



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.25 OF 2016

BAKERY CONFECTIONARY FOOD

MANUFACTURING & ALLIED WORKERS UNION (KENYA).....CLAIMANT

VERSUS

BIG BITE & CONFECTIONERS LIMITED.....RESPONDENT

RULING

The claimant, Bakery Confectionary Food Manufacturing & Allied Workers Union (Kenya) by application and Notice of Motion dated 14th February, 2018 made under the provisions of section 16 of the Employment and Labour Relations Court Act, 2014, Rule 32, 33(1)(a), (b) and (d), (3), (4) and (5) of the Employment and Labour Relations Court (Procedure) Rules, 216 and Rule 22 and 52 of the Civil Procedure Rules and seeking for orders that;

- a) *Pending the hearing and determination of the application herein and / or until further orders, this court be pleased to issue an order of stay of execution of the decree herein dated 1th [?] October 2017 and subsequent warrants of execution issued herein to Messrs Eshikoni Auctioneers dated the 2nd day of February 2018.*
- b) *The court be pleased to review and/or set aside the ruling herein delivered on the 20th of July, 2017, the subsequent decree issued herein on the 16th of October 2017 as well as all consequent proceedings emanating and/or arising therefrom.*
- c) *Upon setting aside of the said ruling as prayed above, this court be pleased to issue directions that this matter be heard and determined forthwith.*
- d) *Costs of this application be provided for.*

The application is supported by the annexed affidavit of **Danchael Mwangure** the General Secretary of the claimant union and on the grounds that there is an apparent mistake on the face of the record where the court proceeded to fix this matter for ruling and disposed of this suit by dismissing the same with costs vide ruling on 20th July, 2017 while the claimant was not given a hearing or given a chance to be heard in violation of natural justice. The matter had been fixed for mention for directions on the 21st April, 2017 and was set for ruling on 20th July, 2017 without the claimant being given a fair chance for hearing and have the matter being heard on its merits or considering the documents on record and this constitutes a fundamental error on the face of the record and warrants a review.

Other grounds in support of the application are that despite the matter being concluded vide the impugned ruling the matter has never come up for hearing or directions as to the given by the court as contemplated by the rules of the court. the claimant was denied constitutional rights under article 50(1) and thus there are sufficient reasons to warrant the setting aside of the ruling and stay execution of the decree and warrants obtained by the respondent and there be a review.

In the affidavit of Mr Mwangure he avers that on 23rd March, 2016 the court issued orders directing the County Labour Officer to conduct a ballot to verify the employees of the respondent who had joined the claimant union before the 1st July, 2016. There was a mention for directions on 22nd July, 2016 to confirm filing of the report by the CLO. The matter then came up in court on several occasions and on 21st April, 2017 when there was such a mention the court set the same for ruling on 20th July, 2017 which directions came as a shock as this matter has never been heard inter-parties to enable the claimant union voice its concerns on the dispute and on the balloting exercise as conducted by the CLO.

Upon the ruling of the court, the suit was dismissed. The respondent proceeded to have the costs assessed and a decree extracted and moved

the motions of execution. The warrants were served by registered posts despite the claimant setting out its physical office and this is prejudicial. There was no leave obtained to substitute service and there was an error apparent in the mode of execution and which should be stayed.

The claimant has been denied the right to a hearing and there will be irreparable loss and damage where the orders sought are not granted as this will lead to execution based on errors set out above.

In reply, the respondent filed a Replying Affidavit sworn by David Teti Advocate for the respondent and who avers that on 23rd February, 2018 the respondents was served with orders herein and the Notice of Motion which is an abuse of court process as it lacks merit. The suit herein was filed by the claimant and who noted address of service to be Chai House, 8th floor Koinange street and the application herein the address has been changed. Service of pleadings have been to the address the claimant had set out in the Memorandum of Claim and not as stated in the Notice of Motion.

