



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.125 OF 2016

SALESIO NJERU MBOGO & 112 OTHERSPETITIONERS

VERSUS

KENYA PLANTERS COOPERATIVE UNION RESPONDENT

RULING

1. The petitioner by application and Notice of Motion dated 8th May, 2017 and seeking the court to review and or set aside ruling delivered on 19th April, 2017 on the grounds that the court made an error apparent on the face of the record by making a finding that the respondent was in receivership which is not the case as such receivership was lifted on 27th June, 2014 via a Deed of Settlement between Kenya Commercial Bank and the respondent.
2. The application is supported by the affidavit of Salesio Njeru Mbogo and on the grounds that the court made an error by putting into consideration that the respondent was sued while under receivership and that the respondent advocate did not enter appearance for any receiver/manager as is the case where the company is under receivership. The respondent is not under receivership and is trading.
3. The pension scheme is no longer in existence and this underscores why the Liquidator did not file the suit and therefore there is an error on the face of the record when the court held that the petitioners had failed to enjoin the Liquidator but the pension scheme has been would up. There is therefore new and important fact for the court to review of set aside the ruling.
4. The petitioners have new material and evidence not available earlier which are Annual Reports of the respondent for the periods 2014/2015 and 2015/2016 where the respondent confirms that the receivership had been lifted and the sums subject to this suit are due to the petitioner and have been provided for. The dismissal of the case on a technical point on the face of these admissions by the respondent is detrimental to the interests of the petitioners who are retirees.
5. The court has power to remedy the error apparent on the record.
6. In reply, the respondent filed a **Replying Affidavit sworn by Wachira Gichu** the managing director and avers that the petition herein filed on 19th September, 2016 alleges that the petitioners are indebted as to their pension benefits by the respondent and amounting to Kshs.249, 825,531.00 and being unpaid pension benefits upon leaving the service of the respondent.
7. Upon service of the petition upon the respondent it was discovered that there were numerous irregularities and hence a Notice of Preliminary Objections dated 15th November, 2015 was filed. A ruling was delivered on 19th April, 2017 dismissing the petition on technicalities of the law. A review is

now applied for. There is no error of the court in making a finding that both parties were in agreement that the respondent was in receivership, an issue raised by the respondent. The discovery of new material stated has not been demonstrated or shown not to have been available when the court delivered the ruling. The annual reports alleged to be new are for years 2014/2015 and 2015/2016 way before the petition was filed.

8. The petitioners are seeking to re-litigate the matter by a review application. The mistake or error by the court has not been set out. There is no admission by the respondent in the Annual Accounts that the sums claimed by the petitioners are due and payable as any such sums ought to have been claimed from the liquidator.

9. Both parties filed written submissions.

10. The petitioners submit that they were employees of the respondent and members of a pension scheme sponsored by the respondent. In 2010 the respondent was put in receivership by the Kenya Commercial Bank and which was lifted in 2014 by a Deed of Settlement. The Petition herein relates to a claim for money held by the respondent on behalf of the petitioners and which money was to be remitted to the pension scheme during employment but has remained in the custody of the respondent. When the respondent was put in receivership the pension scheme was put under liquidation since there was no existing sponsor. The Liquidator wound up the pension scheme and filed reports with the Retirement Benefits Authority.

11. The respondent is no longer in receivership and the pension scheme is non-existent and the money claimed by the petitioners is in the hands of the respondent. The respondent has admitted as having such money.

12. In the court ruling of 19th April, 2017 the court held that the respondent is still in receivership. This is an error that requires correction. The application for review has met the threshold for the grant of an order for review. There is discovery of a new and important matter for the court to consider and by the respondent confirming that the receivership had been lifted, such is material to the petition herein. The Annual Report for 2014/2015 notes that the respondent is out of receivership and that the amounts payable to ex-employees is Kshs.349,291,846 for the year 2015 and Kshs.349,291,846 for the year 2014. The report also notes that there are unremitted pensions contributions amounting to Kshs.77, 938,737.00 and these are facts relevant for the consideration of the court.

13. There are material facts relevant herein which was in the custody of the respondent and they failed to disclose as held in **Arthur Kiprono Korir versus County Government of Kericho [2017] eKLR**.

