REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

MISC. NO.64 OF 2014

[FORMERLY MISC.81 OF 2001]

KENYA UNION OF EMPLOYERS OF VOLUNTARY AND

CHARITABLE ORGANISATIONS (KUEVACO).....CLAIMANT

VERSUS

KENYA UNION OF THE BLIND.....RESPONDENT

RULING

1. The Respondent, Kenya Union of the Blind, through application and notice of Motion dated 6th October 2016, filed application under the provisions of section 1A an 3A of the Civil Procedure Act, Rule 16 of the Industrial Court (Procedure) Rules [Employment and Labour Relations Court (Procedure) Rules, 2016], Order 10 Rule 11, Order 22 Rule 51 and 52, Order 51 Rule 1 of the Civil Procedure Rules and seeking for orders that;

1. spent

2. Spent

3. Spent

4. Pending the hearing and determination of this application, the claimant/respondent, whether by itself, its auctioneers, its agents, servants and/or employers be prohibited from proclaiming, attaching, repossessing, selling or offering for sale, transferring, charging, leasing, pledging or in any other way alienating or dispossessing of the goods listed in the Proclamation of Attachment Notice dated 29th September 2016.

5. This court be pleased to set aside and/or stay the ruling of this court delivered on 9th February 2015 and the decree issued on 7th September 2015 and all consequential orders therefrom.

6. The respondent/Applicant be granted leave to defend the claim.

7. …

2. The application is supported by the annexed affidavit of Jackson Agufana and on the grounds that the

Respondent was served with a Proclamation attachment notice dated 29th September, 2016. They are a charitable organisation and accountable to multiple donors and members and the good listed in the inventory to the proclamation do not belong to the Respondent but the same are held in trust for its members and donors. The Swedish Organisation of the Handicapped (SHIA) has been one of the donor of the Respondent as the core financier which recruited and retained the aggrieved staff. SHIA is based in Sweden and does not have local presence. That it is not prudent to attach the goods as listed.

3. Further grounds in support of the application are that the ruling of this court was entered in default of attendance of the respondent. During the hearing of these proceedings the Respondent had no elected official who could represent it in court. Currently the Respondent has interim officials pending elections of new officials to be held in April, 2017.

4. In the affidavit of Mr Agufana, he avers that he is the Executive Secretary of the respondent, Kenya Union of the Blind, a charitable organisation funded by multiple donors including SHIA, based in Sweden. The proclamation notice served upon the Respondent relate to goods held in trust for its members and donors. The hearing of this matter proceeded *ex parte* and without notice upon the Respondent as there were no elected officials who will be elected in April, 2017.

5. Mr Agufana also filed a Supplementary Affidavit and avers that the Claimant is not a registered trade union in terms of section 12, 13 and 14 of the Labour Relations Act and Mr Boaz Otieno is not its authorised representative and thus lack capacity to litigate in this matter on behalf of the aggrieved former employees of the respondent.

6. That even where the Claimant has the requisite capacity, it does not have authority to represent the aggrieved former employees of the Respondent as this was never communicated to the Respondent as their employer nor were trade union deductions requested or made by the employer under section 48 of the LRA. The Claimant having proceeded herein *ex parte* the Respondent is aggrieved and has a right to a hearing. the Claimant kept the Respondent unaware of the proceedings in this matter and has falsely alleged that suit papers were served upon them and the award contained in the ruling of 9th February, 2015 ought to be set aside and the Respondent accorded an opportunity to be heard. The ruling of the court was based on wrong and incomplete information given that the Respondent had no chance to argue its case.

7. Mr Agufana also avers that the execution by the Claimant was improperly conducted as the proclamation of attachment notice dated 29th September, 2016 listed goods that do not belong to the Respondent but holds the same in trust for its members and donors.

8. That all the signatures alleged to have been varied belong to the deponent herein Mr Agufana as the respondent's Executive Secretary. That where a hearing is given to the Respondent all matters in dispute herein will be adequately addressed.

9. In reply, the Claimant field the Replying Affidavit sworn by Mr Odin Boaz Otieno and avers that he is the authorised representative of the Claimant to handle the matter since August, 1996 through the Ministry of Labour to this court under the provisions of the Trade Disputes Act [now repealed].

10. The Respondent participated in the ministerial investigations and made submissions where there were findings and recommendations in letter dated 29th August, 2000 and the Economist report. The Respondent refused to oblige the findings and recommendation and the Minister under the provisions of section 8 of the Trade Disputes Act directed the filing of Cause No.81 of 2001 and an award was delivered on 16th November, 2002 and published in Gazette Notice No.6512 of 18th July, 2008.

11. The Respondent waived its right to be heard and failed to defend the claim and the award of the court was finalised within the meaning of section 17(1) of the Act. A hearing Notice dated 22nd December, 2014 was served upon Mr Agufana for the respondent, he was present in court but when the matter was called he refused to attend and the Claimant was heard on the Notice of Motion dated 20th December

2012.