Mr Teti also avers that the matter came up for hearing on 23rd March, 2016 where the claimant had its representative Mr Amalemba. The matter related to the recognition of the claimant by the respondent and the court directed parties to attend before the Labour Officer for a ballot to verify the employees of the respondent who had joined the claimant union and a report be filed with the court by 1st July, 2016. On 22nd July, 2016 the claimant representative remained absent on a date issued by consent and where the court directed hearing for 12th September, 2017 [29th July, 2016?]. The claimant was served at the stated address of service and for hearing on 29th July, 2016.

On the date set for hearing the claimant remained absent. A new date was allocated and the claimant served. Several other dates were allocated where the claimant remained absent. On 21st April, 2017 the claimant sent a representative and the court directed that a ruling to be read on 20th July, 2017 when the claimant remained absent. The claim was dismissed with costs.

Mr Teti also avers that the application by the claimant is an afterthought as all along they were aware of proceedings herein and opted to be absent. Despite service and notice that a ruling would be read, no action was taken until where the respondent had its costs assessed and execution process commenced.

The claimant also filed a Further Affidavit sworn by Daniel Amalemba and who avers that the operating law on service of pleadings is Order 5 Rule 3 of the Civil Procedure Rules, 2010 and Rule 12 of the Employment and Labour Relation Court Rules and the claimant being a registered trade union is deemed a corporate and service should be to its secretary, director of any principal officer. Such officers/offices must be served before electing service by registered post.

Mr Amalemba also avers that on 21st April, 2017 he was not able to attend court as he was indisposed and asked Mr Wachira to hold his brief when the matter came up for directions. On the due date the court directed parties that a ruling would be delivered. Such was contrary to Rule 25 where the court failed to hear parties and proceeded to read ruling. No directions had been issued on the hearing. The substantive dispute remains unheard.

Both parties filed written submissions.

In addressing the application by the claimant, the court has put into account the affidavits by the parties and the written submissions and the cited authorities. The issues which emerge are;

Whether the court should stay execution of the decree herein issued on 1th [...] of October, 2017 and the warrants of execution;

Whether the court should review and or set aside the ruling herein delivered on 20th July, 2017;

Whether the court should order fresh hearing of the suit herein.

The issues set out above for determination are interfaced in the presentation and submissions by the clamant as such follows the ruling of the court on 20th July, 2017 where the court in its ruling dismissed the claimant's case with costs.

The application is premised on the grounds that the court delivered ruling and dismissed the claimant's case with costs before giving the claimant a chance for hearing which was in violation of the right to fair hearing and contrary to article 50 of the constitution, 2010.

As submitted by the claimant in the case of **Savings & Loan Kenya Ltd versus Odongo [1987] eKLR**, the right to a fair hearing is fundamental and should be secured for all parties before the court. article 50 of the Constitution, 2010 gives the right to a fair hearing to parties before court. also to ensure parties are given the right to be heard, in the case of **JMK versus MWM & Another [2015] eKLR** the Court of Appeal held that in terms of section 16 and Rule 32 of the Court Rules, then a party has the right to seek for review of court orders so as to conform to the rights secured under article 50 (1) of the Constitution, 2010.

However the court in addressing itself to the question of stay of any decree issued and also in addressing an application seeking a review of its orders, the guiding principles are set to ensure fairness and justice to all parties in any given case. Every case must be addressed on its merits.

Rules 21 and 22 of the Employment and Labour Relations Court (Procedure) Rules,2016 has given the court powers to on motion by the parties or on its motion to isolate the issues in dispute based on the pleadings, affidavits and submissions by the parties and even where a party is absent to proceed and make a determination. The rationale is to be found under Rule 4 read together with Rule 13 where a claim and

defence must be filed and parties are required to attach all relevant documents and evidence to be relied upon at the hearing. Seized with a suitable case for determination based on the application of these Rules, nothing stops the court from delivering judgement or ruling. See the cited cases by the respondent in **Josphat Muthui Muli versus Ezetec Ltd [2014] eKLR** where the court declined an application for review where it was found there was no sufficient cause to justify a review all factors put into account. Similarly in the case of **National Bank Ltd versus Ndungu, Civil Application No.211 of 1996** the Court in addressed what errors apparent on the face of the record should entail held that such must be self-evident and should not require an elaborate argument to be established.