14. The pension scheme is not in liquidation for the liquidator to file the petition and such mistake in the ruling should be corrected as held in **Josphat Munke Ole Mpoie versus David Waiganjo Koinange & another [2015] eKLR**. In this regard there is an error apparent on the face of the record which requires a correction through a review. Such is a good and sufficient cause.

15. In reply the respondent submits that the Petition herein is premised on the alleged indebtedness of the respondent for the sum of Kshs.249, 825,531.00 to the petitioners. Upon service of the Petition upon the respondent, there were notable irregularities which prompted the filing of Notice of Preliminary Objections and which the court addressed and a ruling delivered.

16. The application for review has failed to meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules, 2010. There is no new or material evidence or error apparent on the record or sufficient cause to justify the grant of a review order.

17. The averments by the petitioners that they were not aware of the receivership status of the respondent and that this had been lifted is not correct. They were also aware that the liquidation of the pension's scheme was complete. Such information was within the knowledge of the petitioners and allegations that they got information from the annual reports of the respondent are not correct. Had the petitioners acted

with diligence, they would have discovered such information. The cited authorities and cases are not relevant herein as no information had been held in secrecy.

18. In the case of **Osman Khalif Abdi versus Orange Democratic Movement and 21 others, Election Petition Appeal No.47 of 2017** the court held that the information said to be new was available and could be obtained at any time on request. This position is reiterated in **Peter Omani Obiria versus Hudson Okemwa & 3 others [2017] eKLR**.

19. In this case there is no error or sufficient cause to justify the grant of the orders sought.

20. Under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 a party can apply to the court for a review of an order by ruling or judgement. The ruling sought to be reviewed was delivered on 19th April, 2017 and the application herein filed on 8th May, 2017. This is a few days after such ruling and therefore the application is filed expeditiously and immediately upon the impugned ruling.

21. It is common ground that the respondent by Deed of Settlement is out of receivership. Further, the pensions scheme where the petitioners' dues had been deposited and which had been placed in liquidation, such has since been completed.

22. The challenge by the respondent to the Petitioners application is that all the above factors of the lifting of receivership and the winding up of the pension scheme were matters within their knowledge at all material times and had they requested for such details, upon request, such would have been made available. Further that had such facts been clarified before moving the court, the application herein would not have been necessary.

23. The petitioners have moved the court through a petition. Such does not defeat any claim(s) arising out of employment by the fact of non-disclosure of material facts that ought to have been done or made by the employer to enable the court arrive at a just decision.

24. The filing of work records is a statutory requirement placed upon an employer such as the respondent. Section 10(6) and (7) of the Employment Act, 2007 requires that;

(6) The employer shall keep the written particulars prescribed in subsection

(1) for a period of five years after the termination of employment.

(9) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

25. At the time of filing the response to the petition, reply to the matters addressed by the petitioners or in addressing the Notice of Preliminary Objections, the statutory duty placed upon the respondent as the employer, in matters of employment and labour relations does not change. The respondent ought to have put into context the provisions of section 10(6) and (7) and appraised the court with regard to the receivership and completed liquidation as set out above. To fail to do so and act in a manner so as to steal a march against the petitioners as it were, is acting in bad faith and the application herein by the petitioners I find to be justified on the face of the new matters, evidence, records and the error apparent on the face of the record and vide ruling of the court on 17th April, 2017.

26. I am persuaded by the findings in **Arthur Kiprono Korir versus County Government of Kericho [2017] eKLR** that a review is granted where the court found;

...records were not within his knowledge but were always in the knowledge and custody of the respondent. This is the discovery of new evidence that was not within the custody of the claimant at the time of judgement.

27. In this case therefore, where the respondent as the employer had the knowledge, custody and information relevant to the status of receivership and liquidation of the respondent and pensions scheme respectively, and failed to inform, submit or file with the court such material and records, such can be addressed by a review of the court ruling.

Accordingly, application dated 8th May, 2017 is hereby allowed with orders that the Ruling of the court delivered on 17th April, 2017 is set aside. Costs in the Petition.

Delivered in open court at Nairobi this 13th day of November, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants:

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