



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 350 OF 2015

SUSAN MUMBUA.....1ST CLAIMANT/RESPONDENT

LORNA TSISIGA.....2ND CLAIMANT/RESPONDENT

TIVENDER KAUR JUTTLA.....3RD CLAIMANT/RESPONDENT

JOHANNES OLUOCH.....4TH CLAIMANT/RESPONDENT

JOAN WANGUI KARIUKI.....5TH CLAIMANT/RESPONDENT

HARISSON NDWIGA MURIITHI.....6TH CLAIMANT/RESPONDENT

DANIEL MUEMA MUTANGILI.....7TH CLAIMANT/RESPONDENT

VERSUS

NAVITAS LIMITED.....1ST RESPONDENT

AUSTRALIAN UNIVERSITY STUDIES

INSTITUTE (AUSI).....2ND RESPONDENT

AUSEDKEN.....3RD RESPONDENT/APPLICANT

RULING

1. The Application before me for determination is the Notice of Motion application by the 3rd Respondent/Applicant dated 14th April 2015. The application is supported by Affidavit of Rodney Malcolm Jones sworn on 14th April 2015. Mr. Ochwo appeared for the 3rd Respondent/Applicant while Mr. Kirimi appeared for the Claimants/Respondents in the application.
2. Mr. Ochwo submitted that the application by 3rd Respondent seeks review of the order of court dated 23rd March 2015. He stated that it is a procedural issue in which the 3rd Respondent seeks review based on fact that the Claimants' application dated 7th April 2015 proceeded and a Ruling given without giving the 3rd Respondent an opportunity to file a Response to that application. He submitted that Mr. Mituga who appeared for the 3rd Respondent informed the Court that

documents were served on 12th March a Thursday and the Director is in Australia and the best he could do was a preliminary objection and sought time to respond and file a Reply. He submitted that counsel stated that the application was comprehensive and if it was agreeable the preliminary objection could be disposed of. His understanding was that there was to be a preliminary objection taken and the Reply could be filed within 10 days as sought by Mr. Mituga. In the Ruling given by the Court pursuant to the preliminary objection the Court disallowed the preliminary objection and proceeded to make an order that Kshs. 75 million be provided or a suitable guarantee be preferred for that amount. He submitted that in his view the order amounted to giving orders on the application that the 3rd Respondent had not responded to and was just awaiting a Ruling on the preliminary objection raised by the 1st and 2nd Respondents. The outcome was that the 3rd Respondent was not given opportunity to respond to the application seeking security which was prejudicial when it is considered that parties should be given opportunity. He submitted that the rules of natural justice and procedure were not applied. He thus sought to persuade the Court that the proceedings were conducted in a way that the 3rd Respondent was denied an opportunity to respond to the application. He submitted that he had seen the replying affidavit by Claimants and the only issue that comes out is that the 3rd Respondent chose to go by way of preliminary objection. He submitted that he was not seeking review for the sake of it and stated that had the 3rd Respondent had a chance to file a response, the 3rd Respondent would have demonstrated the redundancy was not a secret as claimed by the Claimants. The 3rd Respondent would have demonstrated that as late as September 2014 the matter was known by the Claimants and the 3rd Respondent was working out payment for its staff in terms of redundancy. He submitted that he would have demonstrated most staff had been paid their money and the Claimants who were the only skeletal staff remaining for purposes of winding up the business and the 3rd Respondent would also have demonstrated the Claimants payments had been worked out by the 3rd Respondent in readiness for payment at the close of the company in March. He submitted that there would have been demonstration it was not necessary to file the suit as there was no indication that the Claimants had refused to accept the tabulations given to them. He also submitted that the 3rd Respondent would have raised the other issues contained in the affidavit and these would have guided the court on how much security was to be provided for by the Respondents. On the grounds for review he submitted that he relied on the limb of any other sufficient cause which in this case is that the Court had given orders without the response by 3rd Respondent which would constitute any other sufficient cause. He submitted that what constitutes sufficient cause is not closed and is subject to interpretation on a case by case basis and need not relate to the 2 limbs – error apparent on face of record or discovery of new matter. He referred to the case of **The Official Receiver and Liquidator v. Freight Forwarders Kenya Limited [2000] eKLR** where it cited Nyarangi JA in case of **Wangechi Kimita v. Mutahi Wakibiru (1982 – 88) 1 KAR 977**. He referred to the second authority that reiterates the grounds of making a review being **Berkshire Foods v. Crescent Transporters**. He stated that the Notice of appeal that had been drawn for 3rd Respondent alongside the 1st and 2nd Respondent but this was withdrawn and thus the 3rd Respondent was not precluded to seek review as there is no appeal by the 3rd Respondent. He submitted that there was no mischief in doing that as it is normal for a party to reconsider an application and withdraw an action. He stated that the appeal in respect of the 3rd Respondent was withdrawn before the application was filed.

