



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 1930 OF 2012

BANKING, INSURANCE & FINANCE UNION (KENYA).....**CLAIMANT/APPLICANT**

VERSUS

TRANSCOM SACCO SOCIETY LTD.....**RESPONDENT**

RULING

1. The Claimant/Applicant seeks a review of the decision of the Court made on 26th July 2013. The Application is dated 4th December 2013 and is brought under Sections 12 and 16 of the Industrial Court Act as well as Rule 32 of the Industrial Court (Procedure) Rules 2010. Mr. Munoru for the Claimant/Applicant submitted that there is an error apparent on the face of the Judgment. He stated that the 1996 recruitment was intended to show the Respondent had been anti-union. The Claimant it was submitted had recruited 17 out of 17 employees of the Respondent. Proof of payment of union dues was by cash receipts attached. He submitted that the Claimant had satisfied the condition on recognition. Relying on the case of **Kenya Building, Construction, Timber, Furniture & Allied Industries Employees' Union v. Sat Joiners Limited Cause No 80 of 2000** he submitted that at the time of consideration the simple majority is what should be considered at the time of recruitment. Mr. Munoru submitted that the Union had a simple majority at the time it came to Court. He thus urged the Court to review its decision and order the Respondent to effect check off and the Recognition Agreement be signed. He also sought costs.
2. Mr. Kurauka for the Respondent was opposed. He submitted that the Application is without merit as it seeks a review of judgment rightly delivered based on the material and facts before the Court at the material time. He submitted that to permit the Claimant to sneak in documents which were not in the pleadings before the Court would mean litigation would never end. The Court rightly stated that the onus to prove lies on the person alleging. The Applicant did not show the Court the actual number of Respondent's employees and the attempt to show the numbers was an attempt to sneak in evidence. He submitted that no new material had been placed before the Court that was not within the control or possession of the Claimant. He stated that the Claimant had not exercised its right to appeal and thus the Application ought to be dismissed with costs.
3. In a brief reprise, Mr. Munoru for the Claimant/Applicant submitted that the Court has jurisdiction to review an award as provided under the law. He submitted that the Claimant had shown there was an error. Appeal was not an error and the Claimant was making all efforts to exhaust all the available remedies before going on appeal and that is why the Constitution allows alternative dispute resolution. He thus urged that the Court grants him the orders sought.
4. In a review, the law provides under Rule 32 that various parameters be met. Rule 32 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—

(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.

(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.

(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.

(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.

(5) The Court shall, upon hearing an application for review, deliver a ruling allowing the application or dismissing the application.

(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.

(7) An order made for a review of a decree or order shall not be subject to further review.

5. The Claimant seeks a review and to the Application attached copies of various documents including the NSSF payments of the Respondent. In the suit, it was incumbent upon the Claimant to show it had the numbers. In failing to avail to the Court the documents sought to be introduced, the Claimant fell into error. In coming to the decision of 26th July 2013, the Court came to the conclusion that the Claimant had failed to prove that it had the requisite numbers. It cannot be open to the Claimant to prove so now by adduction of fresh evidence.
6. When a party elects to seek review, the party foregoes the chance to Appeal. This is because one cannot seek simultaneously to review a decision as well as appeal against the decision. In other words, one cannot attempt review and on failing seek to appeal. That is not an option. If there is basis for an Appeal a party should move the Court of Appeal and forego the review contemplated under the Rules. If on the other hand a party opts to seek a review then the party loses the right to appeal against the decision on which a review is sought.
7. The Respondent rightly pointed out that the Claimant has to be within the confines of the provisions of statute when seeking a review. The Claimant in the attempt at review has gone out of the purview of Rule 32 and the Application is therefore not fit for grant. There is no error in the judgment. In the final result, the Application for Review is dismissed with costs.
8. As the ink dries on this Ruling, there was an aspect adverted to by Mr. Munoru for the Claimant. Mr. Munoru rightly pointed out that the Constitution of Kenya encourages alternative dispute

resolution. That however, is distinct from the litigation that has ensued between the parties. If there is room for alternative dispute resolution then the parties are at liberty to explore that avenue.

Orders accordingly.

Dated and delivered at Nairobi this **31st** day of **January** 2014

Nzioki wa Makau

Judge