



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1067 OF 2010

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

MARAMBA TEA FACTORY.....RESPONDENT

RULING

1. The Claimant Union seeks review of the Court's decision made on 14th June 2013. Miss Wachira for the Claimant/Applicant submitted that the Judgment of the Court states there was no proof that the Union represented the majority of the unionisable employees of the Respondent and yet the Union produced the evidence. The Claimant was aggrieved by the decision of the Court thus the Application for Review dated 26th July 2013.
2. The Respondent was opposed to the Review on grounds that the Claimant came to Court under Section 64(5) of the Labour Relations Act 2007 and yet did not demonstrate the decision of the Minister they were dissatisfied about. Mr. Nakhone on behalf of the Respondent submitted that since the Claimant failed to exhibit the decision the Claim was bound to fail as something cannot stand on nothing. He attacked the check-off forms which he stated had no stamp from the Respondent to show they were received by the Respondent. The Union had come to Court and had the burden of proof.
3. The reprise of the Claimant was that the check-off forms are proof of membership and that once the employee signs the forms indicating willingness to pay to join the Union and the same are in possession of the Respondent they cannot allege that not to be enough proof of membership. Miss Wachira submitted that the decision of the Minister was silence and silence was enough of a decision to prompt the Claimant moving the Court.
4. It is evident that in any review application before Court Order 32 of the Industrial Court (Procedure) Rules 2010 applies. 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 has sought a Review under these provisions of the law however the Application and the submissions on the Review all point to a perceived error in appreciating the evidence adduced. The issues raised are thus not grounds for Review but an Appeal. Simply put, the Claimant was dissatisfied with the Judgment of the Court and the course open at that time was appeal. The Respondent avers no decision was made by the Minister as determined by the Court hence the Claim was properly dismissed. In the case before me, the Claimant produced what were evidently documents that were intended to pass as check-off forms which allegedly had been submitted to the Respondent. There was no proof that these documents were ever delivered or given to the Respondent as there was no stamp nor exhibit of acceptance of the forms by the Respondent. Burden of proof is simply the duty placed upon a party to prove or disprove a disputed fact. The duty was cast upon the Claimant to prove the disputed facts. It was for the Claimant to prove their case and they woefully failed on that score. Failing to produce the constitution of the Union, deemed to be material to the Claimant's case, was fatal to the Claimant's case as the threshold of evidence was proof on a balance of probability. They failed to surmount or discharge the evidentiary burden hence the finding by the Court.
6. It was stated that the substrata of the case was the decision of the Minister. None was disclosed. Silence is not tantamount to decision as suggested by Miss Wachira the learned Counsel for the Claimant. Section 65(4) of the Labour Relations Act provides that where a party is aggrieved by a decision of the Minister under this Section that party may file an Application under Certificate of Urgency before the Industrial Court. Decision is defined by the Concise Oxford English Dictionary as '**a conclusion or resolution reached after consideration**'. Silence is hardly a conclusion or resolution reached after consideration.
7. The case of **Joseph C. Musyoki v. Attorney General [2012] eKLR** cited by the Claimant is not on all fours with this case. In **Musyoki v AG supra**, the Applicant sought review after lapse of a considerably long period of time and the issue that was whether there was inordinate delay in preferring a review. In this case, the period between the decision and the Review Application was not in dispute. The Review was preferred timely and thus Musyoki's case is not relevant in that

regard. As regards the case of **Ndirangu Njau v. National Bank of Kenya Civil Appeal 257 of 2002** (unreported) cited in the case of **Musyoki v AG** *supra*, the Court can review a matter where there is an error. This accords with Rule 32 of the Industrial Court (Procedure) Rules 2010.

8. The decision I reached was on the basis of the evidence before me. In this case, there is no error to warrant a review as in the case of **Njau v. National Bank** *supra*. The fact that there were papers produced indicating alleged members of the Union were not evidence of membership. As pointed out above, there is no proof that the Respondent was aware of the alleged membership. There was no evidence that the Claimant had complied with the law in referring the matter to the Court hence the dismissal of the claim.
9. The upshot of the foregoing is that there is no merit in the Review Application and the same is dismissed in its entirety with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of January 2014

Nzioki wa Makau

JUDGE