



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 1480 OF 2010

KENYA GAME HUNTING AND SAFARIS WORKERS UNION.....CLAIMANT

VERSUS

ADC MUTARA.....RESPONDENT

RULING

1. The matter before me is a Review Application by the Claimant/Applicant. The Application is dated 15th November 2012 and seeks to review my Ruling of 31st October 2012. The Claimant's application premised on Rule 32 of the Industrial Court (Procedure) Rules 2010 seeks a review of the decision of the Court. The first prayer was for the Chief Justice to empanel a three-judge bench to hear the Review application. I at the onset of the Application ruled that the matters raised were on a Review and thus were not fit for a three-judge bench as will be clear in this Ruling as it unravels. The other prayers were that the Claimant was not heard in the dispute. It reiterated the points advanced by the Claimant in the main claim and sought that the Court:-
 - i. Reviews its ruling to conform to the concerns raised in the Review Memorandum
 - ii. Quashes its decision and orders that the suit be heard afresh
 - iii. Quashes the burden of costs from the Claimant/Applicant and directs each party to bear their own costs
 - iv. Orders the Respondents (sic) to deduct and remit union dues upon acceptance of this application
2. Mr. Ndolo urged the Application for Review while Mr. Nyabena opposed the same on behalf of the Respondent.
3. Mr. Ndolo submitted that there are Unions and the Registrar of Trade Unions gives a sector where the Union will represent workers and through the Union constitution, no other Union can be allowed to interfere with another sector. He submitted that the Claimant Union is registered to represent tourist industries – tour operators, conservancies and surgeries for animals among others. Mr. Ndolo submitted that if there is a demarcation dispute the matter is referred to the Minister for Labour for demarcation and determination whether there is interference. He submitted that conservancies are registered under the Management of Wildlife Conservancies Act cap. 376 of the Laws of Kenya. He submitted that you will not find a clause on representation of conservancies by an agricultural workers union. Mr. Ndolo referred to the Industrial Relations Charter he stated that this is what gives directives on how the relationship between the parties should be. He submitted that under Section 48(b) the Labour Relations Act 2007 gives provision on what the Respondent should do upon receiving a written request to deduct union dues from the Claimant Union. He submitted that Section 54 of the Labour Relations Act 2007 guides the manner of recognition of the Claimant. He stated that the Claimant union had the simple majority in the sector and should therefore be recognised. On the basis of the submissions and the pleadings he thus sought the

Orders set out above.

4. Mr. Nyabena for the Respondent opposed the Application for Review. The Respondent had filed Grounds of Opposition on 3rd December 2012. He submitted that the application was misconceived and not based on any of the grounds set out in Rule 32 of the Industrial Court (Procedure) Rules 2010. He submitted that no sufficient reasons had been raised to warrant a Review. He submitted that what Mr. Ndolo was raising were the very same issues the Court made a Ruling on. Mr. Nyabena submitted that the on 19th September 2012 both parties appeared before me and it was agreed that the parties proceed by way of written submissions. Mr. Nyabena thus submitted that the Claimant cannot be right in saying that he was denied the opportunity to call oral evidence. Mr. Nyabena submitted that the Claimant should have raised an objection at the point directions were given. He submitted that the grounds for review are well spelt out in Rule 32. Mr. Nyabena submitted that there must be the discovery of new or important matter or evidence which after exercise of due diligence was not in the knowledge of that person when the decree or order was made or is on account of the award or ruling being in breach of the law or if the ruling requires clarification or rectification or for any other sufficient reason. He submitted that these requirements were not met by the Claimant/Applicant. Mr. Nyabena submitted that the Court was being asked to sit on appeal of its own decision. He submitted the Claimant had not laid sufficient basis for the Court to reverse its decision on costs. The Respondent, it was urged, had not breached any order of the Court. He submitted that nothing new had arisen and the Court would after hearing the very same evidence come to the same conclusion. He urged the Court to dismiss the review application with costs.
5. In a reprise, Mr. Ndolo denied that there was agreement between the parties when the matter appeared before me on 19th September 2012. He submitted that the Claimant was not heard orally and was unable to submit on the Industrial Relations or the law. He stated that the review was sought because the Claimant's members were aggrieved by the Ruling of the Court. He stated that the members of the Claimant Union cannot be represented by another Union per the Industrial Charter. He submitted that the charter was for parties to follow.
6. The Industrial Relations Charter 1984 makes salutary provisions therein. Some of the provisions which are pertinent to the dispute are under Clause 3 and 4 which read as follows:-
 3. *That the Government will, as a matter of policy, promote industrial trade unionism, that is, trade unions organised on the basis of a broadly defined industry irrespective of the craft, occupation or trade in which the workers are engaged. In this connection, it will, in co-operation with the Federation of Kenya Employers and the Central Organisation of Trade Unions (K), encourage conditions which would progressively achieve industrial trade unionism.*

A list of Industrial groupings will be established and attached to this charter as an appendix.

 4. *That the Registrar of Trade Unions shall ensure that the definition of membership coverage provided for each union's constitution shall be defined as clearly as possible to avoid overlapping of such Trade Unions' spheres of activity. In this connection before a trade union is registered the following procedure shall be adopted:-*
 - (a) *The recommendation from the Permanent Secretary to the Registrar of Trade Unions must state that the Minister for Labour has been personally consulted and has approved the recommendation.*
 - (b) *The recommendation from the Central Organisation of Trade Unions must be accompanied by a resolution of a properly constituted Executive Board of COTU(K) supporting that recommendation.*
 - (c) *The recommendation from FKE must be accompanied by a resolution of the FKE Management Board.*

7. The Industrial Relations Charter has therefore made it clear that the membership coverage for each of the trade unions is organised on the basis of a broadly defined industry irrespective of the craft, occupation or trade in which the workers are engaged.
8. The Court has been unable to ascertain whether indeed the list of groupings contemplated in Clause 3 of the Industrial Relations Charter was ever developed. In the matter before me, it is clear that we are not dealing with the effect of the Charter. I have only reproduced it here to enlighten the Union on the import of the same.
9. The issue at hand is clearly review. Section 16 of the Industrial Court Act makes provision that the the Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules. The Rules make provision under Rule 32. Rule 32 of the the Industrial Court (Procedure) Rules, 2010 is crystal. The Rule provides as follows:-

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.

10. My reading of the above Rule is that a party seeking review must be in possession of material which shows that 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 that the review is sought on account of some mistake or error apparent on the face of the record; or that it is sought on account of the award, judgment or ruling being in breach of any written law; or where the award, judgment or ruling requires clarification; or where there is any other sufficient reason or

reasons.

11.The Claimant in the application before me has not demonstrated any of the above-mentioned limbs. No material has been placed before me to suggest that there is any sufficient reason or reasons for the grant of the review sought. I have heard the entreaties by the Union and even after having heard the submissions yet again I am not convinced that the order I made requires clarification, it has no error apparent on the face of it. There is no mistake. No new material or evidence has been led to alter the decision. In the premises, the Claimant's Application which is devoid of merit must fail. It is dismissed with costs.

12.As regards the earlier order mulcting the Claimant in costs, the Court found against the Claimant. The decision went in favour of the Respondent in the Cause and costs were awarded to the Respondent. Costs ordinarily will follow the event. There is no material before me which suggests that the order made on costs was erroneous, capricious, oppressive or punitive. The Court is entitled to award or order costs and even penalise a party in costs if the party's conduct has led to litigation which would otherwise have been avoided. The present proceedings which would otherwise had been avoided had the matter been let to rest has led to this instant Ruling. Accordingly, the Claimant will bear the costs of this application.

13.I order that the costs for the Cause as well as this instant Application be paid to the Respondent forthwith.

It is so ordered.

Dated and delivered at Nairobi this 7th day of June 2013

Hon. Mr. Justice Nzioki wa Makau

Judge