REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO. 2145 OF 2016

KENYA UNION OF HAIR AND BEAUTY SALON WORKERS....CLAIMANT

VERSUS

BLACK BEAUTY PRODUCTS LTD.....RESPONDENT

AND

KENYA SCIENTIFIC RESEARCH INTERNATIONAL & TECHNICAL

INSTITUTIONS WORKERS UNION.....INTERESTED PARTY

RULING

INTRODUCTION

1. On 21st February 2018, the court allowed the request by the parties to consolidate this suit with ELRCC No. **1041 of 2013**, **1683 of 2014**, **1690 of 2014**, and **1579 of 2014** because the dispute in all the five suits is refusal by the respondent to recognition of either of the rival trade unions. By further consent the parties agreed to dispense with the hearing of oral testimonies and instead opted to dispose of the suit by written submissions. Consequently, the Court directed claimant in this suit to file and serve her submission within 14 days from 21.2.2018, and the 1st Respondent and 2nd Respondent/Interested Party had 14 days after service by the Claimant herein to file and serve their submissions. The Court also directed that submissions would be highlighted on 2nd May 2018.

2. On 2nd May 2015 parties attended court none had filed her submissions. The respondents contended that they could not file any submissions because the Claimant had failed to serve them as directed by the court. The Claimant sought leave to file its submissions within 2 days which was granted on the condition that her suit shall stand dismissed automatically should the Claimant fail to file her submissions within the 2 days. The respondents were to file their submission within 14 days after service by the claimant and the suit was rescheduled for mention on 14.6.2018 to confirm compliance.

3. The claimant failed to comply with the court directions given 2.5.2018 and on 14th June 2018, when the court came up for mention, the court made observation that the suit was dismissed automatically after the lapse of the 2 days leave granted on 2nd May 2018. The claimant was aggrieved and filed this application on 30th August 2018 through another lawyer seeking the following orders:

a) That leave be granted to Macharia Burugu & Company Advocates to come on record for the Claimant in place of Nyabena Alfred & Company Advocates.

b) That the Court be pleased to review and/or vary its decision of 14th June 2018 dismissing the Claimant's suit.

c) The Court be pleased to reinstate the suit for hearing on its merits.

d) Costs be provided for.

4. The Application is supported by the Affidavit of Cecily Mwangi, the Secretary General of the Claimant, and is based on the following grounds:

i. The Claimant wishes to engage the services of a new firm to have the conduct of the suit.

ii. The suit has been dismissed which in law constitutes a final judgment necessitating leave before the Claimant can seek alternative representation.

iii. The matter was dismissed upon the failure by outgoing counsel to file written submissions in time as ordered by the Court and the failure was without the knowledge or involvement of the Claimant.

iv. The Counsel further delayed the releasing of the file to enable the Claimant to seek alternative representation.

v. Submissions have however been filed by all the parties and therefore there will be no prejudice to the Respondents.

vi. The mistake was that of Counsel and is excusable and should not be visited upon the client.

vii. It is in the interest of justice that this Application be allowed as the suit raises weighty issues *inter alia* to do with rival Unions claiming members in the Respondent and employees' right to collective bargaining. That the issues are still alive and if left unresolved it will result in conflicts, lack of clarity and confusion to the unions herein, employees, the Respondent and other employers in the beauty industry as regards the proper union for the industry noting that several cases raising this issue have been consolidated to be determined in this cause. The issues raised in the suit affect not just the parties to the suit but also other parties.

1st Respondent's Case

5. On 13th September 2018, the 1st Respondent filed its grounds of opposition dated 10th September 2018. Which grounds are that:

i. The Application lacks merit, is hopelessly incompetent and ought to be dismissed with costs.

ii. The Applicant's Advocate had more than ample opportunity to file submissions having been indulged by the Court on two occasions. On the first, the Applicant's Advocate requested 14 days which were accorded to him and on the second, he requested more time to which the court accorded him 2 days together with an order informing him that failure to comply would result with the suit standing as dismissed.

iii. The suit was dismissed and the court stood *functus officio*. The Applicant is therefore asking the court to sit on Appeal from its own decision. The Honourable court lacks jurisdiction in this matter.

