



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

AT NAIROBI

CAUSE NUMBER 1342 OF 2013

JADES COLLECTION LIMITED.....APPLICANT

VERSUS

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS UNION.....RESPONDENT

RULING

1. By a memorandum of review filed on 22nd December, 2015 and brought under section 16 of the Industrial Court Act and rule 32 of the Court rules, the applicant seeks review of the judgment of the court delivered on 23rd November, 2015 which was entered undefended notwithstanding the fact that the applicant had at all material times a duly instructed advocate to act and represent it in the matter.
2. The applicant further complained that there was no personal service of the hearing notice on the applicant or its lawyers.
3. The applicant also complained that the respondent never had the *locus standi* to write letters to the applicant or represent the grievants because the grievants were not members of the respondent, there existed no recognition agreement between the Applicant and the respondent and finally that the grievants never joined the respondent union during their employment and did so after leaving employment for purposes of filing this suit.
4. In his submissions in support of the application, Mr. Wokabi for the applicant submitted that the firm of Tim Okwaro & Associates was instructed to act for the applicant and all correspondence was to be addressed to the said lawyers. However the advocates never indicated to them that anything was amiss.
5. On 1st December, 2015 the applicant learnt while going through the Business Daily Newspaper that the Court had ordered that it pays the sum of Kshs.2.77 million to the respondent and that no appearance had been entered by the said firm of Tim Okwaro & Company Advocates. Consequently, the applicant was condemned unheard despite having a very meritorious defence.
6. The defences raised by the applicant as submitted by Counsel, included that there has never been any recognition agreement between the applicant and the respondent, the purported conciliator lacked legal backing or authority and in the absence of a recognition agreement between the applicant and respondent any certificate issued by the conciliator was void *ab initio*. Further that the grievants were never part of the applicant's body during the course of their employment and only became so after leaving

employment.

7. Counsel further submitted that Mr. Keya Nyakundi, the process server who allegedly served the hearing notice dated 4th May, 2015 was not licensed at the time which meant the affidavit of service filed by him was false.

8. Mr. Wokabi further submitted that the right to a fair trial in judicial proceedings will not be achieved under article 50 of the Constitution if the applicants are not heard because of mistake by counsel. Counsel further submitted that the applicant had demonstrated that it had triable defence and was therefore just that the application be allowed.

9. The respondent through its Secretary General Mr. Kavuvi submitted that the issue as brought to Court did not border on or touch on collective bargaining hence the issue of existence of recognition agreement did not arise. Further section 62(1) of the Labour Relations Act, 2007 did not require a Trade Union to have signed a recognition agreement in order to report a Trade Dispute.

10. Concerning lack of legal backing on the part of the Conciliator, Mr. Kavuvi submitted that the issue as reported to the Minister concerned victimization of employees on account of union membership. This was in no way related to collective bargaining which requires parties to have signed a recognition agreement. Mr. Kavuvi further contended that under section 65 of the Labour Relations, 2007 the Minister is mandated to appoint a conciliator whose role is specified under sections 67,68 and 69 of the Act. Nothing in these sections of the law relevant to dispute resolution, refer to the existence of a Recognition Agreement.

11. Regarding the grievants not being members of the respondent, Mr. Kavuvi submitted that the grievants registered with the union between 26th March, and 2nd April, 2013. The union first wrote to the applicant on 1st April, 2013 informing the applicant of the grievant's membership and seeking to be recognized. The grievant's union membership therefore came first between 26th March – 2nd April, 2013.

12. This is an application for review of the Court's judgment delivered on 23rd November, 2015. The parameters and grounds for which the court can review its order or judgment are set out under rule 32 of the court rules as follows:

i. A person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgment or ruling:-

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 on the face of the record.*

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

d. *If the award, the judgment or ruling requires clarification; or*

e. *For any other sufficient reason.*

13. The court has considered the present application and is persuaded that it fits the parameters set for review under rule 32. However, the fact that an application for review fits within the scope of rule 32 is not enough. The applicant must go further and demonstrate that the allegations that bring the application within the scope of rule 32 are reasonably proved to merit the disturbance of an order or judgment of the court.

14. The applicant herein has raised two main grounds for review in this application. First, Counsel who

was instructed, failed it by not filing a defence to the claim and attending court to defend the applicant at the hearing despite being properly instructed and paid his legal fees. Second, there being no recognition agreement the respondent had no locus to bring this claim on behalf of the grievants and further that conciliation process prior to this suit including certificate of referral issued by the Conciliator was null and void.

15. Regarding the issue of failure of the advocate to file a defence to the claim and attend Court to defend the applicant, the Court finds this despicable on the part of Counsel and hopes appropriate malpractice claim as well as professional misconduct proceedings are pursued against the advocate concerned.

16. The court in proper cases usually set aside proceedings and judgments where a party has been adversely affected by omission by the advocate to attend court. However, before the court exercises such discretion to set aside the applicant must demonstrate that save for the omission on that part of the advocate to attend court, it has a reasonable or triable claim or defence. Omission on the part of the advocate to attend court is no cover up for frivolous claims or defenses.

17. This position has been put succinctly by my brother Justice Nzioki wa Makau in the case of **Rajab Wakoli-vs- Abson Motors Ltd.** as follows:

“..... in an application for setting aside exparte judgment the court must consider not only the decision why the defence was not filed or why the applicant failed to turn up for the hearing but also whether the applicant has reasonable defence.”

18. The applicant has not raised any substantive defence to the claim herein. What it has done is to raise technical questions as to the existence of recognition agreement, legal capacity of the Concilliator and validity of the process server. Nothing has been tendered that countered the substance of the court’s judgment sought to be reviewed.

19. The court is in agreement with the respondent that a trade union need not have a recognition agreement for it to invoke the dispute resolution mechanisms under the Labour Relations Act.

20. The union is by virtue of section 22 of the Employment and Labour Relations Court Act an authorized party for purposes of concerning proceedings on behalf of its members before the court. This section read together with section 62 of the Labour Relations Act gives a trade union the right to invoke the pre-trial dispute resolution mechanisms provided for in the Labour Relation Act before bringing the dispute to court for adjudication.

21. The court further states that collective bargaining is for purposes of bargaining between the Union and the Employer over terms and conditions of service for employees in active employment of an employer. For this, recognition is necessary however, a union need not have a recognition agreement to agitate or intercede in other fora on behalf of its members in the employment of an organization where it does not enjoy recognition.

22. The court therefore does not think the applicant has demonstrated a reasonable or triable defence to warrant the review of the judgment of the Court.

23. The application is therefore dismissed with costs.

24. It is so ordered.

Dated at Nairobi this 23rd day of June 2017

Abuodha J. N.

Judge

Delivered this 23rd day of June 2017

In the presence of:

..... for the Claimant and

..... for the Respondent

Abuodha J.N.

Judge