security and/or adhere to any directions that this Honourable Court shall order.

9. The Application had been made without any unreasonable delay.

10. This Application ought to be granted in the interest of equity, fairness and justice.

3. The Respondent filed a replying affidavit where they opposed the Application on the grounds that it lacked merit and it was meant to derail the implementation of the orders as issued. They averred that the Registration of the Collective Bargaining Agreement 2017-2020 did not in any way affect the implementation of the Judgement delivered on 20.04.2017 as the effective date of the Agreement was well stated as 1st January of each year.

4. The Claimant/Applicant did not respond to the Counterclaim as clearly set out on the Court record and judgment save what was contained in the statement of Claim filed by the federation of Kenya Employers and Affidavit of Ben Chumo of 21st October 2011.

5. They aver that the award on electricity allowance of Ksh 3,000 effective from 1st January 2011 and subsequent years to July 2017 be implemented without further delay as the Collective Bargaining Agreement 2017-2020 only settles on the interim an amount which had been from 2009/2010 Collective Bargaining Agreement.

6. They further aver that there is no basis or justification for the orders sought and it is only fair and in the interest of justice, that the Claimant/Applicant complies with the Court Orders and set in motion a process to have commuter allowance agreed upon as the application is bad in law and an abuse of the Court Process.

Submissions

7. The Applicants filed their submissions where they submit that they are aggrieved by the Judgment of Hon. Justice M. Mbaru delivered on 20.04.2017. The Respondent/Applicants seek for review as the implementation of the said judgment would be onerous and problematic in light of the fact that the parties had negotiated 4 other Collective Bargaining Agreements for the years 2011/2012, 2013/2014, 2015/2016, fully implemented and concluded which raised sufficient and pertinent issues to review, vary and/or set aside the said Judgment as the entire rationale of any judicial process is to enforce rights that have been violated by the other side. Judicial process is not designed or envisaged to give any party an advantage that is not justifiable.

8. The Respondent submit that the matter before Court revolved around the impasse reached by both parties while negotiating a Collective Bargaining Agreement which prompted the Respondents to call for an industrial action by way of a strike in the industry.

9. The matter was fully heard and determined when the Court delivered its Judgment in favor of the Respondent on 20.04.2017 which was in line with the principles set out at Section 60 and 70 of the Labour Relations Act as well as Sections 12 and 77 of the Employment and Labour Court Act. They further state that the Court has no legal basis of recalling the Judgment of 20.04.2017 which was legally delivered following Judicial process.

10. I have considered the averments and submissions of both parties. I will at the onset allow the firm of M/S KTK Advocates to come on record and take over the conduct of this matter given that there is no objection from previous lawyers on record.

11. That having been concluded, the Application is 2 fold – the first being issue of stay and secondly the issue of review. On these issues the law is clear that stay can be granted as provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:-

(2) “No order for stay of execution shall be made under subrule (1) unless:

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

12. On this issue, the Applicants have demonstrated that they came to Court without delay and are therefore properly before Court. The Respondent/Applicants should also demonstrate that they stand to suffer substantial loss where the orders sought are granted. The issue of security should also be considered.

13. The Applicants aver that the amounts being sought are colossal and as such they will suffer irreparable harm. They also aver that if the Application is not granted the judgement will be onerous and problematic in light of subsequent Collective Bargaining Agreements that the parties have concluded in 2011/12, 2013/2014 and 2015/2016, which have been implemented and concluded.

14. On this aspect the Respondents aver that the Collective Bargaining Agreement applies to a different period namely 2017/2020 and the judgment is in relation to the Collective Bargaining Agreement of 2010/2012.

15. In any case, it is true that the issues considered by Court relates to previous years. The implementation is only limited to that period. The Applicants have not demonstrated the difficulty in implementing the said judgment in respect of the Collective Bargaining Agreement of 2010/2012.

16. The Respondents/Applicants have however indicated that they are ready to offer any security as ordered by Court. What the Respondent/Applicant failed to tell Court is what the prayers sought are subject to. They have not indicated they have filed any appeal or intend to appeal the Court's judgement. In this respect it would not be proper to grant any orders of stay as such orders should be conditional upon an act or intended action by the Applicants.

17. On issues of Review, the law is also clear that this is where there is new evidence, where there is an error or record or for good cause.

18. Rule 33 of the Employment and Labour Relations Act (Rules) 2016 states as follows:-

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.

19. The Respondent have not explained any new or important matter they have now discovered nor pointed out an error that requires correction. In my view, the issues raised by the Applicants are issues subject to an appeal and this Court cannot in the circumstances make an order for review.

20. I find that the Application before me is not merited. I therefore dismiss it with costs.

Dated and delivered in open Court this 30th day of May, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ashubwe holding brief for Guserwa for Respondent – Present

Applicant Absent