**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 213 OF 2011**

**BAKERY, CONFECTIONERY, FOOD MANUFACTURING AND ALLIED WORKERS' UNION (K)…….……CLAIMANT**

**VERSUS**

**MILLY FRUIT PROCESSORS LIMITED……RESPONDENT**

**JUDGEMENT**

This case was heard and Judgment delivered by Justice Isaac E.K Mukunya (as he then was) on 19th April 2012. Having been dissatisfied with the decision of the Judge the Claimant applied for review of the award under section 16 of the Industrial Court Act.

The background of the case as given by the Claimant is that the Claimant originally recruited regular employees of the respondent into its membership and achieved a simple majority upon which it applied for recognition by the Respondent.

The Respondent declined to recognize the claimant. The claimant then reported a dispute which was not resolved at conciliation level. The case was referred to the Industrial Court as Cause No. 198(N) of 2008. After hearing the parties Justice Rika delivered his award on 15th September 2009 in which he found that the Claimant had not attained a simple majority as unionisable employees included casual and seasonal employees whom the Claimant had not recruited.

The claimant embarked on fresh recruitment and by 12th March 2010 had recruited 209 employees out of a total number of 250 unionisable employees. The Claimant again applied for recognition by the Respondent who declined.

The Claimant reported a dispute which for the second time was not resolved at conciliation level as the respondent failed to attend the meetings called by the conciliator. At the same time the Respondent failed, refused and or neglected to deduct and remit monthly trade union dues from the enrolled members of the Respondent.

Another certificate of Disagreement was issued by the conciliator paving way for filing of this dispute.

After hearing the parties Justice Mukunya dismissed the claim on the grounds that the claimant had not recruited a simple majority of unionisable employees into union membership.

It is in respect of this decision that the claimant has filed an application for Review.

In its grounds of review the claimant has raised 3 grounds as follow;

i. Mistake or error apparent on the face of the record.
ii. Award is in breach of the constitution of Kenya and Labour Relations Act, 2007.
iii. There are sufficient reasons to warrant re-examination of the subject matter and the orders as made in the award.

The Claimant submitted that the court made an error on the face of the record when it found that the claim was incurably defective for failure to comply with mandatory provisions of rule 5(1) of the Industrial Court (Procedure) Rules, which require the claim to be accompanied by a verifying affidavit. The claimant has submitted that it filed the verifying affidavit and that there was a stamped copy in the court record.

On the award being in breach of the Constitution the Claimant submited that the court erred in holding that the trade union must remit "the simple" majority instead of "a simple" majority, that a simple majority in the Claimants case is 90 employees. That the 250 if reduced by the 73 seasonal and casual employees who left employment left 177 members which would be the new staff establishment of unionisable staff with a simple majority of 90 employees. That the claimant had recruited 124 employees out of 177 representing an overwhelming majority.

On the third issue the claimant submits that there are sufficient reasons to warrant re-examination of the subject matter and the orders as made therein as the court award failed to address the issue or make an order for remittance of trade union dues by the respondent.

The Respondent replied to the application through the Replying Affidavit of Abigail Kavutha Mwongela, the Respondent's. Human Resources Manager sworn on 16th January 2013 and filed in court on 24th January 2013. The Respondent contends that Cause No.198 (N) of 2008 has no bearing on the present case; that seasonal and casual employees can only be considered to be unionisable employees while in employment and not after ceasing to be employees this being the rationale of the court's decision in case No. 198(N) of 2008.

The Respondent further avers through the affidavit that the decision of the court was proper having found that there were 250 employees out of which the claimant needed to recruit at least 126 employees representing a simple majority and that the union had not achieved the simple majority. Out of the number recruited 73 seasonal employees had left employment, 11 employees had disowned their signatures while one (1) name was repeated.

The Respondent further submitted that as at 31st March 2011, 69 more seasonal employees had left employment and 40 more employees had disowned the union alleging that they never registered.

The Respondent further submits that there was no error on the face of the record, that faulting of the court's decision is a matter for appeal and not for review and that there are no sufficient grounds to warrant re-examination the matter and review of the orders of the court.

The parties made oral submissions in court on 5th November 2013 with Mr. George Muchai submitting on behalf of the claimant and Ms. Macharia submitting for the Respondent. They relied on their pleadings on the review application.

On the first issue of error on the face of the record Mr. Muchai submitted that the court record shows there was a Verifying Affidavit and the court therefore erred in holding that the claimant violated the provisions of rule 5 (1) of the Industrial Court (Procedure) Rules and this made the claim incurably defective.

