



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 748 OF 2014

KENYA CHEMICAL AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

TATA CHEMICALS MAGADI LIMITED.....RESPONDENT

AND

AHMED MOHAMED AND 55 OTHERS....INTERESTED PARTIES/APPLICANTS

Mr. Juma for 56 applicants (intended interested parties)

Mr. Nyabena for claimant

Mrs. Wetende for respondents

RULING

1. The notice of motion application dated 12th May 2016 seeks the following orders *interalia*;

(i) That applicants had no knowledge of this matter yet it was crucial that they should be heard in the circumstances of this case.

(ii) That the court made findings and conclusions with respect to the applicants and their rights without according them a hearing as envisaged under the provisions of Article 50 of the Constitution of Kenya 2010 (the Constitution)

(iii) That consequently the judgment is highly prejudicial and detrimental to the rights of the applicants.

(iv) That the applicants are apprehensive that the respondent shall proceed and deduct the said dues and remit the same to the claimant in view of the 30 day time period stipulated in the judgment.

(v) That the dues that this court has ordered the respondent to deduct form part of the applicants' wages.

2. The application is premised on grounds set out on the face of the application as follows;

(i.) That judgement was rendered by this court on the 1st day of April 2016 in which the court directed the respondent to effect the check-off of all the employees and submit the union dues to the claimant within 30 days from the date of judgment. The court further granted the respondent the liberty in subsequent collective bargaining agreements to negotiate and provide demarcation for purposes of determining which employees are unionisable and which ones are not.

(ii.) That none of the applicant's herein is a member of the claimant.

iii.) That consequently the judgment rendered by the court is highly prejudicial and detrimental to the rights of the applicants

(iv.) That the applicants were not granted a hearing in this matter as envisaged by the provisions of Article 50 of the Constitution of Kenya, 2010 before the judgment was delivered.

(v.) That the dues that this court has ordered the respondent to deduct form part of the applicants' wages.

(vi.) That the effect of the said judgment is to curtail the applicant's rights under the provisions of Articles 40 and 41 of the Constitution.

(vii.) That further the judgment grossly curtails the applicant's rights under the provisions of Section 17 of the Employment Act, 2007 (the Employment Act).

(viii.) That it is inconceivable and unconscionable for such dues to be deducted when the applicants are not members of the claimant.

(ix.) That in effect the judgment compels the applicant's to be members of the claimant.

(x.) That the claimant in this matter deliberately and with an ulterior motive failed to enjoin he applicants in the conciliation process that preceded the filing of the claim herein. This failure denied the applicants the chance to present their case before the conciliator in the manner and style envisaged under the provisions of Articles 47 and 159 (2) (d) of the Constitution of Kenya 2010 and Section 15 of the Employment and Labour Relations Act Chapter 234B.

3. That the applicant stands to suffer grave prejudice if the orders in this application are not granted and it is in the interest of justice that the orders sought herein are granted.

4. The application is further supported by affidavits of Ahmed Rashid Mohamed and Anthony Wanjohi sworn on 12th May 2016.

5. The application is made by 56 intended interested parties who are employees of the respondent and have denounced any purported membership of the claimant union in whose favour this court made a judgement on 1st April 2016.

6. The application of the intended parties is supported by the respondent which has indicated its intention to appeal the decision of the court.

Response to the Application

7. The application is opposed vide a replying affidavit of Were Dibo Ogotu OGW, the National General Secretary of the claimant union as follows;

(i.) That this application has not been brought in good faith as it is a tactic to deny the claimant its right to enjoy the fruits of the judgment especially taking into account that the claimant union had underwent immense struggles and objections in recruiting and having the respondent sign the check

off forms.

(ii.) That the applicant in its supporting affidavit sworn by Sammy Chepkwony contends that the employees in respect of whom the claimant/respondent sought deductions and in respect of which it claimed had been recruited resigned from the union before any deductions could be remitted and/or denied that they had joined the union as alleged by the claimant respondent.

(iii.) That this contention by the respondent applicant is a replica of what it raised as its defence, was canvassed in court and is deliberately intended to deny, frustrate and further delay the claimant from enjoying the fruits of the judgment as it was properly given the chance to present its case.

(iv.) That the respondent has not advanced any valid reasons seeking the stay of the Honourable Court's judgment which was entered regularly and after according the applicant the opportunity to defend the claim.

(v.) That the respondent/applicant's annexed draft memorandum of appeal has not raised triable grounds of mounting a successful appeal warranting the orders sought herein.

(vi.) That the respondent company has at this stage connived with 56 of its unionisable employees by writing to them letters to either confirm deductions or object to the deductions of non remitted union dues within 73 hours upon receipt of the said letter solely to defeat realization of the judgment delivered herein, which is a clear case of intimidation of the claimant's members and arm-twisting them in order for the said members to leave the membership of the union which is a manifestation of bad labour practices in contravention of Article 41 of the Constitution.