3. Mr. Kirimi for the Claimant opposed the application and submitted that the Claimants filed a replying affidavit on 27th April 2015. He submitted that an application for review before this Court is governed by Rule 32 of the Industrial Court (Procedure) Rules 2010. He submitted that the application does not conform to the Rules and there was no memorandum filed. He submitted that the provisions of Rule 32 read with section 16 of Industrial Court Act are couched in mandatory terms. The words used are shall and also sub Rule 4 indicates the review shall be supported by Memorandum of Review. He sought to know on what ground is the 3rd Respondent seeking review? He submitted that a cursory look at the application is that it is brought under Rule 16, 27 and 32 of the Industrial Court (Procedure) Rules 2010. He submitted that there are only 5

grounds on which party can seek review and the 3rd Respondent does not appear to wish to state on what reason it seeks a review. He submitted that he was surprised to hear counsel for the 3rd Respondent state that the 3rd Respondent relies on ground 32(1)(e). The application of review must be clear on the face of it as to what ground is relied on. He submitted that he had scavenged the application and had not seen the words “or any sufficient reason” anywhere. On the submissions regarding the proceedings of 17th March 2015, he submitted that the application of 9th March 2015 was filed under certificate on 10th March 2015, certified urgent for hearing *inter partes* on 17th March 2015. He submitted that the Respondent was served on 11th March 2015, the next day after court appearance and when the parties appeared on 17th March his learned friend indicated the Respondents had filed a preliminary objection which they wanted heard before matter proceeded further. He submitted that he was served with the preliminary objection while on his feet. No adjournment was sought to allow the Respondent’s to file the affidavit in reply and they were happy to argue preliminary objection. In the interests of justice the Court allowed the preliminary objection to be argued and there was no indication that the 3rd Respondent was not happy to pursue the preliminary objection. He submitted that if the Court had allowed the preliminary objection the claims by the Claimants would have collapsed. He submitted that the Respondents filed a joint notice of appeal and came to Court seeking stay pending appeal which was denied. He submitted that the Respondents are litigating in instalments and abuse the court process. He submitted the intention was to frustrate the Claimants and escape from jurisdiction of the court. He submitted that the proceedings of 17th March were very clear and the 3rd Respondent cannot be heard to cry foul. He submitted that when the preliminary objection was taken he took risk of handling the preliminary objection which was one that could be fatal to the Claimants claim. He submitted that review would not avail to the 3rd Respondent. He submitted that what was of critical importance there was no agreement as to what dues were payable to Claimants. He submitted that the assertion that there was a rush to come to court or that there was agreement is far from true. He relied on the 2 cases in his list of authorities - **Civil Appeal No. 211 of 1996 National Bank of Kenya v. Ndungu Njau**. He submitted that the Court of Appeal was emphatic as to what grounds can be brought in review. The appellate Court was clear the grounds must be clear. The 3rd Respondents were part of a review process they purport to have withdrawn and the grounds for review and appeal are mutually exclusive. He submitted that the 3rd Respondent cannot purport to have a basis for review. He submitted that upon service of the application the Respondents chased the Claimants from their business premises and thus the Claimants could not proceed with their work and were not paid their March salaries and even the dues the Respondents had unilaterally proposed to pay, were never paid. He submitted that this is example of Respondents acting in bad faith and stated that the application had been overtaken by events as execution had ensued. He submitted that there is no prejudice the 3rd Respondent will suffer by depositing the dues into court. He submitted that the very same issues raised in preliminary objection had been replicated in the review application on the legal separation. He stated that the deponent of the affidavit is also a Director of 1st Respondent and he had submitted that these 3 entities were one and the same. The 3rd Respondent only signed letter of the 3rd Claimant and all others were signed by the 2nd Respondent. He submitted that the triplets are conjoined and are inseparable for purposes of the suit. He relied on the case of **Pancras T. Swai v. Kenya Breweries** where the Court of Appeal dealt with ‘any other sufficient reason’ and just like in this case, the Applicant had not stated on what limb the review was sought. He submitted that he was not able to find or decipher the reason for seeking to get a review. He stated that it is clear the appeal will not go anywhere and urged the Court to dismiss the application with costs.

