



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2440 OF 2012

MARTIN MAKAU KITHEKA CLAIMANT

VERSUS

UCHUMI SUPERMARKETS LIMITEDRESPONDENT

RULING

1. The ruling relate to the application dated 2nd September 2013 by Notice of Motion filed under the provisions of order 45 Rule 1, Order 51 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking a review of Court orders dated 24th may 2013, set it aside and reinstate the claim against the respondent. The application is supported by the annexed affidavit of the claimant Martin Makau Matheka. The respondent filed Grounds of Opposition on 24th September 2013. Both parties filed their written submissions and were able to highlight these written submissions in court.
2. The application by the claimant is on the grounds that the Court ruling dated 24th May 2013 arose from a preliminary objection raised by the respondent which ruling upheld the objections and held that the claimant and ought to have been addressed as under the Trade Disputes Act. That this finding was erroneous and based on a mistake for the reasons that the claimant would not have been able to recover any dues owed to him during the period the respondent was under receivership as there was a freeze on all disputes against the respondent during this period which was only lifted in 2010 when the cause of action arose. That the claimant had made efforts to settle this matter but the respondent is not willing and thus the claimant approached this court. The issues raised in the claim are disputed and require evidence to be adduced and hence the dismissal of the claimant through the preliminary objection was erroneous.
3. Further grounds are that there is new and sufficient reasons which ought to have been brought tot eh attention of the court which reasons the court ou3.ght to consider by a review of its decision of 24th May 2013.
4. The claimant in his affidavit in support of the application states that the claim herein was for the recovery of balance of terminal dues unpaid after his termination of employment by the respondent filed in court on 5th December 2012, there was a defence where a preliminary objection was raised and the court allowed it on 24th may 2013. That the claim was statute barred but it was not possible to recover due from the respondent as they were under receivership and thus their debts were held in abeyance until the receivership was lifter in 2010. The claimant was unionized and the union approached the Ministry of labour as under the Trade Disputes Act to register the dispute with the respondent and the ministry found the claimant had a genuine claim against the respondent, the dispute was investigated but the respondent failed to attend or settle the matter. The Minister thus advised the union to wait the lifting of the respondent receivership to be able to lodge a claim against them. The cause of action therefore arose in 2010 after the lifting of the respondent receivership and thus not time barred as held by the court. That

this is a sufficient reason to warrant a review of the court ruling dismissing the claim.

5. In support of the application, the claimant submitted that the claimant tried to resolve the dispute herein through the application of the Trade Disputes Act which was not successful as the respondent declined to participate. The Employment Act came into force before the dispute could be resolved and the industrial Court had jurisdiction to resolve labour disputes. Article 159(2) now guides court not to rely on technicalities and in this case the court should not rely on procedural technicalities.

6. That the claim herein had been filed under the Trade Disputes Act and when the respondent went under receivership, time stopped running and the 3 years rule commenced in 2010 and the claim was filed in 2012. The court ruling should therefore be reviewed and the claim reinstated.

7. The respondent on the other hand submitted that from their grounds of opposition there are three questions that must be addressed with regard to an application seeking review in that the claimant has relied on the provisions of the Civil Procedure Rules and the Act while proceedings before the Industrial Court should be based on the industrial Court procedure Rules as under Rule 32 which spells out the grounds upon which a review may be granted.

8. That there must be discovery of new information that was not available to a party at the time they came to court, that there is an error on the record or a clarification that is sought from court and that there is a sufficient cause. In this application the claimant is challenging the finding of the court on the merits of the court arriving at the issue of limitation. This is a legal point that ought to be subject of an appeal and not a review. Where a party finds that the court did not apply the law properly this would be a good issue for appeal and not review.

9. The respondent further submitted that there is no error identified on the face of the record. The claimant attach correspondence between the claimant union, the respondent and Ministry of Labour but these were records in possession of the claimant and by the time the court delivered its ruling these material were not made available and it has not been stated as to why these correspondence was omitted. A party should not litigate in installments and the claimant had the liberty to have the union file the claim and submit the documents now in this application.