(vii.) That the respondent/applicant has acted contrary to Section 5 (2) (b) and (3) of the Labour Relations Act, 2007 by intimidating its employees to resign from the union.

(viii.) That in view of the foregoing the respondent/applicant has not come to court with clean hands and as such not entitled to the order of stay sought.

(ix.) That the applicant should not be allowed to waste Court's time with speculations on what could have been or not have been which are mere excuses on the part of the applicant geared towards obtaining a stay purposed solely to further delaying, frustrating and denying the claimant its entitlement.

(x.) That the judgment and decree issued by this court is a money decree which is ascertainable or capable of being ascertained and refunded should the applicant succeed on appeal and therefore no prejudice will be occasioned to the respondent/applicant if the application for stay pending hearing and determination of the appeal is refused.

(xi.) That the judgment sought to be stayed is a money decree which the respondent is required to deduct from the employees and submit to the claimant, the said money does not belong to the respondent but to the individual employees and therefore the respondent cannot suffer any irreparable damage as alleged.

(xii.) That the claimant/decreed holder is a stable union which has got the means to refund the decretal sum in the unlikely event of the respondent/applicant succeeding in its intended appeal.

(xiii.) That this application is a calculated afterthought and a desperate bid by the respondent to delay the claimant from enjoying the fruits of the judgment.

(xiv.) That the notice of motion application filed herein is incompetent, a non-starter and an abuse of the court process and should therefore be struck out or dismissed with costs.

Determination

8. The issues for determination are as follows;

(i.) Whether the applicants have made tangible grounds for review and/or setting aside of the judgment of the court delivered on 1st April 2016.

(ii.) Whether there are grounds for joining the interested parties to the suit and hearing this suit afresh.

Issue i

9. It is clear from the deposition in the supporting affidavit of Anthony Wanjohi (paragraph 4) that the applicants were members of the claimant union but had ceased to be members. The applicants do not state on which date they left the membership of the claimant's union.

10. However, Mr. Were Dibo Ogutu, the Secretary General of the claimant union deposes in paragraph 10 of the replying affidavit that the respondent has subsequent to the judgment of the court connived with the 56 applicants by writing to them letters to either confirm deductions or object to the deductions of union dues within 72 hours solely to defeat the realization of the judgment of the court.

11. Mr. Ogutu states that this is a clear case of intimidation by the employer to coerce the applicants to leave the membership of the union in violation of Section 5 (2) (b) and (3) of the Labour Relations Act 2007 and Article 41 of the Constitution of Kenya 2010.

12. The court observes that the applicants did not file further affidavit to deny the deposition by Mr. Ogutu under oath.

13. The applicants do not indicate what provisions of the law they rely upon to be joined in a suit which has been heard and determined already.

14. Order 1 rule 1 of the Civil Procedure Act Cap 21 provides;

“All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.”

15. It is not in dispute that the claimant has a Recognition Agreement with the respondent and has signed a Collective Bargaining Agreement with the respondent in respect of all unionisable employees. The claimant had no obligation to co-join any of the applicants.

16. It is not in dispute also that this dispute was reported to the Minister and Conciliation proceedings preceded this suit.

17. There was a specific finding by Mr. R. J. Twaya the Conciliator, as captured in paragraph 6 and 7 of the judgement that all the 116 employees were members of the union and had not resigned as members as at the time the dispute was conciliated upon. The respondent did not claim in court such resignation at all. The application for joinder is misconceived and is accordingly dismissed.

Review

18. Rule 33 (1) (a) to (d) clearly provides circumstances under which the court may review its own judgment which include;

(a) Upon discovery of new and important matter or evidence after exercise of due diligence which was not within 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 on the face of the record;

(c) If the judgment or ruling requires clarification; or

(d) For any other sufficient reasons.

19. It is the court's considered view, that none of these avenues is available to the applicants who are not parties to this suit and have also failed to make out a case for joinder.

20. If the applicants have freely and voluntarily left the membership of the claimant union, after delivery of the judgment of the court on 1st April 2016, which fact has been placed in doubt by the claimant union, then they are at liberty to remain non-members but are obliged to pay agency fees if they continue to enjoy the terms and conditions of service negotiated between the claimant and the respondent in terms of Section 49 of the Labour Relations Act, 2007.

21. The demarcation dispute; that is to say the question whether a certain cadre of employee belongs to management or not is a negotiable issue between the union and the employer in terms of the Recognition Agreement and the applicants do not come into that picture at all.

22. Consequently, the application for review is equally misconceived and is dismissed.

23. No order as to costs.

Dated and delivered at Nairobi this 1st Day of September 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE