



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 532 OF 2014

IN THE MATTER OF: THE DOCK WORKERS UNION (DWU)

AND

IN THE MATTER OF: DOCK WORKERS UNION CONSTITUTION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

ARTICLES 49, 22, 23, 25

AND

IN THE MATTER OF: ANNUAL GENERAL CONFERENCE HELD ON THE
18TH OCTOBER, 2014

BETWEEN

1. GREGORY MAREKO

2. CLEMENT LIBUKO

3. JAMES MBWABI

4. BWORU BARISA

5. MARSHAL KHAYOKO CLAIMANTS

AND

1. THE NATIONAL GENERAL SECRETARY

DOCK WORKERS UNION (DWU) 1ST RESPONDENT

2. DOCK WORKERS UNION 2ND RESPONDENT

RULING

The Claimants filed their Statement of Claim on 29th October 2014. They broadly, seek to stop their Trade Union the Dock Workers Union, from shifting its affiliation with COTU (K) to TUC.

With the Claim was filed an Application by the Claimants dated 29th October 2014, seeking, pending hearing and determination of the Claim, to restrain the Dock Workers Union from associating with TUC.

The Application was made under Certificate of Urgency.

It was scheduled for *inter parte* hearing on 14th November 2014.

Mr. Kithi holding brief for Mr. Kadima for the Claimants, applied for adjournment on two grounds:-

- (a) The Replying Affidavit filed by the Respondents raised issues which required the Claimants' Advocates to seek fresh instructions from their Clients.
- (b) There was no Notice of Appointment of Advocates filed by the Respondents, and the Claimants did not know where to serve.

The Court rejected the request for adjournment.

When the file was called at 10.00 a.m., at the end of the call-over of the day's Cause List, the Claimants and their Advocates were not there to prosecute their Application.

The Respondents asked the Court to dismiss both Application and the Claim.

The Court dismissed the Application dated 29th October 2014 for non-prosecution, with costs to the Respondents.

The Claimants filed the Application dated 28th November 2014, seeking to set aside the orders of 14th November 2014, and to reinstate their Application of 29th October 2014.

The Application is made under Article 59 of the Constitution of Kenya, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act Cap 21 the Laws of Kenya, and Order 12 Rule 7 of the Civil Procedure Rules 2010. It is supported by the Affidavit of Ms. Rajab, Advocate for the Claimants.

It is opposed through the Replying Affidavit of Mr. Leonard Rufus Ochieng', the Authorized Representative of the Respondents, sworn on 5th December 2014.

It was canvassed on 11th December 2014.

Ms. Rajab, instructed by Kadima and Company Advocates for the Claimants, explained she was not able to attend Court on 14th November 2014, because she was ill. She instructed another Advocate to hold her brief. There was no proper communication between Ms. Rajab and the Advocate instructed to hold brief. The Claimants' Advocates were advised by the Advocate holding brief, that the matter had been stood over generally. There was no communication the Application would proceed later the same day.

There is an extract of the recording made of the proceedings of 14th November 2014, attached to the Claimants' Supporting affidavit, which was made by the Advocate holding brief for Ms. Rajab. The extract indicates the Court ordered:-

- (a) Application for adjournment rejected.
- (b) Adjournment fees and costs awarded to the Respondent.

(c) Matter S.O.G. (Stood Over Generally).

The Court Finds

1. This extract is obviously wrong, and does not reflect the day's proceedings. If the application for adjournment, made by the Claimants was rejected, what adjournment fees and costs would be awarded to the Respondents? Which matter would be stood over generally? Is it possible to refuse adjournment and at the same time stand the same matter over generally?
2. The record shows the Claimants' application to adjourn the hearing of their Application was rejected. When an application for adjournment is refused, it means the hearing must proceed.
3. The file was called at 10.00 a.m. for hearing. It was not necessary for the Court to inform the Claimants that once their request for adjournment was refused, hearing would go on as scheduled. The Claimants, and the Advocate holding brief for Ms. Rajab walked out, and failed to prosecute the Application. The Respondents applied for dismissal of the Claim and the Application, and the Court granted the prayer for dismissal of the Application. The Claimants cannot complain that they were not given the opportunity to argue their Application, or even that there was no proper communication on the day's proceedings.
4. The reasons given to the Court by the Advocate having Ms. Rajab's brief on 14th November 2014, in seeking adjournment, differ from those given by the Claimants in seeking to reinstate their Application.
5. On 14th November 2014, the Claimants were not ready to proceed with their Application because the Replying Affidavit filed by the Respondents, raised new matters requiring further consultations between the Claimants and their Advocates. Secondly, the Claimants alleged they did not know where to serve the Respondents. These grounds were rejected by the Court in declining the application for adjournment.
6. The Claimants now say their lack of preparedness in prosecuting their Application, was occasioned by Ms. Rajab's illness. The treatment card attached to Ms. Rajab's supporting Affidavit indicates she was treated on 12th November 2014, while the hearing was on 14th November 2014. The Court has explained why the recording of the day's proceedings by the Claimants is faulty.
7. There are clearly no grounds to warrant the Court revisiting the orders issued on 14th November 2014. If the Claimants have an issue with Mr. Ochieng's involvement in this dispute, they should make a separate Application. There is no ground to justify reinstatement of the Application dated 29th October 2014. The Claimants should endeavour to prosecute their main Claim.
8. The Application is technically defective. It is entirely made under the Civil Procedure Act, while there are Rules, governing proceedings of the Industrial Court, under which the Court can be moved to revisit, vary or set aside its decisions. The Claimants have not explained why they ignored the Industrial Court (Procedure) Rules 2010, in seeking reinstatement of their Application.

IT IS ORDERED:-

- (a) *The Claimants' Applicant dated 28th November 2014 is refused.***
- (b) *Costs in the cause.***

Dated and delivered at Mombasa this 19th day of December 2014.

James Rika

Judge