



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 1280 OF 2012
TRANSPORT WORKERS UNION CLAIMANT
VERSUS
EURO PETROLEUM PRODUCTS LIMITED 1ST RESPONDENT
PABARI DISTRIBUTORS 2ND RESPONDENT

Mr. Nasib Makuwa for claimant/applicant

Mr. Amollo for Respondent

RULING

1. The claimant union filed a memorandum for review of the ruling by Hon. Nzioki wa Makau delivered on 14th June 2013.
2. The application for review is dated 15th September 2015 and filed on 17th September 2015 which is more than two years from the date of the ruling. The application was heard by myself while the Judge was away in United States of America on study leave.
3. The ruling by Justice Nzioki wa Makau upheld three preliminary objections to wit;
 - i. The court had no jurisdiction to entertain the suit;
 - ii. The suit was fatally defective as it was premised on repealed law;
 - iii. The claimant union lacked locus standi to represent the grievants in the suit.
4. The issues in dispute according to the memorandum of claim dated 26th July 2013 were:
 - a. Non-remittance of union dues to the claimant by the respondent.
 - b. Non-recognition of the union by the respondent and unfair termination of seven (7) employees by the respondent.
5. The applicant seeks review of the order dismissing the claim for unlawful termination of seven (7) employees because this was not based on the repealed law but on the provisions of the Employment Act.

6. The applicant pray that they abandon the labour claim for recognition and remission of union dues brought erroneously under the repealed provisions of the Labour Institutions Act, 2007.

7. The application is based on Rule 32 of the now repealed Industrial Court (Procedure) Rules 2010.

8. That Justice Rika had dealt with the issue of separating employment disputes of dismissal with labour matters in **Industrial Cause No. 128 of 2012**.

9. The applicants rely on this case to pray for the review of the ruling of Hon. Justice Nzioki wa Makau, in which the entire suit was dismissed and urge separation of the termination dispute accordingly.

10. The respondent filed a replying affidavit to the application sworn to by Harshil Kotecha, a director of the respondent companies on 9th November 2015. In addition the respondent filed preliminary objection to the application for review as follows:

i. The application is time barred and hence defective.

ii. The defect in the application is incurable.

iii. The Honourable Court is *functus officio*.

iv. The application offends the principles of *resjudicata* and therefore an abuse of court process.

Response

11. The respondent submits that the applicants ought to have filed an appeal in terms of Section 27 (4) of the Industrial court (Procedure) Rules 2010 and not file an application for review.

12. That Rule 32 of the said Rules permitted review of a decision of the court;

a. if there is a 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; or;

b. on account of some mistake or error apparent on the face of the record; or

c. on account of the award, judgment or ruling being in breach of any written law; or

d. if the award, the judgment or ruling requires clarification; or

e. for any other sufficient reasons.

13. The respondent submits that the applicant has not satisfied any of the above requirements and therefore the application be dismissed with costs.

Determination

14. Before we get to the merits of the application it is the court's considered view that an application for review of a ruling, judgment or order of the court in terms of the erstwhile rule 32 must be brought expeditiously and without inordinate delay. This application was brought more than two (2) years from the date this impugned ruling was delivered. this ought to disqualify the application outright as an abuse of court process.

15. Litigation must come to an end, and it is unjust for the applicant to seek to revive a matter more than two years from the date of the ruling. However, with regard to the claim for dismissal of seven (7) employees, the court will not visit this delay on these innocent grievants who left the matter in the hands

of the union.

16. The Judge noted in his ruling that the dismissed grievants had the right to pursue their claims for unfair dismissal in their private capacity. The learned Judge did not therefore dismiss the claims for unfair dismissal. It is the Labour claims for recognition and deduction of union dues that were dismissed for failure by the claimant to pursue conciliation first in terms of the Labour provisions applicable.

17. This being the case, and given that the memorandum of claim was filed within the limitation period, the individual claimants needed only to seek amendment of the suit to bring the claims in their own names. The Judge clarified this issue at page 9 paragraph 14 of his ruling and no review is required in this regard.

18. We do not think the claimant's right to pursue their individual claims within the existing suit were extinguished. However, to the extent that the Judge found that unions may only represent employees where the union has recognition with the employer this in court's view was in breach of the law, because membership of a worker or ex-worker to a union grants the union *locus standi* in *judicio* to represent the member before this court. This was a permissible ground for review in terms of the repealed Rule 32 (1) (c) of the Industrial Court (Procedure) Rules 2010.

19. Accordingly, the court allows the application for review only to the extent that the claims by the individual employees for unfair dismissal are still alive and may be heard on the merits.

Dated and delivered at Nairobi this 27th day of January 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE