



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 982 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th June, 2017)

AMALGAMATED UNION OF KENYA

NETAK WORKERS.....RESPONDENT/ CLAIMANT

VERSUS

TOYOTA KENYA LIMITED.....APPLICANT

RULING

1. The Application before Court is dated 10th January, 2017, brought under Rule 16(1)(5) and Rule 32(1)(b)(c) and (e) of the Industrial Court Rules 2010, and the inherent powers of the Court where the Applicant seeks for orders:

- 1. That the Application be certified urgent.***
- 2. That the Application herein be set down for hearing inter-partes as a matter of urgency.***
- 3. That this Honourable Court be pleased to review/vary the Ruling delivered on 5th December, 2016.***
- 4. That the Applicant be at liberty to apply for further orders and/or directions as the Honourable Court may deem just to grant.***
- 5. That the Costs of this Application be in the cause.***

2. The Application is premised on the grounds:

- 1. That upon perusal of the Ruling delivered on 5th December, 2016, it has emerged that the Court dismissed the Applicant's Application dated 27th March, 2016, on the sole basis that it lacked jurisdiction to grant the order for extension of time to file the appeal out of time.***
- 2. That the ratio of the Ruling of the Court issued on 5th December, 2016, constitutes an express breach of a written law being Section 7 of the Appellate Jurisdiction Act and/or sufficient reason to review the Ruling in light of the decision of the Court of Appeal in Kenya Airports Authority & Another vs. Timothy Nduvi Mutungi, Civil Appeal Nai No. 165 of 2013 (UR 113/2013)2014***

eKLR.

3. The Application is supported by the Affidavit of Amos Kisilu the Advocate on record on behalf of the Applicant wherein he states that the Claimant/Respondent filed suit on 6th June, 2014 and a Notice of Motion Application seeking for the Orders that interim orders issued against the Respondent to continue complying with the Kenya Gazette Notice No. 7344(Vol. CXI –No. 62) by way of continuing to deduct agency fee of 2% of the consolidated salaries of all the unionisable employees of the Respondent who are not members of the Applicant and remitting the same on the Union Gazetted Account till the matter is heard and determined.
4. That the Applicant filed its Memorandum of Response and subsequently its Replying Affidavit on 30th June, 2014, the parties proceeded by way of written submissions in compliance with the directions of the Court and Ruling was set for 8.10.2015.
5. The Respondent states that on 21.3.2016, they received a letter dated 3rd March, 2016, from the Respondent notifying the Applicant that the Ruling in the matter had been delivered on 8.10.2015 in the absence of both parties. The letter demanded that the Respondent pay up Kshs. 2,690,316/= within 14 days of the letter failing which the Applicant would commence contempt proceedings.
6. That the Applicant perused the Court file and found indeed that Ruling had been delivered in the said terms and being dissatisfied with the said Ruling, the Applicant gave instructions for an Appeal to be instituted in addition to seeking stay of execution pending the said appeal.
7. That by the time instructions to appeal were given, the appeal could not be filed without leave of the Court since the time within which to file the Notice of Appeal had lapsed, furthermore, stay orders could not be sought as there was no existing appeal filed which was the basis of the Application for extension of time to file the appeal.
8. The Applicant states that they proceeded to file an application dated 24.3.2016 seeking inter alia extension of time to file and serve the Notice of Appeal. The Claimant/Respondent opposed the said application by filing a replying affidavit and the Application was canvassed by way of written submissions.
9. That on delivery of its Ruling on 5.12.2016, the Court stated that it lacked jurisdiction to extend time since it was the Court of Appeal only vested with that jurisdiction. They state that this is a breach of an express provision of the law as there is sufficient reason to review the said Ruling in light of the decision of the Court of Appeal in **Kenya Airports Authority & Another vs. Timothy Nduvi Mutungi, Civil Appeal Nai No. 165 of 2013 (UR 113/2013)2014 eKLR** where it was held:

