



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 260 OF 2011

(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 19TH OCTOBER, 2015)

SALOME AKOYA & 22 OTHERSCLAIMANT

VERSUS

EAST AFRICAN GROWERS LIMITEDRESPONDENT

RULING

1. The Application before this Court for determination is the Respondent's Application dated 23rd June, 2015, and filed in Court on 25th June, 2015. The Application is brought pursuant to Section 12(3) of the Industrial Court Act, Cap 234B of the Laws of Kenya; Rules 16, 27, 31, and 32(c) of the Industrial Court Rules, 2010 and all other enabling provisions of the law seeking the following Orders:
 - a. *That this Application be certified urgent and heard on priority in view of its urgent nature and service of the same be dispensed with in the first instance.*
 - b. *That pending the hearing and determination of this Application inter-partes, a temporary stay be and is hereby granted staying execution pursuant to the Ruling of the Honourable Mr. D.K. Njagi Marete delivered on 23rd September, 2014, in Cause No. 260 of 2011 and all other consequential Orders.*
 - c. *That pending the hearing and determination of this Application inter-partes, a temporary stay be and is hereby granted staying taxation of the Bill of Costs dated 14th May, 2015, filed by the Respondents' Advocates on 15th May, 2015, and the Notice of Taxation issued thereunder.*
 - d. *That pending the hearing and determination of the Applicant's Application for Review of Decree, a stay be and is hereby granted staying execution pursuant to the Ruling of the Honourable D. K. Njagi Marete delivered on 23rd September, 2014, in Cause No. 260 of 2011 and any Decree extracted pursuant thereto an all other consequential Orders.*
 - e. *That pending hearing and determination of the Applicant's Application for Review of Decree, a stay be and is hereby granted staying taxation of the Bill of Costs dated 14th May, 2015 filed by the Respondents' Advocates on 15th May, 2015, and the Notice of Taxation issued thereunder and all other consequential Orders.*

- f. ***That the annexed Application for Review of Decree be deemed as duly filed upon payment of the requisite Court fees.***
2. The Application is opposed by the Claimants and they have filed Grounds of opposition citing the following reasons:
 - a. ***That the Application as drawn and filed is fatally defective and incompetent as the same violates the Industrial Court (Procedure Rules 2010) and the Industrial Court Act 2011.***
 - b. ***That the Application as drawn and filed is mischievous as to seeking stay as well as Review without any reasonable grounds.***
 - c. ***That the Application as drawn and filed does not disclose the true events in so far as the Respondent's Court attendances and particularly on the 16th September, 2014 and 23rd September, 2014.***
 - d. ***That the Application is therefore frivolous and vexatious and should be dismissed with costs.***
3. The Applicant avers that on 4th March, 2014, the Honourable Court delivered its judgment and referred the matter to the Commissioner for Labour for conciliation with directions that the Commissioner ascertains the relationship of the Claimants and the Respondent, verify the claim vis-à-vis the defence, ascertain and confirm the position of the parties' cases as presented in evidence, calibrate and compute the amount payable to each of the Claimants, determine the claims and amounts payable to the Claimants and to determine a case for reinstatement of the Claimants.
4. The Applicant contends that on 15th September, 2014, the Commissioner issued a Report and recommended the payment of a total amount of Kshs. 1,866,000.00 to thirteen (13) Claimants/Respondents.
5. On 16th September, 2014, the Applicant avers that the matter was mentioned in Court and the Applicant's Advocate sought for time to peruse the said Report and seek instructions from the Applicant. The matter was consequently adjourned to 23rd September, 2013, on which dated Justice D.K. Njagi Marete delivered a Ruling adopting the said Report and awarded the Claimant's Kshs. 1,866,000.00 together with costs. The Applicant avers that as a result they were denied a right to be heard.
6. The Respondents' Advocates have now filed a Bill of Costs in respect of which a Notice of Taxation of Bill of Costs has been issued and taxation of the Bill is pending before the Deputy Registrar.
7. The Applicant sets out the reasons for a review as:
 - a. ***The Commissioner for Labour in its Report indicateds that the Respondents were casual employees engaged on diverse dates from 1995. The actual days worked were not indicated in the Report or otherwise taken into account when making the Report.***
 - b. ***That the Commissioner for Labour failed to take into account the diverse dates of employment and work attendance records of each Claimant in tabulating the final dues.***
 - c. ***That a proper arithmetical figure after all considerations have been taken into account should amount to Kshs. 1,691,400.00 and not Kshs. 1,866,000.00.***
 - d. ***The Commissioner of Labour awarded a sum of Kshs. 117,000.00 to one Solomon Akuya whose name does not appear in the list of Claimants in the Statement of Claim.***

