REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 34 OF 2011

RACHEL CHEPKORIR MARU.....CLAIMANT

KENYA UNION OF EMPLOYEES OF

VOLUNTARY & CHARITABLE ORGANISATIONS.....APPLICANT

VERSUS

BOARD OF GOVERNORS RIFT VALLEY

ADVENTIST SECONDARY SCHOOL.....RESPONDENT

RULING

1. Before me for determination is the Applicant's Notice of Motion application dated 24th December 2013. That application seeks orders of review of the Court's decision made on 21st January 2013.

2. The Application was supported by the memorandum in support of the Review Application. The Memorandum had authorities attached to it as well as writings from the Bible and other religious texts and treatises on law and judicial canons and the law. The Applicant submitted through Mr. Odin Boaz Otieno aka Janitor on 25th November 2014. He submitted that the Industrial Court Act Section 16 was in concurrence with a divine call for review of mistakes in places of responsibility in the book of Isaiah 1:16-19. He submitted that there are errors on the face of the record and the Ruling requires clarification as the Ruling was in breach of the divine law, labour laws and the Constitution. He stated there are mistakes apparent on the fase of the record in reliance on the case of **El Busaidy v Commissioner of Lands** and disregard of the decision of Onyancha J. on *locus standi*. He submitted that the provisions of Article 22 gives a trade union the right to represent a party and that upon registration there was right of the trade union to sue and be sued in its own behalf or on behalf of one of its members. He submitted that the Court failed to consider the Union came to Court under the provisions of the Labour Relations Act or Trade Unions Act. He stated that calling the union a busy body was not proper as it challenged the authority given to unions under Article 22(2)(d) and Labour Relations Act. He submitted that the Civil Procedure Act and the Civil Procedure Rules are not applicable in this Court as per the provisions of Section 21 of the Industrial Court Act. He submitted that accepting a preliminary objection grounded on the wrong law was an error apparent on the face of the record. He stated that he had a counter submission on the appearance of counsel and the Court did not rule on the issue raised and thus abdicated its responsibility under Canon II and Section 56 of the Advocates Act. He submitted that the Court should review the Ruling so as to remedy the wrongs and injustices that might have been visited upon the party to the earlier judicial pronouncement. He urged the Court to allow the application and set aside the Ruling

in its entirety and allow the matter to proceed to full hearing and costs awarded.

3. The Respondent was opposed to the orders sought and Mr. Kalii submitted that this was not a Review Application but an appeal. He submitted that Review is under Rule 32 of the Industrial Court (Procedure) Rules 2010. He submitted that there must be an error apparent on the face of the record. He stated that the issues raised are matters of appeal and that under Rule 27(4) there is an appeal the Applicant would have pursued as the Court is *functus officio*. He submitted that the Court is not permitted to sit on appeal. He stated the decisions relied on by the Applicant were pre 2007 and the law is a 2007 statute and in some decisions there is reference to the repealed Trade Disputes Act. He referred the Applicant to Ecclesiastes 6 and submitted that there is a proper mode and procedure. He submitted that the Court substituted the name of the Applicant with that of the Claimant Chepkorir and she can still pursue the claim and in that the Court was very fair. He stated that he was amazed that a party can come to Court and attempt to lecture the Court on code of conduct. He submitted that there were cannons of Judicial Ethics and he trembled at the thought that one can exchange words with the court. He was of the view that there were no grounds for review and the Court should dismiss the application with costs.

4. The Industrial Court (Procedure) Rules under Rule 32 prescribe the instances when review lies. It provides as follows:-

> 32. (1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—
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> (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; or
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> (b) on account of some mistake or error apparent on the face of the record; or
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> (c) on account of the award, judgment or ruling being in breach of any written law; or
>
> (d) if the award, the judgment or ruling requires clarification; or
>
> (e) for any other sufficient reasons.
>
> (2) An application for review of a decree or order of the Court under subparagraphs (b),(c), (d), or (e), shall be made to the judge who passed the decree, or made the order sought to be reviewed.
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> (3) A party seeking review of a Court decree or order of the Court shall apply to the Court in Form 6 set out in the First Schedule.
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> (4) An application under paragraph (3) shall be accompanied by a memorandum supporting the application and the Court shall proceed to hear the parties in accordance with section 26 of the Act.
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> (5) The Court shall, upon hearing an application for review, deliver a ruling allowing the application or dismissing the application.
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> (6) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
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> (7) An order made for a review of a decree or order shall not be subject to further review.

5. The Rule above makes it plain that a party seeking review must have met set criteria which is enumerated in the Rule and sub-rules. The party seeking the review must be in possession of material which shows that 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 award or decree was passed or the order made; or that the review is sought on account

of some mistake or error apparent on the face of the record; or that it is sought on account of the award, judgment or ruling being in breach of any written law; or where the award, judgment or ruling requires clarification; or where there is any other sufficient reason or reasons.

6. In his submissions the Applicant did not reveal the new and important matter or evidence which was not in possession of the Applicant at the time the ruling was made. He did not reveal the mistake or error apparent on the face of the Ruling or the area that requires rectification. In my Ruling of 21st January 2013 I held that counsel for the Respondent had not deviated from her oath. As such the issue raised by the Applicant regarding the representation by the advocate was dealt with in paragraphs 10 to 13 of the Ruling. In the decision I stated thus:-

The rules provide details on the pleadings including the signatures. In this Claim, the dispute is between one Rachel Chepkorir Maru and her former employer The Board of Governors, Rift Valley Adventist Secondary School. No reference was made to the Minister. The Claimant did not try to interpose between the two. As noted, the dispute is NOT between the Claimant Kenya Union of Voluntary & Charitable Organisations and the Respondent…… ?

7. In the decision I held that the person who is said to be aggrieved has not been heard. Her claim is upheld and the order that commends itself for me to make is for the Claimant's name to be struck off and substituted therefor the name of Rachel Chepkorir Maru. It is clear that the decision was in favour of retaining the suit by substituting the Claimant for the Applicant. The suit can be heard and should of necessity be set down for hearing by the Claimant Rachel Chepkorir Maru as soon as possible so that the merits of the case can be gone into. The Respondent is right in urging the dismissal of the present Application for Review as no review lies. The issues raised are the same arguments raised previously. The objection taken was well taken and the decision in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696** was upheld in my decision. The fact that I did not follow the decision of Onyancha J. does not detract from the correctness of my findings. I am not bound to follow the decisions of fellow judges of equal rank.

8. In the final analysis I find the Application by the Applicant without merit and I dismiss it with costs which I assess at Kshs. 25,000/-. The same be paid by the Applicant forthwith. May the words of Ecclesiastes 3:6 guide the Applicant.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of February 2015

Nzioki wa Makau

JUDGE