



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 82 OF 2002

BETWEEN

TRANSPORT AND ALLIED WORKERS UNION.....CLAIMANT

AND

KENYA AIRPORTS AUTHORITY.....RESPONDENT

VS

JOHN DELFINO NTORURU.....APPLICANT

RULING

Background

1. On 8th October 2002, the Industrial Court received a Notification of Dispute Form 'A' dated 17th June 2002, together with the statutory certificates from the Labour Commissioner and the Minister for Labour under Section 14(7) and 9(e) and (f) of the Trade Disputes Act (now repealed). The dispute was mentioned on 23rd October 2002 when the Court directed the parties to file their respective written Memoranda by 16th January 2003.
2. The Claimant filed its Memorandum on 4th June 2003 but the Respondent did not file its Reply as directed. The parties subsequently began to explore the possibility of an out of court settlement but failing to reach an agreement the matter was fixed for hearing on 28th October 2003.
3. However on 24th July 2003, the Court was presented with a copy of a letter dated 16th July 2003 from the Respondent to the Federation of Kenya Employers in which the Respondent accepted the following recommendations from the Minister for Labour:
 - a. That Mr. Ntoruru be paid his terminal dues in accordance with the existing Collective Bargaining Agreement;
 - b. That he should in addition be paid the equivalent of nine (9) months' basic salary as compensation for wrongful loss of employment;
 - c. That he should further be issued with his certificate of service.
4. David Immo accepted this offer on behalf of the Union and Chemmutut J adopted the terms set out

therein as an Award of the Court. It is this Award that John Delfino Ntoruru, the Applicant herein seeks to challenge.

The Applicant's Application

5. The Applicant came to Court on 10th May 2013 under Certificate of Urgency seeking the following orders:

- a. That he be enjoined as an Interested Party in this matter;
- b. That he be granted leave to seek a review of the Award of the Court issued on 24th July 2003.

6. When the matter came before me I certified it urgent and directed the Applicant to serve the Respondent. The matter then proceeded *inter partes* on 19th June 2013.

The Applicant's Submissions

7. John Delfino Ntoruru, the Applicant herein submitted that Cause No 282 of 2002 in which he was the grievant was never heard and that when he came to Court for hearing he discovered that the case had been settled by consent, whose terms were drafted by the Respondent.

8. Ntoruru maintained that the matter was not heard on merit and his right to a fair trial was therefore violated. The Award was issued in contravention of Section 12 of the Industrial Court Act, Sections 45 and 49 of the Employment Act, 2007 and Article 50(1) of the Constitution.

9. Ntoruru told the Court that he was not properly represented by his Union and that his pleas to the Union to pursue a review of the Award had gone unheeded. He had thus lost confidence in the Union as his representative. According to him, the Respondent was allowed too much leeway in crafting of the consent. He was dissatisfied with the consent Award and he was therefore seeking a review thereof.

The Respondent's Reply

10. The Respondent filed Grounds of Opposition to the Applicant's application on 4th June 2013.

11. The gist of the Respondent's opposition is as follows:

- a. That the Applicant's application has been brought after an inordinate delay of eleven years from the date the matter was concluded and no reason for the delay has been advanced;
- b. That the Applicant is bound by the consent between his Union and the Respondent which consent stemmed from recommendations made by the Conciliator whom the Applicant did not object to;
- c. That the Applicant has no *locus standi* in this matter which was heard and concluded between two parties and the Applicant being only a witness lacks the capacity to make this application;
- d. That this Court is *functus officio* and cannot therefore reopen this matter since neither of the parties to the suit is before the Court. To allow the Applicant's application would amount to reopening a case which has been heard and determined;
- e. That under the repealed Employment Act (Cap 226) an employer was required to keep employment records for three years post termination of employment. In view of the time lapse in this case, the Respondent would therefore be prejudiced if the case is reopened at this stage;
- f. That under Section 17 of the Trade Disputes Act and the Procedure Rules made there under which were applicable in 2003 when this matter was determined, the Award is not amenable to review;
- g. That under Rule 32 of the Industrial Court (Procedure) Rules, 2010, a review can only be made before the Judge who issued the Award and it was unlawful for a review to be conducted by another Judge;
- h. That the matter was concluded before commencement of the Industrial Court Act, 2011, the Employment Act, 2007 and the Constitution of Kenya, 2010 and the law could not be applied retrospectively;
- i. That the Applicant has not disclosed any new material facts or any incidence of fraud on the part

of the Respondent that would necessitate a review at this stage.

