



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 388 OF 2014

KENYA HOTELS & ALLIED WORKERS UNION CLAIMANT

v

MARA SIRIA T/ASAFARI CAMPS (K) LTD RESPONDENT

RULING

1. In a judgment delivered on 6 May 2016, the Court found and held that Vitalis Lukwa Mujalwa (Grievant) had voluntarily resigned and therefore dismissed his claim for unfair termination of employment.
2. However, the Court found that the Grievant was entitled to salary for days worked in March 2014, pro rata leave and leave travelling allowance.
3. The Kenya Hotels & Allied Workers Union (Union) which brought the proceedings on behalf of the Grievant was aggrieved with the judgment and on 19 May 2016, it lodged a Notice of Appeal with the Court.
4. On the very same day, the Union filed an application for review, which application was fixed for hearing on 31 October 2016.
5. When the motion was called out for hearing on the scheduled date, the Union and Grievant were not in Court and the Court dismissed it with costs to the Respondent.
6. The dismissal prompted the Union to move Court on 18 November 2016 seeking
 1. That, the Honourable Court be pleased to vacate its own orders dated 30th October 2016.
 2. That, the Honourable Court be pleased to resume hearing of application for review dated 17 May 2016.
7. The Court directed that the motion be served for *inter partes* hearing and fixed 18 January 2017 for the taking of arguments.
8. The Respondent filed a replying affidavit sworn by one of its Directors in opposition to the motion and arguments were taken as scheduled.
9. The Union has contended that its representative failed to attend Court because a public service vehicle he had taken broke down and therefore he reached Court at around 10.30 am, after the application had

been dismissed.

10. In the supporting affidavit, it is deposed that the representative was informed by the Court Assistant that the motion had been dismissed.

11. The Respondent in opposing the motion asserted that no bus ticket had been produced to show the Union representative had undertaken the journey to Court and that the failure had not been satisfactorily explained.

12. The Court has noted that the Union representative has not disclosed the identity of the Court Assistant who informed him of the dismissal of the application. Such disclosure was relevant and material.

13. But of more significance, as the Court has already observed is that the Union had filed a Notice of Appeal and at the same time sought for review.

14. The question therefore begs whether such a course of action is open to the Union.

15. In *Orero v Seko* (1984) KLR 238, the Court of Appeal held that the review remedy is only available to a party who is not appealing. A similar position was reached in *Kisya v Attorney General* (1986) eKLR where the Court held that a party who has filed a notice of appeal cannot apply for review, but if the application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending.

16. In the Court's view, it would be imprudent and waste of judicial time to reinstate the review application when there is a Notice of Appeal against the judgment sought to be review.

17. The Court therefore declines the invitation by the Union and orders that the motion dated 17 November 2016 be dismissed with costs.

Delivered, dated and signed in Nakuru on this 27th day of January 2017.

Radido Stephen

Judge

Appearances

For Union Mr. Simiyu, Deputy Secretary General

For Respondent Mr. Konosi instructed by Konosi & Co. Advocates

Court Assistant Daisy