



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.37 OF 2016

EVELYN KAGWIRIA MUTHAMA..... CLAIMANT

VERSUS

SOLUTIOS SACCO SOCIETY LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th May, 2017)

RULING

The claimant filed the memorandum of claim on 19.02.2016 through Mbaabu M'Inoti & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Full and prompt payment of her retirement benefits.
- b) Costs of the suit.
- c) Interest on (a) and (b) above at court rates until full payment.

The respondent filed a statement of defence on 10.05.2016 through Mwirigi Kaburu & Company Advocates. The respondent prayed for dismissal of the claimant's suit with costs.

The case went to full hearing and a judgment was delivered on 30.09.2016. The court dismissed the claimant's suit with orders:

- a) Each party to bear own costs of the suit.
- b) The parties at liberty to apply within 14 days from the date of this judgment as may be appropriate.

The court stated in the judgment as follows:

“The court has carefully revisited the record. Initially an incomplete copy of the CBA was filed and then a copy purporting to be the complete set of the CBA was produced by RW as exhibit R1. The court has examined exhibit R1 which forms the basis of the claimant's otherwise generous pay under clauses 12 and 44 of the CBA and which in the claimant's submissions puts the claimant's benefits at Kshs.10,441,076.80. That CBA appears to give the claimant generous double benefits as submitted for the respondent and if the parties have agreed as much, there would be nothing to stop the court from making the award. However the copy of the CBA exhibit R1 is not dated and is not signed for the respondent and the

union, the Banking Insurance and Finance Union (Kenya). The claimant's case would therefore collapse and the remedies prayed for declined on the account that exhibit R1 is of diminished probative and evidential value as to justify the award of the remedies as prayed for and on the basis of the alleged terms and conditions of service founded upon the purported and unsigned document referred to as a CBA by the witnesses at the hearing of the suit. As parties appeared not to dispute the document referred to as the CBA, the claimant would be at liberty to apply for review towards ends of justice if the copy of the CBA duly certified by the union's General Secretary or the Registrar of this Court is filed to support such a review."

The claimant applied for review by the notice of motion filed on 13.10.2016. The application invoked section 16 of the Employment and Labour Relations Court Act, section 3A of the Civil Procedure Rules 2010, Order 45 Rule 1 of the Civil Procedure Rules, 2010 and Article 159 (1) and (2) (d) of the Constitution of Kenya, 2010. The claimant prayed that the honourable court be pleased to review its judgment and orders issued on 30.09.2016; and costs of the application be provided for.

The claimant filed a copy of the collective agreement certified on 04.10.2016 by the registrar of the court as the true and original copy. The copy as filed was duly signed by the union chief organiser one Mwaura Ngage and the respondent's chief executive officer one Justus Mburugu Ikiara. It is clear that the application was filed within the time as allowed by the court in the judgment, which was within 14 days from 30.09.2014 and therefore, it was filed without undue delay.

In the supporting affidavit by the claimant, it was urged at paragraph 6 that the judgment is reviewed and the prayers in the statement of claim be granted.

The respondent opposed the application by filing on 09.11.2016 the 1st replying affidavit of Daniel K. Marete, the respondent's chief executive officer. The court has considered the respondent's allegations that the collective agreement as filed in court as annexed on the supporting affidavit was a forgery. The court finds that contrary to the respondent's allegation, the agreement bears signatures of the signatories on each page and it was indeed signed on 17.10.2014 as per the letter of 11.12.2014 forwarding the same to the court for registration. The court further finds that the collective agreement was certified as a true copy of the original by the registrar of the court and in accordance with the terms of the judgement.

The opposing affidavit purported to open matters already determined in the judgment such as whether it would be fair for the respondent to pay the claimant as prayed for in the statement of claim. The court considers that such would not defeat the review which seeks to prevent manifest injustice in view of parties' own agreement per the collective agreement. The court finds that enforcement of the parties' own agreement and furtherance of the terms of the CBA as found to apply in the judgment would be sufficient reason to allow the review as per Rule 32(1) (e) of the rules of the court; as failing to uphold the agreement would amount to manifest injustice against the claimant. As stated in paragraph 12 of the claimant's supplementary affidavit filed on 01.12.2016, clauses 12 (c) and 44 of the collective agreement is binding upon the parties.

The court has considered the respondent's position that the collective agreement was not new evidence. Indeed the agreement was before the court at trial and there was no dispute between the parties that it applied but despite that agreement, the court was reluctant to award the claimant in the interest of justice that the terms of collective agreement would require verification in view of the generosity in the provisions and that the filed copy, though not in dispute, needed verification. Thus the court considers that at the hearing the claimant had established her case on a balance of probability but, upon the court's own volition and judgment, further verification was desirable. It was a case of the court seeking to be sure that as undisputed between the parties at the hearing, the terms of the collective agreement were indeed correct as was stated.

In conclusion, the application for review filed for the claimant on 13.10.2016 and dated 11.10.2016 is hereby allowed with orders that as prayed for in the statement of claim, the claimant is entitled to full and prompt payment of her retirement benefits per the collective agreement and to be paid by 01.09.2017

failing interest to be payable thereon at court rates from the date of this ruling till full payment. The respondent will pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 12th May, 2017**.

BYRAM ONGAYA

JUDGE