- e. ***The Commissioner for Labour recommended the payment of Kshs. 121,500.00 to a Claimant known as Martha Dianga (deceased) yet the Estate of the said Claimant was not a party to the Suit, and as such the Decree of 23rd September, 2014, is erroneous.***
8. As a result of the above series of events the Applicant/Respondent feels there is sufficient cause to warrant a review of the Ruling of 23rd September, 2014, as provided for under Section 16 of the Industrial Court Act, 2011 and Rule 32 of the Industrial Court (Procedure) Rules, 2010.
9. The Claimants/Respondents have opposed the Application dated 23.6.2015 stating that it is a replica of two (2) other Notice of Motion Applications previously filed by the Applicant on 16.1.2015 and 8.6.2015 respectively. The Respondents aver that these two previous Applications have never been properly withdrawn. The Respondents aver that the Applicant wrote a letter to the Deputy Registrar withdrawing the Applications instead of filing a Notice of Withdrawal as is required by the law. By these actions of the Applicant the Respondents aver that they have been denied costs of the Application.
10. Secondly, the Respondents aver that the Application before Court for determination does not meet the criteria set out in Rule 32 (c) and (e) of the Industrial Court Rules 2010. The Applicant, according to the Respondents, has not disclosed which law has been breached and neither have they demonstrated how the provisions of Section 3, 12 and 15 of the Industrial Court Act have been breached.
11. Thirdly, the Respondents aver that the current law firm representing the Applicant is not properly on record as they did not seek leave to come on record as is required since they came on the record long after Judgment had been delivered.
12. The Respondents are of the view that the allegations by the Applicant that the computations of the Labour Commissioner are wrong are just an attack on the said report as the Applicant has failed to disclose the source of the information as to the number of days worked.
13. It is also the Respondents' contention that the Application is incompetent, frivolous and vexatious and a duplicity and ought to be dismissed with costs to the Claimants.
14. Having considered submissions of both parties, the issues for determination are as follows:
1. ***Whether the application is properly before Court.***
 2. ***Whether the Applicants can be awarded the orders sought.***
 3. ***What orders to award in the circumstances?***
15. On the 1st issue, the application in Court is brought under Section 12(3) of Industrial Court Act and Rule 16, 27, 31 and 32 (c) of Industrial Court (Procedure) Rules 2010. Rule 16 provides for the manner of filing an interlocutory application and state that they shall be brought through a Notice of Motion. Rule 27 provides for what the Court can determine. Rule 31 deals with execution.
16. Rule 32 deals with Review. The Respondents have submitted that the application does not meet the conditions of the legal provisions as split out in Rule 32(1) and (e) on which the application is based as the Applicants do not disclose which law has been violated or breached.
17. Concerning the issue of competency of the application, I find that the application has been filed under the correct provisions of law being the Industrial Court Act and the rules made thereunder and in particular Rule 32.
18. On 2nd issue, in determining whether the orders sought can be granted, Rule 32 provides that:

- i. ***A person who is aggrieved by a decree or an order of the Court may apply for review of the award, judgment or ruling:***
- 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***
 - b. ***On account of some mistake or error apparent on the face of the record or***
 - 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***”

19. It is the Applicant's position that they seek review of the Court's orders because there is sufficient cause to warrant a review of this ruling. They have also submitted that the ruling has some errors on the face of it including the fact that knowledge of exact dates that Claimants worked was not established by the Labour Commissioner.

20. They have submitted that the calculations of the Labour Commissioner were flawed and were supposed to be 1,691,400/= and not 1,866,000/= as awarded by the Court. They also pointed out that a total of 117,000/= awarded to one Solomon Akinyi is erroneous as there was no such Claimant in the claim. That also Kshs.121,500 was awarded to Martha Dianga who is currently deceased.

21. On the issue of these calculations being flawed, the report of Labour Commissioner stated that the Respondents who are the custodian of the employment records of Claimants were unwilling to share them even after being requested to do so. The Labour Commissioner only managed to get the last payment records of the said Claimants and from these records found that they were causal employees and were being paid 300/= daily payable at the end of each week. The investigation report also explains how the calculations were arrived at and the Court awarded interest on the amount which is clear from the records.

22. On the issue of whether Solomon Akoya was awarded money yet he was not one of the Claimants, I note the error as being a type error where the correct Claimant is Salome Akoya and not Solomon Akoya and this does not in any way change the figures. As to whether Martha Dianga is deceased or not, no evidence of this was produced by the Applicants who allege this fact.

23. It is this Court's finding that there is not new or important thing to warrant review and the error on the record which is only the name is corrected. The rest of the judgment as ordered by J. Marete will not be disturbed.

24. The Application for review is therefore rejected. The execution process may proceed after taxation.

Read in open Court this 19th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mumbe holding brief for Nyachoti for Respondent

No appearance for Claimants