



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO. 1724 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL FOOD AND

ALLIED WORKERS UNION.....CLAIMANT

VERSUS

KAPA OIL REFINERIES LIMITED.....RESPONDENT

RULING

The Respondent initially filed its Application dated 7th July 2017 and thereafter filed an amended Application dated 24th July 2017 under certificate of urgency. The amended application seeks the following orders:

1. The service of this application be dispensed with in the first instance and the same be certified urgent and heard *ex-parte* in the first instance due to the urgent nature of the reliefs sought herein;
2. This Honourable Court be pleased to stay the execution and/or the implementation of the decree dated 3rd July 2017 issued by the Honourable Court pursuant to the award of Hon. Justice Murtaza Jaffer dated 22nd December 2004 in Cause No. 25 of 2004 and all other consequential orders pending the hearing and determination of this application inter-partes.
3. The decree issued by the Honourable Court dated 3rd July 2017 pursuant to the award of Honourable Justice Murtaza Jaffer dated 22nd December 2004 in Cause No. 25 of 2004 and all other consequential orders herein be reviewed, set aside and/or varied.
4. In the alternative to the prayer (3) above, the Honourable court be pleased to direct that the grievants need not be reinstated to their jobs and positions by the Applicant provided they are paid in accordance with the alternative award of the Honourable Justice Murtaza Jaffer of 22nd December 2004.
5. The Costs of this application be in the Cause.
6. Any other orders that meet the cause of justice.

The Application is supported by the Affidavit sworn by Milan Nemchand Shah on 25th July 2017 on amongst the following grounds that;

1. Order 1 in the Decree issued by the Court on 3rd July 2017, in line with the award of Honourable Jaffer, requires the reinstatement of the grievants into their positions as at the time of their termination on 20th December 2002.
2. The import of the said decree is that the Decree is that the grievants would be reinstated back to their positions after a period of 15 years from the date of their termination.
3. It is impractical to reinstate the grievants as their positions no longer exist and that the Respondent has since engaged third party companies in outsourcing for labour.
4. The law does not entitle the grievants the remedy of reinstatement to their employment where a period of three years has lapsed since their termination.

The Claimant in opposition to the Application filed its Replying Affidavit sworn by Charles Kitheka on 11th October 2017. He states that the

delay had in the reinstatement of the grievants has been occasioned by the Respondent.

The Respondent in the Application argued that the award of Justice Murtaza Jaffer having being issued on 22nd December 2004, Order 1 in the Decree cannot be implemented 15 years after the termination of the employees. It further stated that Section 12 (3) (vii) of the Employment Act provides that Court may only issue an order for reinstatement within three years of dismissal.

According to the Respondent the impracticability of the reinstatement of the grievants is that it has outsourced third party companies to provide services and it would not only be impossible to terminate the services offered by the third party companies but also a breach of third party companies. In addition, that the grievants are incapable of performing the duties fifteen years later. The Claimant on its part averred that the delay in the compliance with the orders of the Court was occasioned by the Respondent and that it would the proceedings instituted by the Respondent.

Though the Respondent averred that it has made payment to the grievants as ordered in the alternative, the Claimant alleged that the amount paid was made prior to the delivery of the award. Therefore, the Respondent has not made any payment of the decretal amount.

The Respondent relied on the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** on determining the practicability of reinstatement and the provisions of Section 12 (3) (vii) of the Employment Act which provides for reinstatement within 3 years from the date of termination. The Respondent further submitted that in considering the period after termination from employment it should not be about the period from when the initial judgment is issued, rather than the period after all mechanisms of review and appeal have been exhausted. The Claimant on its part argued that Section 12 (3) of the Employment Act cannot be applied retrospectively as the award for reinstatement was made within 2 years of the filing of the dispute and that the Applicable law was the Trade Disputes Act (now repealed). Therefore, the Respondent's failure to reinstate the grievants or make any payment amounts to disobedience of court orders.