iv. That the orders as sought in the Application are incapable of being granted because the orders being sought to be reviewed have not been annexed to Application and as such the Application is fatally defective.

v. That the Claimant has alleged lack of information from its former Advocate as the reason for the delay in presenting the same. This appears false as nothing in law prevents the Applicant from seeking alternative representation from any other law firm. Further, the existence of a consent on record from Nyabena & company Advocates clearly shows that there was and is nothing but willingness from his end.

vi. That there is no mistake of counsel capable of being levied against the Applicant's former firm of Advocates. Further, in the absence of an Affidavit of the said counsel detailing the alleged mistake none can be presumed and the law cannot act in a vacuum.

vii. That a lethargic client cannot and should not be authorized to take advantage of its lethargy by seeking to apportion blame on its former counsel and revive an otherwise dismissed matter despite being accorded all opportunity under law.

viii. That the Applicant has not sought the aid of the Court with clean hands hence its Application ought to be dismissed.

2nd Respondent/Interested Party's Case

6. The 2nd Respondent/ Interested Party filed her response dated 19th September 2018 opposing the application. She contended that the Applicant did not file its submissions within the 2 days extended by the court to do so and filed the same 20 days after the said order. The 2nd Respondent therefore did not see any justification for the reinstatement of the suit and contended that the Court gave the Applicant reasonable time to file its submissions but failed to do so.

7. In addition, the interested party accused the Applicant for delaying the signing of a recognition agreement by the 1st respondent (employer) in her favour after the applicant purported to recruit as members the same workers she had earlier recruited from the 1st Respondent.

Claimant's Submissions

8. The Claimant submits that his former Counsel did not inform about the final chance given to file submissions and that the suit had been dismissed. That she never knew that the suit had been dismissed until she perused the court file. She urged that the issues for trial are still alive and the suit should be reinstated so that the issue concerning the rival unions is determined once and for all for the sake of the employees of the 1st Respondent.

9. The Claimant further submits that the parties have filed their submissions to dispose of the suit and such there will be no prejudice occasioned to the Respondent if the court reinstates the suit and sets the same for judgment. She relies on the case ***Edney Adaka Ismail vs.***

Equity Bank Limited [2014] eKLR where the Court held that it is not enough for a party to blame its former counsel. The party must also show steps it made itself in remedying the mistake of counsel. The Court further held that Court should consider whether there is any prejudice to the Respondents if the application is allowed. The Applicant has demonstrated getting clear information from counsel and getting the file released after delay by counsel.

10. The Claimant urges the Court to consider the principle of proportionality as regards the effect to the various parties of dismissing the suit compared with reinstating the suit. To that end, she argues that there is a higher risk of injustice if the suit is dismissed and the issues remain unresolved.

11. In response to the 1st Respondent's Grounds of Opposition dated 10th September 2018, the Applicant submits that the Court is not *functus officio* and always has jurisdiction to hear and determine an application of this nature because it is on discretionary principles. She further dismissed as false the contention that the order sought to be reviewed has not been annexed.

12. The Applicant further submits that the fact that the previous counsel signed a consent for having the matter taken over by incoming counsel is indicative of support by former Counsel. The Consent was signed long after the file was released because she did not want to antagonize the counsel because he was in conduct of her other sensitive matter. She further denied that she has not been lethargic and has taken reasonable steps despite counsel's failure.

1st Respondent's Submissions

13. The 1st Respondent did not file its submissions and opted to rely on the grounds stated in its Grounds of Opposition dated 10th September 2018.

2nd Respondent/ Interested Party's Submissions

14. The 2nd Respondent submits that the Claimant has not attached a copy of the Order he is seeking to be reviewed and as such the Application is fatally defective as the order must be annexed. The 2nd Respondent further submits that the Applicant is blaming her former advocate for all its ills yet no complaint has been lodged at the Advocates Complaints Commission or the Disciplinary Tribunal.

15. She further submits that the acts complained of against the counsel cannot be classified as a mistake as the said acts were done deliberately and with the foresight as the orders of this Court were quite clear on the consequences of failure to comply. She therefore urges that the Applicant has clearly failed the test outlined in law for the Court exercise its discretion as sought and as such the application should be rejected with costs.