12. The orders sought to stay the award and ruling of the court has no basis as the Claimant has proceeded herein premised on the provisions of section 17, 15 of the Trade Disputes act [now repealed] and Rule 19 of the Industrial Court (Procedure) Rules and further legal Notice No.186 of 1965. The Respondent has offered different signatures in the various documents and such should be expunged and by letter dated 9th July, 2016, the Respondent offered the Claimant to satisfy the award and by failing to attend court and defend the claim, the orders sought should not issue.

13. The application by the Respondent has no merit as the property proclaimed is alleged to belong to donors and held in trust but the proceedings herein proceeded against the Respondent as the former employer of the aggrieved employees. The Claimant has proceeded for due performance of the decree and lawful orders of the court and thus the application should be dismissed with costs. That the decretal sum due from 18th July, 2008 should be paid with interest at 14% and amounting to kshs.1, 421,112.80. Costs are payable as taxed at kshs.72, 920.00 together with auctioneer's costs of Kshs.165, 000.00. Fresh warrants of attachment should issue in execution of the decree.

14. Both parties made their oral arguments in court in support of each case.

Determination

15. At the core of the application by the Respondent is that the ruling of 9th February, 2015 herein should be set aside so that the Respondent can be given a hearing. That the respondents were never served with the suit documents and the Claimant relied on service that was never effected upon the respondent. There is no evidence of service and documents filed are false.

16. The Respondent has also challenged the capacity of the Claimant to sue and proceed for and on behalf of the 11 grievants and alleged aggrieved members and former employees of the respondent. That the Claimant has no capacity to represent the aggrieved former employees.

17. That based on the provisions of Article 50 of the Constitution, the Respondent has a right to a hearing and such should be given priority. That in the interests of justice, the ruling of the court should be set aside and the Respondent given a chance to defend the suit.

18. The subject ruling dated **9th February**, **2015** and the orders therein is not attached to the application by the respondent. This is the order the subject of the application that the Respondent is seeking to be *set aside and/or stay the ruling delivered on 9th February 2015 and the decree issued on 7th September 2015 and all consequential orders therefrom.*

19. I have however gone through the file and traced this Ruling of 9th February 2015. The essence of the ruling was to allow the claimant's application dated 20th December, 2012 for the adoption of the decree in the award of the court. At paragraph 9 of the impugned Ruling of 9th February 2015 the court held;

> *The publication of the court award under Cause No. 81 of 2001, now substituted as noted above in this cause through orders dated 12th November 2014 was done on **18th July 2008**. The publication of the award as noted was under the provisions of the Trade Disputes Act, now repealed. …*

20. All disputes heard and arbitrated upon under the Industrial Court as then constituted and such disputes being based under the Trade Disputes Act (now repealed) were premised on very technical and procedural requirements. Such procedures required that a duly registered trade union such as the Claimant report the dispute with the Minister before being granted the permission/consent and approval to proceed before the Industrial Court. such procedures also required that the parties in a dispute be invited to attend before the Minister which are matters I find the Respondent herein complied with when they filed their submissions and attended before the Minister's representative Mr J. M. Kiraguri, Chief Industrial Relations Officer and letter dated 29th August, 2000 issued noting the same.

21. Therefore, the Respondent has had long knowledge of the dispute herein since the dispute was filed with the Minister where the Respondent was in attendance. Further, the dispute in court and the publication of the award as noted in the challenged ruling of 9th February 2015 gave the Respondent a fair chance to note the award and where not previously not aware to have a chance to challenge the same. In the ruling of 9th February 2015, the court at paragraph 10 delved into this issue thus;

> *The Industrial Court Act, 2011 came into force on **30th August 2011**. Effectively the award published with regard to the matter herein on **18th July 2008**. Once the Court published its award in the Kenya Gazette, the same became a valid judgement of the court that was subject to enforcement subject to any review, appeal or amendments that may be requested. Otherwise once the Court published the award and served the Minister with such an Award, the Trade Disputes Act, as repealed and its Rules thereto did not create time limits for enforcement. Therefore with the coming into force of the Industrial Court Act, 2011 where such an Award as under the Trade Disputes Act still remained not executed, under section 13 of the Act, the Court has the power to cause the same to be executed as under the Rules applicable.* [Emphasis added].

22. A publication of the court award vide Kenya Gazette Notice No.6512 of 18th July, 2008 was thus to bring to the attention of the Respondent and any other party keen on addressing the same that there exists such an award. The Respondent does not challenge such notification as having been obtained through fraud, misrepresentation of through unlawful means. Such a publication was by the court – Industrial Court – through the order of the Principal Judge and based on proceedings before the court that ascertained that the Respondent had been dully served with suit papers and was aware of the proceedings but opted not to defend the suit.

