



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**PETITION NO.10 OF 2016**

**UNION OF KENYA CIVIL SERVANTS ..... PETITIONER**

**VERSUS**

**THE CABINET SECRETARY, MINISTRY OF TOURISM ..... 1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL, KENYA UTALII COLLEGE ..... 2<sup>ND</sup> RESPONDENT**

**KENYA UTALII COLLEGE ..... 3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. By application and Notice of Motion filed on 13<sup>th</sup> September 2016, the Petitioner is seeking for orders under the provisions of Rule 32 of the Industrial Court Rules, 2010 (now the Employment and Labour Relations Court (Procedure) Rules, 2016 and vide **Kenya Gazette Supplement No.129 of 5<sup>th</sup> August 2016**) and seeking for orders that;

1. ...

2. *The Court be pleased to review/vary its ruling delivered on 4<sup>th</sup> august 2016.*

3. ...

*15. The costs of this application be borne by the respondents.*

*16. This Court be at liberty to issue such further orders as it deems just and expedient in the circumstances and for the ends of justice.*

2. The application is supported by the affidavit of Tom Mboya Odege and on the grounds that due to no fault on the part of the petitioner, crucial parts of the application dated 22<sup>nd</sup> March 2016 were missing from the Court record and which missing parts included interlocutory prayers that the applicant was seeking pending hearing and determination of the substantive petition. Also missing were the supporting grounds to the application. On this basis the Court was unable to deliver ruling basing on all the facts and evidence and Petitioner members remain suspended without a disciplinary exercise being taken against them. The Petitioner members on whose behalf the application dated 22<sup>nd</sup> March was filed risk their salaries being deducted and their scholarships recalled to their detriment.

3. These I find to be the substantive orders being sought by the Petitioner at this stage.
4. The 2<sup>nd</sup> the 3<sup>rd</sup> Respondents filed their Grounds of Opposition to the petitioner's application. The grounds are that the application has not met the threshold for review; it lack merits; is an abuse of Court process; and the Petitioner has come to Court with unclean hands.
5. The 1<sup>st</sup> and 4<sup>th</sup> Respondent opted to watch brief but submitted that the current application and dated 13<sup>th</sup> September 2016 is a replica of the application dated 22<sup>nd</sup> march 2016 while the Court directed the Petitioner to amend their Petition but have opted to come for a review.

### **Determination**

6. I have put into account the application dated 13<sup>th</sup> September 2016, the affidavit in support, Groups in opposition and submissions by the parties. The main issue before the Court is for a review of the Court ruling on 4<sup>th</sup> august 2016.
7. An application for review of the orders of the Court should be based on Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and published vide Kenya Gazette Supplement No.129 of 5<sup>th</sup> August 2016. See **Michael O Were versus Maths Trading Co. limited, Cause No.1449 of 2014.**
8. Rule 33 address review of a judgement and decision of the Court and sets the principles to be followed. In the new Rules now in use for the court, these principles have not changed save for a few matters of clarity. Rule 33(a) provides that where an applicant is seeking a review of the Court orders and decision, must demonstrate that;
  - (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*
9. Part of the history in this matter is therefore necessary.
10. The Petitioner filed application dated 22<sup>nd</sup> march 2016 and parties attended Court on various occasions for directions on the hearing of the same. Parties took their time until 27<sup>th</sup> July 2016 when all parties had filed written submissions with regard to this application and Court reserved date for ruling for the 4<sup>th</sup> august 2016.
11. On the due date [4<sup>th</sup> august 2016] the Court was not ready with the ruling on the grounds and reasons that, upon going through the application and submissions, responses by the Respondents and their submissions, it was apparent that the petitioner's application dated 22<sup>nd</sup> march 2016 was missing key parts and pages, especially pages No.9, to 19/19 and grounds thereto and pages No.1 to 9/23 which in my view formed the biggest part of the application as therein were the grounds in support of the application and maybe the content missing formed the crucial part of the application but such records were denied of the Court by the petitioner.
12. Based on the above, the Court allowed the Petitioner to amend the Petition and with it the application which was noted as missing key and crucial parts, to serve the Respondents and then move the Court as appropriate. further and noting the orders and directions of the Court and noting that interim orders in place were based on the application with missing pages, parts and crucial material, such interim orders were vacated.
13. The current application by the Petitioner and dated 13<sup>th</sup> September 2016 is seeking a review of the Court ruling on 4<sup>th</sup> of august 2016. The Petitioner is also seeking interim orders pending the hearing of the application. What then is up for review? Is it the direction to amend the petition? Is it the order and

directions to amend the Notice of Motion and application dated 22<sup>nd</sup> march 2016 that was found with missing pages, parts and crucial material or the orders vacating the interim orders?

14. For the Petitioner to proceed in the current form, manner and style and without going back to the orders and directions issued on 4<sup>th</sup> august 2016 is on the least abuse of process. To file a new application seeking review of orders of 4<sup>th</sup> of august 2016 and setting out similar and or new prayers therein is in utter disregard of the clear Court directions on 4<sup>th</sup> august 2016. Where the directions made were ambiguous, not clear or required further explanation, the Court left the Petitioner at will to move the Court as appropriate but to seek a review is not an appropriate process for the same.

15. To go back on a matter that the Court has issued clear directions and circumvent the same by seeking similar orders as previously sought and where the directions given wee to make an amendment in application dated 22<sup>nd</sup> march 2016 and the Petition thereto and only add a few issues to make the application look fresh and relevant, I find to be in abuse the Court process. Where an amendment of the subject application was required, then such should have been pursued but to file an application for review of Court directions is to engage the Respondents in unnecessary litigation that is not helpful at all.

16. In any event Rule 33 of the **Employment and Labour Relations Court (Procedure) Rules, 2016** is clear on what matters should form part of review of Court order and directions. The Petitioner has not made any effort to set out what new matters exists; what error or mistake exists or what substantial issue that requires the Court to address with regard to the orders and directions of 4<sup>th</sup> august 2016 exists so as to warrant a review of the same.

**Application dated 13<sup>th</sup> September 2016 filed by the Petitioner lack merit; the same is in abuse of the Court process; the same is hereby dismissed with costs to the Respondents.**

Delivered in open court at Nairobi this 3<sup>rd</sup> November, 2016.

**M. MBARU**

**JUDGE**

In the presence of:

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