In submitting that there is sufficient reason to warrant an order for review, the Respondent relied on the case of **MBURU MUTHOKA -V- CHAIRMAN KINANGOP LAND CONTROL BOARD, SECRETARY CENTRAL LAND CONTROL BOARD, ATTORNEY GENERAL NJUNGE NJENGA [2004] eKLR** and **DELKAN ENTERPRISES LIMITED -V- MASAKU COUNTY COUNCIL [2008] eKLR** to demonstrate that the court has unfettered discretion to review orders and that it would suffer great injustice and hardship if the ruling is not reviewed.

The Claimant in its written submissions argued that the Respondent had applied for review of the award in Misc. Civil Application No. 8 of 2005 and therefore the Application is res-judicata by virtue of the High Court having pronounced itself on the Application. The Claimant relied on the case of **JOHN FLORENCE MARITIME SERVICES LIMITED AND ANOTHER -V- CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE AND 3 OTHERS [2015] eKLR** in which the Court of Appeal held that the ingredients of *res judicata* must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same and the parties should be the same and the claim should have been determined by a competent Court. In addition, the Claimant submitted that the Respondent's Application does not meet the conditions for review as held in **Kipkorir v Langat & Another (2008) 3 KLR**.

Determination

1. Whether the application for review is res judicata

It is not a contested fact that the respondent herein was dissatisfied with the award of Hon. Justice Murtaza Jaffer and filed Judicial Review Application No. 18 of 2005 which was dismissed in the judgment of Dulu J. delivered on 6th July 2012.

Res judicata was explained in the case of **JOHN FLORENCE MARITIME SERVICES LIMITED AND ANOTHER -V- CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE AND 3 OTHERS** (supra).

A judicial review application is not the same as a review and an application for review of a decree or order cannot be affected by *res judicata*. A review is not another suit. It is an application to either amend or set aside a decision.

I do not find the plea of *res judicata* applicable in the present circumstances.

2. Whether this court can review the orders issued pursuant to the award of Hon. Justice Murtaza Jaffer of 22nd December 2004

The respondent in its application further seeks for an order for review. Rule 33 (1) and (6) of the Employment and Labour Relations Court Rules provides—

(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)

(3)

(4)

(5)

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

The decree was issued by this court on 3rd July 2017 and the Application seeking review and stay of execution was filed on the 10th July 2017 and subsequently amended and filed on 25th July 2017. The period in which the Application was filed is 7 days from the date the Decree was issued. I take the view that there was no delay in the filing of the Application. An Application for review of a Decree is restricted on the grounds which include there being any sufficient reason. In **Francis Origo & Another Vs Jacob Kumali Mungala C.A Civil Appeal No. 149 Of 2001 (2005 2 K.L.R 307**, the Court of Appeal held:

“In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the applicant must make the application for review without unreasonable delay”.

The respondent’s main reason for seeking a review of the decree is that it would be impractical to reinstate the grievants and it would require the respondent to train the 106 grievants afresh. This amounts to sufficient reason to review the decree issued on 3rd July 2017. In **Republic v Public Procurement Review Board & 2 Others [2018] eKLR**, the High Court held;

*“Review can also be allowed for any other sufficient reason. The expression ‘any other sufficient reason’ means a reason sufficiently analogous to those specified in the rule... My finding is also fortified by the holding in the case of **Evan Bwire vs. Andrew Nginda** where the court held that ‘an application for review will only be allowed on very strong grounds...’.*

Despite the claimant submitting that the respondent had filed a notice of appeal dated 24th April 2017 the notice of appeal was not produced as evidence before the court as the issue was only raised in its submissions.