4. Mr. Ochwo replied that on the issue on want of form in Review application that procedural technicality is not to be given prominence over the substance. He admitted that the 3rd Respondent did not file a memorandum in support of the application and stated that the grounds on the face of the motion and the supporting and supplementary affidavit bring out the grounds on which the review is sought. He urged the Court to consider Article 159(2)(d) of Constitution, the supreme law. He submitted that his learned friend knew exactly the grounds the 3rd Respondent had come

to Court upon and these were stated and in the submissions it was clearly stated the 3rd Respondent was moving under the limb of 'any other sufficient reason'. The sufficient reason is that the 3rd Respondent was not given chance to file reply. On issue of preliminary objection, he submitted that as stated by Mr. Mituga there was no record that he was proceeding by way of preliminary objection to dispose of the application. Regarding the submission that there was no application to adjourn, by asking for 10 days to file a response was by implication an application for adjournment as the Respondent could not proceed with application proper. He submitted that the application for stay has not been dismissed and it was pending before the Court. He submitted that the 3rd Respondent had worked out the dues and the Claimants were to state whether that was okay or not. He submitted that it had been suggested the 3rd Respondent acted in bad faith by chasing the Claimants. He stated that was not true as the 3rd Respondent was in Australia and there is no indication how it could have affected that chasing. On issue of failure to pay salaries in March, he submitted that it is common knowledge that the operating account of the Respondent has been attached pursuant to Court order and wondered how would the salary be paid if the attachment was done? He submitted that it is never too late to correct a procedural issue on an order that is issued against a party and that no prejudice will be suffered as the Claimant will be able to respond to the reply by Respondents.

5. The Notice of Motion Application in the main seeks the review of orders. Though objection was taken as to the ambiguity of the motion, the motion expressed to be under Section 12 Rule 3 of the Industrial Court Act and Rules 16, 27 and 32 of the Industrial Court (Procedure) Rules 2010 and Article 50 of the Constitution, was properly before Court. In his submissions before the Court, Mr. Ochwo isolated Rule 32 (1) sub rule (e) as the rule he specifically relied on. In as much as it is desirable for parties to identify with particularity the Rules and Sections of the law under which they move the Court I find that the failure to isolate the rule in the heading did not render the application incurably defective.
6. The Application was supported by grounds on the face of it as well as the affidavit of Rodney Malcolm Jones. The grounds upon which it was premised were *inter alia* that when the application came up for hearing the 3rd Respondent sought time to file a Replying Affidavit to the application and that the Court proceeded to hear the preliminary objection by the 1st and 2nd Respondent which it proceeded to dismiss on 24th March 2015 and the 3rd Respondent still expected to have the application heard. In his affidavit, Mr. Jones depones that he was the director of the 1st and 3rd Respondent and that the 3rd Respondent had sought time to file a replying affidavit. In his replying affidavit he deposed that the 3rd Respondent had made arrangements for the settlement of the Claimants dues and some of the 3rd Respondent's employees received their terminal dues in December 2014 and the Claimants continued working for purposes of closing AUSI College and not winding up the 3rd Respondent's affairs. The affidavit is rather silent as to whether the dues of the Claimants have been settled.
7. The review application has been considered as have the authorities and submissions of parties. A preliminary objection is defined in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. wherein Law J.A. stated a preliminary objection to be thus:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

8. Simply put, the preliminary objection taken was one that could dispose of the suit and in this case led to the orders granted on 24th March 2015. The 3rd Respondent was ably represented in the preliminary objection raised and cannot now be heard to complain. Mr. Mituga's submissions on

the preliminary objection were never expressed to be solely for the 1st and 2nd Respondent to the exclusion of the 3rd Respondent. In the Court record there was no severance of representation for the 3 respondents. This came up much later.

9. The review sought is not merited as there is no basis laid for the grant of the orders sought. The 3rd Respondent was heard whether or not it intended to file a Replying Affidavit. There is no requirement in law that a party can only be heard if they have filed a replying affidavit. Often parties respond to applications by filing grounds of opposition or raise objections as was done in this case. The fact that there is an indication that payments were to be made and there is no confirmation that any was made is indicative that the 3rd Respondent is approaching equity with unclean hands.

10. I agree with the Court of Appeal, and indeed I am bound by its decision, in regard to the expression 'any other sufficient reason'. It need not be analogous with the other grounds for review. That is as clear as crystal. However, in this case I find no sufficient cause or merit in the review application and dismiss it with costs to the Claimants.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of June 2015

Nzioki wa Makau

JUDGE