10. That the claimant had had inordinate delay as the ruling was on 24th may 2013 and the application herein is dated 2nd September 2012 a period of over 3 months and the delay in not explained and must have been an afterthought after failing to utilize the remedy of appeal.

11. The court ruling subject in this application that seek a review orders dated 24th may 2013 established that the cause of action herein is based on a contract of employment and The Claimant's employment was terminated on 1st June 2006, six years and a half (6 ½) from the date of filing this claim in the Industrial Court on the 5th of December 2012 and therefore by operation of the law, the claim lapsed on 1st June 2012. Even where the party were to rely on the provisions of the Trade Disputes Act, a time of 6 ½ years was obviously beyond the limitation period as under the provisions of section 4 of the limitation of Actions Act.

12. The claimant has submitted that time stopped running after the respondent went under receivership. That the receivership was lifted in 2010 when time started running again and hence the claimant as at the time the claim was filed on 5th December 2012, there was till time. However, employers who become insolvent or go under receivership, any claims due to the affected employees are governed as under Part VIII of the Employment Act especially section 66 and under section 71 it states;

71. (1) a person who has applied for a payment under section 66 may present a complaint to the Industrial Court?

(a) That the Minister has failed to make the payment; or

(b) That the payment made by the Minister is less than the amount which should have been paid

(2) The Industrial Court shall not consider a complaint under subsection (1) unless it is presented-

(a) Before the end of the period of three months beginning with the date which the decision of the Minister on the application was communicated to the applicant; or

(b) Within such further period as the Industrial Court considers reasonable in a case where it is not reasonably practicable for the complaint to be presented before the end of that period of three months.

13. Hence, the Employment Act regulates what is to happen in the event of an insolvency or receivership. A dispute reported to the Minister relate to a dispute that arise within the meaning of the Employment Act and not as under the Trade Disputes Act which has since been repealed.

14. Were these matters within the knowledge of the claimant when they filed the claim on 5th December 2012? Can these provisions now be applied as new and sufficient cause to warrant a review of the court ruling dated 24th May 2013? The ruling subject of review herein outlined the impact of time and the applicable law therein which details were within the knowledge of the claimant as at the time of filing the claim on 5th December 2012. The cause of action arose way back in 2006, the investigator appointed by the Minister is not equivalent to the process as envisaged under part VIII of the Employment Act or the provisions outlined under section 66 for which this court can confirm as under section 71 of this Act.

15. Further to this, the Industrial Court Procedure Rules at Rule 32 now outline the grounds upon which a party can seek a review of court orders;

33. 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) A person seeking review of a decree or decision of the court shall apply to the court by notice of motion supported by affidavit and the Court shall proceed to hear the persons in accordance with section 16 of [the Act](#).

16. There must be a new and important matter which was not within the knowledge of a party, there is a mistake, breach, clarification is needed or there is a sufficient reason. The materials attached to the claimants application is not stated to be new or was not within their knowledge or has now been found after due diligence. The questions raised as to time limitations are not mere technicalities that can be addressed or cured by the application of Article 159 of the Constitution. Provisions of section 90 of the Employment Act are mandatory and cannot be cured by reliance to these constitutional application and or reference. This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims. This time can be extended upon the Court being

moved by a party who on good grounds finds themselves under this circumstance. That is why the law exists to assist parties who for good reasons are unable to come to court in good time. This was not the case here.

17. The failure to file the claim in good time cannot be cured by the operation of Article 159(2) (d) of the Constitution which obligates the court when exercising judicial authority to administer justice without undue regard to procedural technicalities but the court must define what procedural technicality is. That where there is a breach of a statutory provision that is mandatory as the case for section 90 of the Employment Act this is not a procedural technicality but an issue that goes to the core of the claim herein. Thus Article 159 of the Constitution cannot come to the aid of the claimant.

The application dated 2nd September 2013 fails to establish a good cause for review and is hereby dismissed. Costs to the respondent.

Dated and delivered in open court this **10th** Day of **March 2014**.

M. Mbaru

Judge

In the presence of:

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