“It is evident that on 10th December, 2012, the 1st Applicant filed High Court Misc. Application No. 709/2012 seeking three orders namely; leave to lodge a notice of appeal out of time; extension of time with which to file suit and stay of execution of the judgment of the High Court. Victor Arika deponed that at the hearing of the application the learned Judge made it clear that he was not willing to grant the orders sought. On his part, the Respondent contends that the application should have been filed in this Court and not in the High Court which had no jurisdiction. The proceedings of the High Court show that on 17th June, 2013, the respective counsel agreed, amongst other things, and the learned Judge so ordered, that the 1st Applicant herein should seek leave, extension of time and stay of execution in this Court within 30 days of the date of the Order. The Application of 10th December, 2012, was properly in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court Appeal pursuant to Rule 7 of the Court of Appeal Rules which provides;

‘The High Court may extend time for giving notice of intention to appeal from a Judgment of the High or making an application for leave to appeal or for a certificate that the case is fit for appeal notwithstanding that time for giving such notice or making such appeal may have already

expired...'

As I have already observed, the High Court had jurisdiction by virtue of Section 7 of the Appellate Jurisdiction Act to entertain and determine the application for extension of time."

10. That same reasoning was also adopted in the case of **Edward Njane Nganga & another Vs. Damaris Wanjiku Kamau & Another (2016) eKLR** where it was held that:

"It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010, needs to be construed also including the Environment and Land Court and the Industrial Court) may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law."

11. That presently there is no appeal filed against the ruling delivered on 8.10.2015, neither is there an order for stay of execution of the said ruling. There is therefore nothing on record challenging the adverse orders of 8.10.2015, as threatened in the letter dated 14.12.2016, to recover the sum of 4,033,974/=.

12. That the application meets the criteria set out in Rule 32(1), (b), (c) and (e) of the Industrial Court Rules, 2010. Further upon receiving the Ruling of the Court, the Advocate for the Applicant forwarded the same to the Respondent/Applicant who immediately gave instructions to appeal and as such there is no undue delay. They pray for the Application to be allowed in the interest of Justice.

13. The Application is opposed by the Claimant/Respondent who has filed a Replying Affidavit wherein they state that the Application is out of time as the Ruling in question was delivered on 5.12.2016, and the Application was filed on 17th January, 2017, without the leave of the Court.

14. That the breach in the law as alleged by the Respondent/Applicant is not specified and as such it does not exist. And further that the Applicant has not disclosed what relief they wish to be granted if the said Ruling is granted.

15. They also state that the Application is bad in law and filed in bad faith because after delaying to file an appeal to the judgment in this matter, the instant Application was still filed out of time without leave of the Court.

16. The Claimant/Respondent state that they have not commenced execution for they wish to maintain good industrial relations and the Respondent is taking advantage of this.

17. They state that failing to pay the Claimant the sums Ordered has caused it a lot of hardship as they have failed to pay their employees' wages and they have also been forced to close down some of their branch offices.

18. That should the Court grant the prayers sought, they pray that the Respondent/Applicant be ordered to deposit the sum of Kshs. 4,130,021/= and continue with monthly deposit of Kshs. 97,047/= into a joint account by the Parties representatives. Further that if the orders sought are granted the Claimant/Respondent will suffer irreparable damages of closing down its doors in the entire Country. They pray for the Application to be allowed as drawn.

19. In submissions, they reiterate the contents of their Affidavits.

20. This is an Application for review. Rule 33 of the Employment & Labour Relations Court 2016 gives 4 scenarios where this Court can review its orders as follows:

1) “A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling:-

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.

2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station...”.

21. The reason the Applicant has given herein seeking for review of my Ruling dated 5th December 2016 do not fall under any of the above stated that would warrant this Court to review Court’s order.

22. In my view the issue complained of falls squarely under the arena of appeal and this Court cannot sit on appeal on its own orders or judgment.

23. I therefore find the application for review has no merit and I dismiss it accordingly with costs to the Respondents.

Read in open Court this 19th day of June, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Patrick Makale for Claimant Respondent – Present

Omenga holding brief for Mr. Kisilu for Applicant