3. Whether the Grievants can be reinstated to employment in compliance with the decree issued on 3rd July 2017 pursuant to the Award of Honourable Justice Murtaza Jaffer of 22nd December 2004

The award of Justice Murtaza Jaffer dated 22nd December 2004 in Cause No. 25 of 2014 was issued prior to the enactment of the Employment Act No. 11 of 2007. The award ordered the Respondent to immediately put into effect the process of reinstatement of the grievants to their original positions as at the date of their termination. Section 15 (1) of the Trade Disputes Act, now repealed, provided:

“In any case where the Industrial Court determines that an employee has been wrongfully dismissed by his employer, the Court may order that employer to reinstate that employee in his former employment, and the Court may in addition to or instead of making an order for reinstatement, award compensation to the employee:

Provided that such compensation shall not exceed -

(i) in a case where reinstatement is ordered, the actual pecuniary loss suffered by the employee as the result of the wrongful dismissal;

(ii) in any other case, twelve months monetary wages.

Section 15 of the Trade Disputes Act did not provide any limit within which an order for reinstatement may be made as currently provided under Section 12 (3) (vii) of the Employment Act. Therefore, Section 12 (3) (vii) of the Employment Act cannot be applied retrospectively to bar the grievants from reinstatement. In addition, Paragraph 2 (4) of the Fifth Schedule of the Labour Relations Act provides that any trade dispute referred to the Industrial court before the commencement of the Act, revision or interpretation of an Award would be determined in accordance with the Trade Disputes Act.

In **Kenya Ports Authority v Andrew Ochieng Odongo [2017] eKLR** the Court of Appeal held;

*“It must be borne in mind as we consider these two questions that the suit giving rise to this appeal was instituted in 2006 before the coming into force of the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011 but the hearing and determination took place between 2012 and 2015. We are of the view therefore that the dispute was governed by the repealed Employment Act as the current labour laws cannot be applied retrospectively. We are guided in arriving at this by the Supreme Court decision in the case of **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others** Civil Application No. 2 of 2011 in which the principle of retrospectivity of a statute was explained this way:*

“(61) As for non-criminal legislation, the general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”

We find no express intention in the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011, for their retrospective application. As a matter of fact the Fifth Schedule paragraph 2 (4) of the Labour Relations Act expressly provides, inter alia that any trade dispute that arose before the commencement of the Act and any summary dismissal that took place before the commencement of the Act would be determined in accordance with the provisions of the repealed Trade Disputes Act.”

The Respondent argues that it would be impractical to reinstate the grievants who were terminated 15 years ago. The reasons advanced by the Respondent include the current engagement by the Respondent with third party companies in outsourcing for services and the need to train the grievants afresh on the skills required. The Claimant on the other hand averred that there was no proof that the grievants are incapable of performing their duties.

Taking into account that it has been 15 years since the grievants were terminated, it would be impractical for the Respondent to reinstate the grievants due to obvious impact of change on the organization over the years including both internal and external factors. The Respondent stated it has since embraced a system of outsourcing of labour hence the services rendered by the grievants are rendered by third party companies a fact that is not denied by the claimant. In any instance, the Respondent in the most likely of situations has over the years undertaken measures to fill the grievants positions to ensure that it is still in operation. Reinstatement of the grievants would therefore affect other parties besides requiring the Respondent to train the grievants on current market and professional practices. In **Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 Others [2014] eKLR** the Court of Appeal held:

*“One of the factors to be considered in determining whether or not to order reinstatement is practicability. In **New Zealand Educational Institute v. Board of Trustees of Auckland Normal Intermediate School 16** the New*

Zealand Court of Appeal stated defined what practicability means: “Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.”

With regard to when it is practical to order reinstatement, it stated:

“Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship.”

Practicability in these circumstances includes reasonableness, which invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned. This includes consideration of the prospective effects of the order of reinstatement, not only upon the individual employer and employee in the case but also upon the other affected employees of the same employer and perhaps upon third parties.

However, despite the impracticality to reinstate the grievants, the award and consequently the decree provides that in the event a grievant was no longer willing to work for the Respondent they would be entitled to the payment of their terminal dues. It is disputed whether the Respondent made any payments to the grievants with the claimant alleging that the payment referred to by the Respondent was made prior to the award. However, payment of the dues is the practical opinion in complying with the award and the Decree issued on 3rd July 2017 since even on the face of it, it would be difficult for the grievants to be integrated into the work place which must have undergone changes over the years. Besides, the Respondent is willing to make payment as ordered in the alternative.