A party also should also be able to isolate what matters ought to go on appeal and what should essentially be addressed through a review. In this court, reference is Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

In this case why is the stay of execution necessary?

The claimant's rationale is that the execution process has commenced and warrants of attachment issued by the auctioneers following the ruling of the court when they were absent from court following service by registered post.

I have gone through the record and note that the claim was filed on 2nd February, 2016. The substantive orders sought by the claimant were that a declaration be issued directing the respondent to execute the Recognition Agreement and also an order be issued directing the respondent to commence deduction of union dues together with all accrued union dues from its account when such became due and in accordance with section 48 of the Labour Relations Act, 2007.

On this basis the parties attended court on 23rd March, 2016 and the court noting the issues in dispute related to the recognition of the claimant by the respondent directed the County Labour Officer to conduct balloting to verify employee of the respondent who have joined the claimant and file a report. These thus defined the issue(s) before court as the report by the County Labour Officer was to address a substantive issue between the parties, that of recognition.

On the mention date to address the report by the County Labour Officer, the claimant was absent on 22nd July, 2016.

On 21st April, 2017 when the court mentioned the matter, both parties were in attendance. The respondent presented that the County Labour Officer had filed a report on 25th July, 2016. The claimant's representative noted that Mr Amalemba was the claimant's representative and thus should be given a mention date to address the court. the court proceeded and directed for a ruling date on 21st July, 2017.

On the court ruling, the court has set out the issues in dispute as noted above. The court has further outlined the procedures undertaken in addressing the issues in dispute, the various dates parties attended court and what action was taken.

Fundamentally, in the court ruling, the report of the County Labour Officer is taken into account and the outcome of directions issued on 23rd March, 2016. Such directions are not faulted by the claimant. No review or appeal has been lodged.

The court thus noting the report by the County Labour Officer held that the claimant had not attained the status for recognition by the respondent. such are based on facts verified by the exercise of the balloting undertaken on the shop floor. The substantive issue thus addressed, the court proceeded to dismiss the claim with costs.

Stay of execution applied for herein on the grounds that the claimant was not given a hearing and noting the procedures and directions of 23rd March, 2016 lacks basis. The court has since applied the facts of the case, dealt the substantive issue and made a finding.

On the issue of review of the court ruling, as set out above, and based on Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 a review can only arise in a case where there is a new fact or matters; where there is an error apparent on the face of the record, where parties require a clarification; or on sufficient cause. As set out above, the substantive issue in dispute was isolated on 23rd March, 2016 and directions taken, such has since been addressed vide ruling on 20th July, 2017.

In the application by the claimant seeking a review, I do not find any new matter raised that were not in their possession at the time the ruling was read and which the court filed to take into account to justify the application for review. The error stated to exists in terms of the claimant alleged right to a fair hearing, such right was secured by the court directing parties to go for balloting on the shop floor where matters of recognition were to be addressed and the court based on the provisions of section 54 of the Labour Relations Act, 2007 has since made a finding of law backed by the facts. As no clarification is required, such principle does not apply herein. Equally I find no other sufficient cause to warrant any review of the court ruling and to order fresh hearing of the suit.

Where the claimant's status with the respondent has changed in terms of attaining recognition, such is a matter after the fact of the ruling on 20th July, 2017 and which should not justify taking parties back to the claim filed on 2nd February, 2016.

Accordingly, application dated 14th February, 2018 is hereby found without merit. Application is hereby dismissed with costs to the respondent.

Delivered in open court at Nakuru this 14th day of June, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant: