



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 881 OF 2011

(Before D.K.N. Marete)

KENYA BUILDING, CONSTRUCTION, TIMBER, FURNITURE

AND ALLIED EMPLOYEES UNION.....CLAIMANT

Versus

SMOKY HILL LIMITED.....1ST RESPONDENT

RULING

The matter for adjudication and determination before court is an application by way of Notice of Motion dated 17th November, 2011. It comes to court vide a certificate of urgency and is supported by the affidavit of Tony Rusafio sworn on the 16th November, 2011. It seeks the following orders of court;

1. That this application be certified as urgent and service thereof be dispensed with in the first instance.
2. That pending the hearing and determination of this application *inter partes* this Honourable court be pleased to stay the execution of the decision in the award made on 19th October, 2011.
3. That the award made on 19th October, 2011 be reviewed and/or set aside.
4. That an order do issue directed at the Kenya Quarry and Mine workers Union requiring its authorized officer to appear before this Honourable court within such a time as the court may direct with a view to testifying on oath as to the existence or no-existence of any labour relations between it and the respondent.
5. That the claimant's claim be dismissed with costs.
6. That the costs of the application be born for.

The claimant/respondent responds to the application vided a Reply to Notice of Motion dated the 14th December, 2011 and filed on 16th instant. He prays that the application be dismissed with costs for being not meritorious and also that an order be made for the respondent to sign within the stipulated period or else this be deemed to be contempt of court.

The respondent/applicants case in support of the application is grounded as hereunder;

- a. *There is a new and important matter prompted by a letter from Kenya Quarry and Mine worker union which was not then present to justify the granting of the orders sought.*
- b. *There is an error on the face of award which once cured would enable this Honourable Court grant the orders sought herein.*
- c. *The award made herein is punitive to the respondent to the extent that it has mandated two unions to engage it on matters relating o its over 179 employees and thus creating an environment not conducive to run its lawful quarrying business.*
- d. *It is in the interests of justice that this court does grant the orders sought.*
- e. *Such other grounds and reasons to be adduced and the hearing hereof.*

In her supporting affidavit, the respondent/applicant avers that she is not engaged in building and construction but is licensed by Kilifi Town Council to engage in quarrying services. In such understanding and recognition, the applicant has engaged in labour relations with Kenya Quarry and Mine Workers Union. It has a workforce of 170 persons.

The respondent/applicant further avers that the award of court was based on falsehoods and this shall negate the overriding objective of the court and cause injustice to the respondent. Further, the claimant has threatened to execute the orders while Kenya Quarry and Mine Workers Union continue to insist on existing relations between the applicant and themselves. Execution of this award is likely to cause disharmony between the respondent/applicant and her workers.

Lastly, the respondent/applicant insists that it is contentious as to whether a Collective Bargaining Agreement should issue to the claimant bearing in the existing relationship between the applicant and Kenya Quarry and Mine Workers Union. He contends that these proceedings are a disguised mode of resolution of a supremacy war between the claimant and Kenya Quarry and Mine Workers Union.

The claimant/respondent opposes these applications for being groundless. He further avers that this application is intended to delay or block Collective Bargaining Agreement negotiations and came out only on receipt of proposals of the CBA.

The claimant/respondent in his reply further submits that;

1. That this application is based on a few correspondences exchanged between them and Kenya Quarry and Mine Workers Union which the respondent/applicant ebbs out as evidence of a cordial relationship.
2. That these do not compromise discovery of new and important evidence as envisage in the rules and cannot sustain a review.
3. There is no new evidence on at all.
4. This long standing dispute was earlier subjected to reconciliation and the respondent did not raise the issue brought out here and therefore therein belated nature and approach.
5. The annexures in support of the application are outdated and scanty thereby making the same unsustainable.
6. That there is no evidence of an executed CBA between the respondent/applicant and Kenya Quarry and Mine Union thus rendering the relationship questionable on credibility and usefulness to the employees industrial relations.

7. The Kenya Quarry and Mine Workers Union is not interested in this dispute and are only being dragged in for the respondent/applicants interests of scuttling the award.

In the penultimate, the claimant/respondent submits as follows;

- a. That its registered constitution mandates it to represent the interest of employees in quarrying.
- b. The award is in compliance with the law.
- c. That there is no error on the face of the record contrary to the averments of the respondent.
- d. The respondent/applicant has not demonstrated any other sufficient grounds to warrant a review of the award.

The matter came to court on 18th November, 2011 when the court directed on the way forward and issued orders for stay of execution pending hearing and determination of the application for review. The matter was later dismissed with costs to the respondent for want of prosecution. There was no appearance for the respondent/applicant in court.

By a consent order dated 23rd May, 2012, the application was reinstated and set for hearing on 19th September, 2012 with an extension of the interim orders. (Did these exist?).

Proceedings in this application were on until the 31st May, 2013 when the parties agreed to dispose of the application by way of written submissions. These were heard and the parties agreed on a ruling date of 1st July, 2013.

On 1st July, 2013, the court observed that there were no written submissions on the face of the record of court. Counsel for the claimant/respondent submitted that they were served with the written submission of the respondent on 28th June, 2013. That the claimant indeed filed their submissions but these were disallowed into the court file by the court.

The court therefore made the following orders;

- a. The court registrar is ordered to place the filed written submissions on the record of court.
- b. The written submissions by the respondent/applicant are struck out of the record of the court.
- c. Ruling on 12th July, 2013.

The net effect of order no. 1 above is the accommodation of the written submissions of the claimant/respondent and the exclusion of these of the respondent/applicant.

My finding on this application is that it is ostensibly preposterous. It is not compliant with rule 16, Industrial Court (Procedure) Rules, 2010 and only comes out as a callous attempt to scuttle the execution of the award to the detriment of its own employees. The respondent/applicant is clearly intent on delaying the realization of appropriate industrial relations between himself and her employees. This is not right. The bill of rights under the constitution of Kenya, 2010 clearly defines the place of workers rights as envisaged in the said constitution. Article 41 is pivotal on this. Other statutes come in to buttress this position.

The grounds for review as aforesaid are flimsy and not proven.

I am in the circumstances inclined to dismiss this application with costs to be claimant/respondent. He is now at liberty to execute and implement the award dated 19th October, 2011 to the letter.

Dated, delivered and signed this 18th day of July, 2013.

D.K. Njagi Marete,

JUDGE

Appearances:

1. Muema & Associates Advocates for the respondent/applicant.
2. Mr. Francis K. Murage instructed by KBCT & FE Union for the claimant/respondent.