



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
PETITION NO. 4 OF 2013
(Formerly High Court Petition No. 105 of 2010 at Nairobi)

NAKURU INDUSTRIES.....PETITIONER

- VERSUS -

THE INDUSTRIAL COURT.....1ST RESPONDENT

THE ATTORNEY GENERAL OF KENYA.....2ND RESPONDENT

-AND-

JAMES MWANGI & 22 OTHERS.....INTERESTED PARTIES

(Before Hon. Justice Byram Ongaya on Friday 13th June, 2014)

RULING

The judgment in the petition was delivered on 11.07.2012 by *Mumbi Ngugi, J.* In the judgment, the High court found that the 1st respondent (then constituted as a tribunal under the former constitutional and statutory dispensation) entertained and adjudicated upon a dispute which the law at section 73 (3) of the Industrial Relations Act clearly provided it had no jurisdiction to entertain so that the 1st respondent exceeded its jurisdiction thereby rendering its decision amenable to supervisory jurisdiction of the High Court. The High Court then found and held that the award of the 1st respondent in Cause No. 462 N of 2009 was null and void for being arrived at without jurisdiction and for violation of the petitioner's right under section 70(a) of the former Constitution.

On 17.05.2013, the interested parties filed the notice of motion under Article 22 of the Constitution. The interested parties prayed that the court reviews and sets aside the judgment delivered by the High Court on 11.07.2012. Consequential to the review, it was prayed that the petitioners serve the applicants all pleadings filed in the proceedings within time as the court may deem fit; and the applicants be allowed to file their response to the petition together with the other pleadings filed by petitioner, together with their cross-petition. The interested parties also prayed that costs of the application be borne by the petitioner.

The application was based on the following grounds:

- a. **That the applicants were not served with the petition or other pleadings in the petition as required by law.**

- b. That the petitioners were condemned unheard in contravention of their fundamental rights under the Constitution.**
- c. The issues raised in the petition directly affect the rights of the applicants under law and the Constitution. The judgment made without service and participation of the applicants violated the applicants' rights in the Constitution and law.**
- d. The hearing of the petition and the judgment given are unlawful and un-constitutional.**
- e. At the hearing, the petitioner failed to make material disclosures hence the prayer for setting aside.**

The affidavit supporting the application by the interested parties states that they were not served with the petition and other documents filed for the petitioner and they did not participate in the hearing in absence of the relevant service.

The petitioner opposed the application by filing the notice of preliminary objection on 25.11.2013 stating grounds as follows:

- a. The application offends the provisions of section 73 of the Labour Relations Act.**
- b. The applicants being members of a union have no *locus standi* to bring the current application.**
- c. The application has been brought after unreasonable delay.**
- d. The application can be brought only by the 23rd interested party acting through its officials and there is no affidavit or authority by the 23rd interested party on filing of the application.**

The petitioner also filed on 10.02.2014, the replying affidavit of R. P. Shah, the petitioner's director. It was stated that the applicants were not the primary respondents in the petition but they were named as interested parties. As admitted at paragraphs 9 and 10 of the supporting affidavit, it was stated that counsel for the interested parties in proceedings before the 1st respondent was served and was aware of the petition proceedings but failed to take steps to place relevant materials before the High Court. Further, it was urged for the petitioner that the only issue for determination was whether the jurisdiction of the 1st respondent had been exceeded and the applicants have not showed how in their case, the High Court would have arrived at a different finding and holding. The petitioner has stated that the facts in the petition proceedings were not contested and there were no new facts to be urged by the applicants if the review application were to succeed.

The petitioner's grounds are repeated in the grounds of opposition filed on 24.03.2014 for 1st and 2nd respondents in the petition. In particular, the 1st and 2nd respondents have urged that the applicants have not established any error apparent on the face of the judgment, or new evidence or material not placed before the court at the hearing of the petition and which after due diligence could not avail the same at the hearing of petition, and the application was made after unexplained delay.

The court has considered the submissions and the documents filed for the parties and make the findings as follows:

1. There is no dispute that while the petition was pending, the advocates for the applicants on record in the proceedings before the 1st respondent and which were in issue in the petition were made aware of the petition proceedings but took no steps to file relevant pleadings or papers in the petition. The court finds that the applicants were aware through their advocates of the petition proceedings and subsequently the judgment but opted not to file the application for review until after the unexplained delay. The court finds that the application for review was filed after unexplained and inexcusable delay.

2. The applicants seek to set aside the judgment but have not put forward any plausible answer, cross-answer or line of defence that would lead to a different finding by the court on the petition. The court holds that empty pleas by a party to be heard on merits without showing the substance of the facts that may entitle the party to be heard will not justify the orders for setting aside and rehearing as urged for the applicants.

3. The applicants, as submitted for 1st and 2nd respondents, have failed to meet and establish any of the settled grounds for grant of an application for review and the court finds accordingly.

In conclusion, the court finds that the application dated 16.05.2013 was not merited and the same is dismissed with costs.

Signed, dated and delivered in court at Nakuru this Friday 13th June, 2014.

BYRAM ONGAYA

JUDGE