



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 11 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th June, 2018)

NAHASON NDIAMAE.....1ST APPELLANT
JACKYLYNE NEKSESA NYONGESA.....2ND APPELLANT
MARK MATASI.....3RD APPELLANT
KIMSOP CHEPYEGON MATHEW.....4TH APPELLANT
BENSON SIMIYU.....5TH APPELLANT
EUNICE MASINDE.....6TH APPELLANT
INNOCENT OUMA ONYANO.....7TH APPELLANT
JAMES OTIENO ALUKWE.....8TH APPELLANT
DAVID MASIBO.....9TH APPELLANT
AGNETA L. IMBANYARA.....10TH APPELLANT

(All suing as the proposers of

THE KENYA UNION OF SECONDARY SCHOOLS NON-TEACHING STAFF)

VERSUS

THE REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

THE NATIONAL LABOUR BOARD.....2ND RESPONDENT

AND

THE KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS, HOSPITALS AND

ALLIED WORKERS.....INTERESTED PARTY/APPLICANT

RULING

1. The Application before Court is dated 17th November 2017 filed by the Applicants herein seeking review orders against this Court's judgment delivered on 19.5.2017 citing discovery of new and compelling facts/evidence.

2. The Application was filed under Certificate of Urgency and brought through a Notice of Motion filed under Section 33 of the Employment and Labour Relations Court (Rules) 2016 and all other enabling provisions of law.

3. The Application is based on the following grounds:-

a) THAT the Honourable Judge delivered Judgement on the 19th May, 2017 in favour of the Appellants.

b) The aforementioned Judgement was delivered without the Honourable Court having an opportunity to consider material evidence in the Applicants' possession since the Interested Party/Applicant herein was not aware of the existence of this suit prior to the delivery of Judgement and hence was not able to give crucial evidence for the Honourable Court's consideration.

c) THAT the Appellants who are the promoters of the proposed Union seek to recruit members from the Interested Party/Applicant's Union area of coverage for purposes of scuttling the Applicant's operations in the education industry/sector.

d) THAT the Applicant is of the opinion that the Honourable Court made an error that is capable of correction by allowing registration of a new union where there existed an already registered union.

e) THAT It is in the interest of justice that the Judgement delivered on 19th of May, 2017 be reviewed and be set aside and judgment be entered in favour of the Applicant.

4. The Application is also supported by the Affidavit of Mr. Albert Njeru who depones that this Court delivered a Judgement on 19.5.2017 in favour of the Appellants herein but without the opportunity of considering material evidence in the Unions' possession since they were not served nor made aware of the existence of this suit prior to the delivery of judgment and therefore were unable to give material evidence before this Court.

5. They aver that the Appellant Union is seeking registration of a splinter union whose activities are covered by their own Union's Constitution. That the Appellants who are promoters of the proposed Union seek to recruit members from the Interested Party/Applicants' operations in the education sector.

6. They aver that the compelling evidence in their possession which they did not have an opportunity to put before Court will prove that there is no purpose or need for the establishment of another trade union whose objectives are a replica to their own.

7. The 1st Respondent – the Registrar of Trade Union opposes this Application. She deponed that the Honourable Court had all the crucial evidence necessary for proper disposal of the matter before delivering its Judgement on 19.5.2017 in favour of the Appellants. That following that judgement, the Appellants' Union was duly registered by the 1st Respondent on 24.5.2017 and a Certificate of Registration No. TU/178 issued.

8. The Appellants also opposed this application. They aver that this is not a proper matter for review, that the application is bad in law and substantially without merit and should be best tackled by way of appeal.

9. Rule 33 of Employment & Labour Relations Court (Procedure Rules) states as follows:

“33. (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.

10. Under this rule, the parameters upon which a decree or order of this Court may be reviewed are set out. The Applicants state that the issue warranting review is the discovery of new and important matter/evidence, which this Court did not have in its possession when it delivered its judgement. The Applicants submit that the new material is their Constitution.

11. I note first that the judgment was delivered in this case in late May 2017. The Applicants filed this Application on 27.11.2017. This was not in the first instance filed within a reasonable period. The Appellant Union has since been registered and it cannot be destabilized at this late time.

12. Secondly, the matter being raised by the applicants are not matters that fall under review. Issues before Court are matters which can best be dealt with in an appeal as reviewing this Court's judgment would amount to this Court sitting on appeal against its own orders and judgement.

13. It is my finding that there is nothing reviewable by this Court and I dismiss the Application accordingly.

Dated and delivered in open Court this 28th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Nafula holding brief for Enonda for Applicants – Present

Kubai holding brief for Guserwa for Interested Party – Present

Odukenya holding brief for Oyugi for Registrar Trade Union – Present