On the second issue of breach of the constitution Mr. Muchai submitted that the Judge erred in referring to "a simple majority" when the law refers to "the simple majority" that "the simple majority" would relate to the ruling as it were then, that any change would be a simple majority" and that by attempting to

change the law inaccurately the court breached the law. Mr. Muchai further submitted that the judge used the words "if it is true that the employees left employment" meaning that the court was not sure. That an award of this magnitude cannot be determined on the basis of a fact that is not proven. He further submitted that a simple majority did not change because at the time the employees singed the check off the 73 who later left union membership were part of the unionisable employees. That the court changed this to mean the number of union members at the time when the dispute was in court, that the law is couched in a manner that the dispute is determined on the basis of the number at the time of hearing. He further submitted that the court found that another 11 employees withdrew from membership of the union basing its decision on letters appended to the statement of Reply whose authors were never called to give evidence to confirm they wrote the letters, and if so under what circumstances the letters were authored. That on this basis the court erroneously held that the simple majority was less by 73 employees and a further 11 employees leaving 166 employees, less 1(one) whose signature was repeated. That for purposes of union membership all the employees who wrote letters disowning the union and those who left employment were members of the claimant and the amendment was to prove the position of the Respondent. He urged the court to hold that at all material times the applicant had the simple majority.

On the 3rd issue Mr. Muchai submitted that there are sufficient reasons to re-examine the award. He submitted that the court failed to address some of the orders prayed for, that the claimant had prayed for orders directing the Respondent to pay from its own funds all the union dues that would have been deducted from the employees and remit to the claimant from the month the employees joined the union, that the Respondent is by law bound to deduct and remit union dues and failure to do so constitutes an offence. He submitted that the court should not aid the Respondent in committing an offence. That the court failed to guide itself of the principle in article 159 to the effect that Justice shall be done to all irrespective of status, that the court assisted the employer to continue trampling the rights of the applicants by failing to determine a prayer by the Claimant. That the court denied the applicants members the rights enshrined in the bill of rights in the constitution. Mr. Muchai finally referred the court to applicant's annexture 6 which he states is an authority to the effect that irrespective of recognition the employer is obliged to remit union dues.

In reference to the replying affidavit filed by the Respondent, Mr. Muchai objected to the fresh matters and documents raised therein and urged the court to disallow the letters attached to the Replying Affidavit as this constituted fresh matters.

Ms. Macharia for the Respondent submitted that the Respondent opposed the application. In addition to the issues deponed in the Replying affidavit of Abigal Kavutha Mwongera, Ms. Macharia submitted that Cause 198 of 2008 which the claimant made reference to has no relevance to the present case, that the issue of the missing verifying affidavit was raised in the Respondents Reply to the Memorandum of Claim but the claimant did not make any response to the same so the prayer that the award has a mistake or error apparent on the face of the record is misplaced, that the verifying affidavit appeared 6 months after the hearing. She further submitted that the issue of the verifying affidavit was not the basis of the court's decision and therefore does not affect the determination of the court.

On the second issue of breach of the Constitution Ms. Macharia submitted that the use of the word "the simple majority" as opposed to "a simple majority" is a matter of application and interpretation of the law by the court and is not a ground of review. The issue can only be dealt with on appeal. Ms. Macharia further submitted that the claimant's plea to this court to re-assess a mathematical equation is an attempt by the claimants to re-open the case through the back door and would be tantamount to this court sitting on its own appeal. That if the claimant is aggrieved by interpretation and application of the law.

She further submitted that the Claimant has not pointed out the express articles of the constitution which were beached by the award or demonstrated how such provision were breached and that the claim for beach can therefore not stand. She submitted that the claimants position on the exclusion of the 73 employees is an opinion of the claimant and asking the court to reverse the decision in the award is asking the court to sit an appeal on its own decision.

On the ground that there are sufficient grounds to warrant review of the court award Ms. Macharia

submitted that the argument is based on appendix 6 of the application and concerns parties other than the claimant and is not relevant to this case. She further submitted that it is a new document that was not presented to the court when the case was heard.

Ms. Macharia further submitted that at t 31st March 2011 69 seasonal employees had left employment and a further to have since written to disown their signatures. That facts have changed and it is not possible to review the decision based on facts prevailing more than a year before the date of the review, that it would lead to employees who were no longer members of the union being compelled to become members the union. She submitted that the Respondent does not object to employees joining the membership of the union.

Responding to Mr. Muchai's submissions. Ms. Macharia stated that she did not call the employees who had disowned membership of the union to testifying because parties relied on their written submission as filed in court and that further the Respondent did not object to the production of the letters at the hearing, that raising the issue now is re-opening the case through the back door. She further submitted that the court had taken the number of employees to be 250 and the award was to the effect that the Claimant had not raised the simple majority of that number.

I have considered the application by the claimant and the supporting documents. I have also considered the replying affidavit filed by the respondent and the appendices thereto. I have further carefully perused the record of proceedings before the court, the original pleadings and the award delivered by Mukunya.

The Law relating to review of employment case is contained in section 16 of Industrial court Act 2011 and Rule 32 of Industrial Court (procedure) rules 2010 as follow;

***16. Review of orders of the Court***

***The Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.***

**Rule 32 of Industrial Court (Procedure)Rules 2010**

32. Review.

***(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.***

The Claimant has applied for review on account of rule 32(b).