12. Gladwell Mumia for the Respondent reiterated the above grounds of opposition and submitted that the Applicant's application is vexatious and an abuse of the court process and should therefore be dismissed. The Applicant had not shown any communication to the Union expressing his displeasure with the way the matter was handled or even giving instructions to the Union to appeal against the Award. The Applicant had not demonstrated fraud, misrepresentation or negligence to warrant a review of the Award. There must be an end to litigation

Ruling by the Court

13. The only issue for determination in this application is whether the Applicant can lawfully move the Court to review the Consent Award issued on 24th July 2003. The Applicant's case is that the proceedings in Cause No. 82 of 2002 were conducted in a manner that infringed on his rights as the case was not heard on merit.

14. The Respondent on the other hand submits that the matter was concluded as between the Claimant Union which was the representative of the Applicant and the Respondent. To reopen a matter that was closed eleven years would be prejudicial to the Respondent.

15. It is not in contest that the Applicant was duly represented by his Union both at the conciliation stage and in the proceedings before Chemmutter J. The law confers a special role on Trade Unions in industrial litigation, to sue in their own name on behalf of its members who are aggrieved by the action of their employer. In such cases, the member who is referred to as a grievant cedes his right to the Trade Union. Of course it is expected that the Trade Union will act in the best interests of its member. However, in cases where the member feels that the Union no longer represents his interests, he may apply to act in person much like a client would withdraw instructions from an Advocate.

16. This case is somewhat unique since the grievant has recorded his displeasure with the way his Union represented him eleven years after conclusion of the case. The Court must therefore determine whether in spite of the delay which is long by any standard the Applicant has a recognizable stake to warrant activation of a file which has remained dormant for so long.

17. The Applicant told the Court that he has been dissatisfied from the day the Award was issued on 24th July 2003 and in the Draft Memorandum of Review dated 8th April 2013, he casts aspersions on the integrity of the Trial Judge, giving the impression that he sat at home bidding time waiting for Chemmutter J to exit from the Bench before making his dissatisfaction known. The Applicant did not however provide any evidence to support his allegations against the Trial Judge and the Court has therefore disregarded these allegations in reaching its decision.

18. Counsel for the Respondent submitted that since the Applicant's claim arose out of a contract of service, the limitation provisions in the Limitations of Actions Act are applicable. Section 4(1) of the Limitations of Actions Act provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.

19. This position was restated by the Court of Appeal in the case of **Divecon Ltd Vs Samani [1995-1998] 1 EA 48 at 54** thus:

“No one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose; or any application to extend such time for the bringing of the action.”

20. The Respondent's Counsel also submitted that the Applicant, who was duly represented by his Union, could not resurrect a matter that was concluded eleven years ago. Counsel referred the

Court to the case of Mary Wairimu Gitonga and 29 Others vs Ken Knit Limited (Industrial Court Cause No 84 of 2010) in which the Court held that a Conciliator's report that is accepted by a union on behalf of its members is binding on the members and the said members are not competent to resurrect the matter. I agree. Once a matter is concluded either before a conciliator or the Court, a grievant should not be allowed to resuscitate it unless the grievant demonstrates that he took issue in the course of the proceedings and was ignored or that the union and the employer have colluded to short change him. The Applicant has not placed any such evidence before the Court and I therefore find that this matter is *res judicata* and the Applicant's application has no leg to stand on. The said application is therefore dismissed with no order for costs.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF AUGUST 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....*Applicant*

.....*Respondent*