Analysis and determination

16. After careful considering the application, ground of opposition, affidavits and the rival submissions the following issues arose for determination:

a) Whether leave should granted to the clamant to change counsel after the dismissal of the suit.

b) Whether the court should review or vary its decision of 14.6.2018.

c) Whether the claimant's suit should be reinstated for hearing on the merits.

Leave to change counsel

17. Under Order 9 rule 9 of the Civil Procedure Rules, a party to a suit has liberty to change her counsel after judgment upon obtaining leave from the court. The said leave is given as a matter of course if the outgoing counsel gives his consent in writing. In this case Nyabena & Company Advocates formerly on record for the claimant signed the letter dated 24.8.2018 consenting to have Macharia Burugu & company Advocates take over the claimant's brief herein. Consequently I grant the claimant leave to change her advocate as prayed.

Review or vary the order made on 14.6.2018

18. The jurisdiction of the court to review its own decisions is donated by ***Rule 33 (1) of the Employment and Labour Relations Court Procedure Rules*** which provides for the following instances when an aggrieved party may apply for review:

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 said power of review is discretionary and it is unfettered as it was held by the Court of Appeal in ***Shanzu Investment Ltd vs. the***

Commissioner of Lands, Civil Appeal No. 100 of 1993 [1993] eKLR, thus:

> ***"The court has a wide discretion to set aside judgment and there are no limitations and restrictions on the discretion of the judge except if the judgment is varied, it must be done on terms that are just''.***

20. In this case, impugned order made on 14.6.2018 was never annexed to the application herein and was never extracted. On the said day the court made the follows observations:

> ***"The claimant did not comply with the express orders dated 2.5.2018 which were meant to deter the claimant from continued delay. She was to file submissions 14 days from 21.2.2018 but she defaulted. On 2.5.2018 she requested for 2 days to file her submissions but again she defaulted despite being directed to comply or the suit stands dismissed after the lapse of that period. Under the rules, the court has the power to punish a party who defaults to comply with its directions. This suit was dismissed effective the date when the 2 days' window lapsed or closed. Each party shall bear their own costs of the suit."***

21. Considering the foregoing observations or orders for lack of a better word, I am without doubt that the application for review or varying of the orders made on 14.6.2018 is misconceived, frivolous and vexatious. It is clear from the record that I never dismissed the suit on 14.6.2018 nor did I make any substantive orders to that effect. All what I did was to observe that the suit was dismissed effective from the date when the 2 days conditional leave to file submissions lapsed. It was automatically dismissed by effluxion of time due to claimants own fault. I therefore decline to review or vary the observation I made on 14.6.2018 about the status of the suit because that was the true position.

Reinstatement of the suit.

22. The reason why the court gave conditional leave to the claimant was to deter her from her continued delay of the finalization of the suit since from 21.2.2018 to 2.5.2018 she had defaulted to prosecute her suit by filing written submissions as agreed by the parties. After the second default, I would not haste to say that in total the claimant failed to file her written submissions to prosecute her case from 21.2.2018 to 4.5.2018, which was about 74 days. The said conduct is inconsistent with that of a party who is keen or interested in prosecuting her case. I therefore decline to exercise my discretion aid an obvious indolent.

23. The dispute in the claimant's suit was that she had recruited 73 members from the 1st respondent's unionizable staff and therefore sought to have the respondent compelled to accord her recognition. Section 54 of the Labour Relations Act requires that recognition be accorded to a trade union, which has recruited a simple majority of the employer's unionisable staff. In her statement of claim, the claimant has not pleaded that she recruited a simple majority nor has she pleaded the total number of the respondent's unionisable staff. Consequently, I am of the view that the suit does not disclose a reasonable cause of action against the 1st respondent and she will not suffer prejudice if reinstatement of the suit is declined. She is free to remedy that lacuna by conducting fresh recruitment and seek fresh recognition and even file another suit if the recognition is unlawfully withheld.

Conclusion and disposition

24. I have found that the court never dismissed the claimant on 14.6.2018, and that no just cause has been shown to warrant reinstatement of the claimant's suit herein. I therefore dismiss the application with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 7th day of December, 2018

ONESMUS N. MAKAU

JUDGE