The words error on the face of the record were defined by the court of appeal in the case of **Nyamongo & Nyamongo Advocates v. Kogo (2001) E.A 17** as follows :-

***"There is a real distinction between mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error on the face of the record…. A mere error or wrong view is certainly no ground for a review although it may be for an appeal."***

Similarly **Odunga J.** in **Kenya Planters cooperative Union** stated that

***"Where a court of law has made a decision, parties should heed it and any party dissatisfied with the same should appeal against the same and only in deserving circumstances apply for review. The procedure for review should not be an avenue ventilating matters which, properly speaking, should be ventilated by way of an appeal……A good ground of appeal, it has been stated time without number, is not necessarily a good ground for review since mere error or wrong is not a ground for review."***

In the present case Mr. Muchai on behalf of the Respondent has urged the court to find that there was an error on the face of the record. He has explained the error to be the use of 250 members as the number of unionisable employees based on which the simple majority should have been derived. He has further urged the court to find in the alternative that the simple majority should be derived from the number of unionisable employees less the seasonal workers who had ceased employment at the time the claimant sought recognition. I have checked the court record of the proceedings and the pleadings filed by the claimant. These arguments were not raised by the Claimant either in its pleadings or during the hearing before Mukunya J. during the hearing Mr. Muchai only urged the court to find that the claimant had recruited 209 out of 250 unionisable employees which constituted a simple majority. He further urged the court to use the number of employees who were in court at the time of recruitment.

For a party to be entitled to review on the ground of error on the face of the record, there should be no two different opinions. The court also not have been expected to make a findings based on grounds which were not argued at the hearing.

I have also considered the pleadings and submissions of the parties and no issue was raised during the entire proceedings about the number of unionisable employees. There was no clarification whether the number of 250 included or did not include the 73 employees who had left employment. No register or list of the names of the 250 employees referred to in the proceedings was produced.

For those reasons I find that the claimant has not proved that there was an error on the face of the record.

The other issues raised under this head are issues of interpretation and the courts have held in numerous cases that issues of interpretation and application of the law are matters for appeal and not review.

The Claimant's other argument under this head of review is that the court made an error by holding that

the failure to attach the verifying affidavit made the claim incurably defective. I have checked the record and find that the Claimants Memorandum of claim is accompanied with a Verifying Affidavit of Danchel Mwangune. I however note that although this fact was pleaded in the respondents statement of Reply, there is nothing on the record to show that the claimant responded to the issue. The Respondent alleges that the verifying affidavit was sneaked in later, and the judge made a ruling that the verifying affidavit was not attached to the proceedings.

Since I did not have the opportunity to look at the record at the time the award was written, I am unable to tell whether or not the verifying affidavit was on the record at the time the court made that decision. This therefore means that I am unable to find that the Judge made an error on the face of the record by finding that the claim was incurably defective by virtue of there being no verifying affidavit attached to the Memorandum of claim.

The second ground of review is that the award is in breach of the constitution Mr. Muchai urged the court to find that the court erred in holding that the words "**the simple majority**" instead of "**a simple majority".**

I have looked at Section 54 of the Labour Relations Act. It provides as follows.

***54. Recognition of trade union by employer (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.***

***(2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.***

The words "a simple majority" and "the simple majority" are both used in that section as if they are synonymous. In any event this is again a matter of interpretation and application of the law and I have no jurisdiction to fault an interpretation or application of another judge of this court

I therefore find that his is not a ground suitable for review. An error made by a judge in interpretation and application of the law is a matter for appeal and not review.

The final ground of review that there are sufficient reasons to warrant review of the award. Mr. Muchai urged this court to find that the court failed to address prayer for remittance of trade union dues. I have confirmed from the Memorandum of claim that prayer (ii) of the Claim is that the court directs the Respondent to pay from its kitty all the money it would have, except for its refusal/failure/negligence, deducted from its employee's wages and remitted to the claimant as trade union dues since the month the employees first joined the claimant. This prayer was again made by the Claimant during the hearing. The Response by the Respondent was that it could not implement check-off by deducting and remitting union dues as the list was not authentic, that some employees had left employment while others had disowned their signatures.

I specifically note that the claimant only prayed for payment of dues not yet deducted, which dues were to come from the employer's kitty. The claimant did not specify how much was due from each employee and from when, or give a global figure. Further the claimant did not address the court on the legal basis of requiring the Respondent to take over the liability of payment of union dues that had not been deducted. The Labour Relations Act which provides for the deduction of union dues is silent on what the claimant should in such an event.

Section 19 of the Employment Act which provides for deductions from wages of employees, which would include union due does not provide for the employer to be penalized to make such deductions from its own funds.

Sub section 19(5) provides for the penalizing of an employer to pay only if the employer has deducted but failed to remit the amounts for deductions to the beneficiary thereof.

The prayer for review under this head is granted and I owned the court award adding thereto as follows;

”The Claimant’s prayer that the court directs the Respondent t pay from its kitty all the money it would have, except for its refusal/failure/negligence, deducted from its employees’ wages and remitted to the trade union dues since the month the employees first joined the claimant is hereby dismissed for the following reasons;

i. The claimant has not given justification for the prayers.
ii. The union has not specified the amount to be deducted.

Review application dismissed. Each party shall bear it’s costs.

Delivered and signed in open court on **27th** day of **January** 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**Mrs. Kimwatu for the** Claimant in person

**Ms Muchemi** for Respondent