23. The publication of Kenya Gazette Notice No.6512 on 18th July, 2008 is not by the claimant. This was done by the Principal Judge on good ground and based on the court award. Hence no ill motive can be imputed upon the Claimant in this regard. I therefore find that there is an award of the court that has since been published and not challenged by the Claimant since 2008. The orders of 7th February 2015 subject of the application herein relates to lawful orders of the court whose basis is the award of 16th November, 2002. To therefore challenge the order of 7th February, 2015 without addressing the court award, the basis of the same is lost and cannot serve the purpose for which the Respondent is seeking to have a chance to be heard and set out the case.

24. In this regard, where a party is seeking to set aside the orders of the court the principles governing the same are clearly set out in the case of **Sameer Africa Limited versus Aggarwal & Sons Limited [2013] eKLR;**

> ***In this instance, the judgement was regularly obtained and in such circumstances the court will not interfere unless satisfied that there is a defence on the merits. This means there must be a "triable issue" that is an issue which raises a** prima facie **defence and which should go to trial for adjudication.***

25. In this case, even where the Respondent is keen to offer a defence and have a chance to be heard and despite the long delay since 2001, there is nothing offered in terms of a statement of defence that the court can assess and find it sets out a *prima facie* defence. Is there any defence that if offered so as to disturb the judgement/award that was regularly obtained?

26. I find none in this case. No useful purpose shall be served by setting aside the ruling of 7th February 2015 as there was no possible defence to the action. In **Patel versus East Africa Cargo Handling Services Ltd (1974) EA, held that;**

> *Where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means … "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.*

27. Also in the case of **YAMKO YADPAZ INDUSTRIES LIMITED v KALKA FLOWERS LIMITED [2013] eKLR,** the court in addressing an application where a party has sought to set aside an *ex parte* judgement held that;

> *Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (***Jesse Kimani v McConnell** *[1966] EA 547, 555F)".*

28. In this case, the award of the court delivered on 16th November, 2002 is not challenged. Such remains a valid award in the terms issued and published on 18th July, 2008. To thus seek to set aside the ruling of 7th February, 2015 and not address the core of the matters giving rise to the same will not serve any useful purpose known in law. To grant such orders as sought by the Respondent will be the injustice caused upon the Claimant who have held a valid order and award of the court since 16th November, 2002. The grievants should receive the fruits of their litigation. To delay the execution of the decree herein is the injustice.

29. The Respondent has challenged the capacity of the Claimant sue herein and for Mr Otieno to proceed as the representative of the claimant. Trade unions are regulated under the provisions of the Labour Relations Act and returns filed with the Registrar of Trade Unions. Any evidence that the Claimant union does not exist or that based on their annual returns do not permit and or allow Mr Otieno to represent the Claimant have not been supported by any credible evidence. The cited provisions of section 12, 13 and 14 of the Labour Relations Act cannot be used to challenge the standing and or representation of the Claimant by Mr Otieno.

30. Under the Trade Disputes Act, now repealed, unionisation of employees was allowed by direct contributions to the union or through check off through the employer. Unionisation of unionisable employees was not controlled in terms of informing an employer so as to have employees enjoy their right to join the trade union of their choice. Even under the Labour Relations Act, the employee has the right to join a union of choice and can opt to effect union dues directly to their union or through a check off system. This is a right given affirmation under article 41 of the constitution.

31. In this case therefore, the Respondent cannot rely on non-information by the aggrieved former employees that they did not make their union dues remittance through a check off system and through their employer. Such non-communication of the aggrieved employees to their employer does not take away the employees right to unionise. The safeguards now created under the Labour Relations Act though not available before, the unionisable employees held the right to form and join a trade union of their choice.

32. In the penultimate, the application by the Respondent seeking to set aside the ruling of 9th February, 2015 is premised on matters extraneous to the grant of stay and the decree issued subsequent and dated 7th September, 2015 is within the law. To seek that the same be set aside on the basis that the proclaimed goods are held by the Respondent in trust for its members and donors without setting out such rights and trusteeship is to divert justice in terms of the valid judgement/award of the court now on record and not challenged. Annexure "JA2" to Mr Agufana Supporting affidavit is a document made in 1999 and the essence of the same is not linked to the assets set out under annexure "JA3" which consists a list done in 2015. In any event, the referenced document and annexure "JA2" does not list any assets as belonging to SHIA as alleged and where the Respondent is a membership based organisation who own the cited goods/properties, then the right goods have been proclaimed to satisfy the decree herein.

In conclusion, the application by the Respondent and dared 6th October, 2016 has no merit, the application is hereby dismissed with costs to the Claimant. The Respondent shall meet the Auctioneer costs owed to Javan H Kariuki t/a Moran Auctioneers all at Kshs.165, 000.00 and

execution to proceed in accordance with new Notice upon the Respondent.

Orders accordingly.

Ruling delivered in open Court at Nairobi at Nairobi this 14th day of December, 2016.

M. MBARU JUDGE

In the presence of:

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