In **OMUNYOKOL V. ATTORNEY GENERAL (Civil Appeal No. 06 of 2012) (2012) UGSC 4 (8 April 2015)** the Supreme Court of Uganda held;

“The appellant was dismissed on 8th June 1998 and the High Court delivered its judgment on 9th March 2010, a lapse of 13 years. During this period many things had changed in terms of posting and promotions, and it would have been difficult to find an appropriate placing for the appellant. As the appellant himself testified, some of his colleagues were now occupying higher posts. What then would become of him? Further, the Court of Appeal delivered its decision on 29th March 2012 and this appeal was heard on 10th September 2014. The appellant who was born in 1961 is now 53 years of age and would have to retire in seven years' time, on reaching the retirement age of 60 years.

In conclusion, I am unable to fault the Court of Appeal for upholding the order of the trial Judge not to reinstate the appellant in his employment, I find that the two Courts below were justified in holding that the most appropriate remedy for the appellant was the award of damages to compensate him for the loss of his employment. Accordingly, I find no merit in these grounds of appeal which should fail.”

The award ordering the reinstatement of the grievants was made two years after their termination. Hence, the decree issued on 3rd of July 2017 was pursuant to the award of Justice Murtaza Jaffer. It would therefore prejudice the grievants should they be deprived to enjoy the award which has been curtailed by the series of lengthy litigation in this matter.

Conclusion

It is not in dispute that the claimants have a valid award in favour of the grievants. The award has not been set aside or varied. The grievants are therefore entitled to the fruits of the award, which they have been prevented from accessing by the respondent.

The court can however not ignore the fact that the respondent has a constitutional right to pursue its case to the highest level, and that it should not be blamed merely because it exercised its constitutional right to file the Judicial Review Application.

The Judge and members of the court in their wisdom foresaw the possibility of reinstatement not being practical in certain circumstances and made provision for the same by way compensation when it awarded as follows –

1. The respondent immediately put into effect the process of reinstatement of the grievants and each of them to their original jobs and positions as at the date of their termination;
2. The Respondent do pay to the Grievants to each of them compensation amounting to 6 months' of their full wages inclusive of house allowance and other allowances;
3. The parties do forthwith and within twenty-one (21) days of the date of this Award meet under the conciliation of a Ministry of Labour official of agree on the modalities for a return to work of the aforesaid Grievants;
4. In the event that a particular Grievant no longer wishes to work for the Respondent, the Respondent do pay to such employee the following:
 - a. All outstanding wages, leave pay and allowances as provided for in the CBA between the parties;
 - b. Pay in lieu of notice in accordance with Clause 11 of the CBA;
 - c. Gratuity in accordance with Clause 26 of the CBA;
 - d. Twelve (12) months' wages by way of compensation.
5. We further order that the Ministry of Labour investigate compliance by the Respondent with the labour laws (wages regulations as well as healthy and safety requirements) in respect of the casual employees employed either directly by the Respondent or through sub-contractors or other agents. A report of the Ministry's investigator be produced in Court within 45 days.
6. All sums already paid by the Respondent be taken into account in the process of implementation of this Award by the parties.

Taking into account the alternative Order 4 in the award and the respondent's willingness to pay the amount, I would review the decree thus:

1. That the respondent do pay to the grievants compensation amounting to 6 months of their full wages inclusive of house allowance and other allowances;
2. That the respondent do pay each grievant the following,
 - a) All outstanding wages due from the date of termination to date of **judgment** leave pay and allowances provided for in the CBA between the parties.
 - b) Pay in lieu of notice in accordance with clause 11 of the CBA.
 - c) Gratuity in accordance with clause 26 of the CBA.
 - d) Twelve (12) months wages by way of compensation based on gross monthly pay.
3. All payments attract interest from date of award.
4. That all sums already paid by the respondent to be taken into account in the process of implementation of this award by the parties.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE