



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 842 OF 2009**

*(BEFORE D.K.N. MARETE)*

**KENYA UNION OF ENTERTAINMENT**

**& MUSIC EMPLOYERS.....CLAIMANT**

**VERSUS**

**VANGUARD LIMITED.....RESPONDENT**

**JUDGEMENT**

This is an application by way of a Notice of Motion dated 30th March, 2013 and filed on the same date under a certificate of urgency. It seeks into the following orders of court;

1. **THAT** *this Application be certified urgent and be heard ex parte in the first instance.*
2. **THAT** *a stay of execution be granted pending hearing and determination of this Application.*
3. **THAT** *the Honourable Court does review and/or set aside the orders given on 24th April 2013 and the application be heard and determined on its merits.*
4. **THAT** *the costs of this Application be borne by the Grievants.*

It is based on the following grounds;

- a. **THAT** *the Orders in this matter were made on 24<sup>th</sup> April 2013 requiring the Claimant to pay the sum of Ksh.239,394/- to the Grievants and barring the Claimant from deducting one third or any deductions whatsoever from the Grievants entitlements as union dues or at all, together with costs.*
- b. **THAT** *the person purporting to represent the Claimant being Erick Maurice Ochieng had no authority to represent the Claimant as per the laid down provisions of the Claimant's Constitution and he did not represent the Claimant Union against the Grievants' claim thereby causing the said application to be heard undefended and determined without the Claimant putting forth its defence.*
- c. **THAT** *the said Erick Maurice Ochieng is involved in trying to undermine the registered National Officials of the Claimant and he therefore intentionally failed to defend the claim by the Grievants.*

- d. **THAT** the Grievant known as JOHNSON GICHAGO had written to the Claimant on 6/7/2011 indicating that he and his wife FLORENCE GICHAGO do not have any claim of dues against the Respondent herein and therefore requested that the monies be returned back to the Respondent.
- e. **THAT** later on vide a letter dated 1/9/2012, his wife FLORENCE WANGUI GICHAGO wrote to the Claimant requesting for the cheque to be drawn in her favour and thus gave a conflicting position than that earlier given by her husband JOHNSON GICHAGO.
- f. **THAT** thereafter, among others, the Grievants JOHNSON GICHAGO and his wife FLORENCE GICHAGO filed the application dated 19<sup>th</sup> October 2012 requiring that the monies be paid to them, without disclosing to this Honourable Court that they had already indicated that they were not entitled to the same and that they were not remitting Union dues as required and hence the reason the Union deducted its dues.
- g. **THAT** there is a very real threat that the Grievants may institute execution proceedings against the Claimant at any time unless these Orders are granted since it is a monetary claim.
- h. **THAT** this Application has been brought without delay and the Grievants do not stand to suffer any prejudice should the Orders sought be granted and if the prayers sought herein are not granted the Claimant stands to suffer irreparably.

#### Supporting Affidavit

1. **THAT** I am the Secretary General of the Claimant union herein, well conversant with the matters in question and therefore competent to swear this affidavit.
2. **THAT** the Grievants in this matter filed the application dated 19<sup>th</sup> October 2012. I was not served with the same.
3. **THAT** orders were given on 24<sup>th</sup> April, 2013 wherein the honorable Court ordered that the Claimant union pay the sum of Kshs.239,394/= to the Grievants. The Court also barred the Claimant from deducting one third or any deductions whatsoever from the Grievants entitlements as union dues or at all, together with costs
4. **THAT** I came to learn of these Orders after the ruling was delivered and I immediately wrote to this Honorable Court seeking copies of the Proceedings in the matter. **(Annexed hereto and marked JW '1' is a copy of the letter dated 30/4/2013 written to that effect).**
5. **THAT** I saw the matter in the Case list on 27/3/2013 and upon attending Court on that day I indicated that I was not aware of the matter and I then realized that one ERICK MAURICE OCHIENG who is the Assistant National Secretary General of the Claimant purported to represent the Claimant Union yet he has never been on record in this suit and he did not even indicate that he was holding brief for the Secretary General who has all along been on record as having the conduct of this suit.
6. **THAT** I have been advised by our Advocates on record which advise I verily believe to be true that due process was not followed in this matter because it was irregular for the Assistant Secretary General to purport to represent the Claimant Union without demonstrating to this Honourable Court when he became seized of the conduct of this matter. Also, it is not clear why the Grievants chose to serve the suit papers on the Assistant Secretary General who has never been on record in this suit and is not based in the union's registered office.
7. **THAT** I verily believe that the Assistant Secretary General conspired with the Grievants to have the application served upon him even though he was not on record so that the Claimant Union would not know of the application and so that he could deliberately fail to defend the claim thereby putting the Claimant Union's interest in jeopardy.

8. **THAT** to the best of my knowledge, the Assistant Secretary General did not have any written authority to act on behalf of the Claimant Union in this matter or indeed to swear the Replying Affidavit, as purported. One of the person he purports to have obtained authority from, Mr. Peter N. Chege has denied that he gave him authority while the other Mr. Reuben Chahuga who was Vice Chairman did not have any authority under Rule 10 (f) the Union's Constitution to assign the Assistant Secretary General any duties including to represent the union in his matter. As such, the contents of the said Replying Affidavit do not represent the position of the Claimant union and the actions of the Assistant Secretary General were unconstitutional. (Annexed hereto and marked JW '2' is a copy of the letter dated 30/4/2013 from Mr. Chege and a copy of the Constitution).
9. **THAT** the Assistant Secretary General has been trying to undermine the National officials of the Claimant Union and he together with others have attempted to overthrow the current officials unsuccessfully, by convening illegal meetings and requesting the Registrar of Trade Unions to recognize the same but the meetings and/or purported election of new officials was found to be irregular and was therefore rejected by the Registrar of Trade Unions. **(Annexed hereto and marked JW '3' are copies of correspondence to that effect).**
10. **THAT** I verily believe that the said Assistant Secretary General in failing to defend the Grievant's application is in furtherance of the undermining tactics he has been employing to remove the afore named officials from the Union.
11. **THAT** one of the Grievant's known as JOHNSON GICHAGO had written to the Claimant on 6/7/2011 indicating that he and his wife FLORENCE GICHAGO did not have any claim of dues from the Respondent herein and therefore requested the claimant Union to return eh monies back to the Respondent. **(Annexed hereto and marked JW '4' is a copy of he said letter).**
12. **THAT** later on vide letter dated 1/9/2011, his wife FLORENCE WAGUIGICHAGO wrote to the Claimant requesting for the cheque to be drawn in her favour and thus gave a conflicting position that that earlier given by her husband JOHNSON GICHAGO. **(Annexed hereto and marked JW '5' is a copy of the said letter).**
13. **THAT** thereafter, among others, he Grievants JOHNSON GICHAGO and his wife FLORENCE GICHAGO filed the application dated 19<sup>th</sup> October, 2012 requiring that the monies be paid to them, without disclosing to this honorable Court that they had already instructed the Claimant Union in their aforementioned correspondence that they were not entitled to the said monies and that the money should be returned to the Respondent.
14. **THAT** in spite of their instructions to have the money returned to the Respondent, they proceeded to report the matter to the Police and as such the Union was not able to either pay them or refund the monies due to this confusion.
15. **THAT** moreover, the Grievants failed to disclose that they have not been remitting union dues as required of them and as such, once he award was made, the Claimant Union was entitled to deduct the dues from them since they cannot seek to reap where they did not sow.
16. **THAT** although JOHNSON GICHAGO has attached one payslip for the month of March 2003 as per the calculations of the Union annexed as Annexure JG '3' in the Grievant's Supporting Affidavit and as such, the payslip he has attached is not genuine and cannot be relied upon. A payslip which was issued in November, 2001 while he was in employment does not have any deduction of Union dues, and as such, I have been advised which advise I verily believe to be true that the onus is on him to prove the payment of Union dues during the years he worked before he can claim to be entitled to the award made, which award he had already declined payment of. **(Annexed hereto and marked JW '6' is a copy of a payslip for November 2001 showing no deduction of union dues).**

17. ***THAT*** with respect to FLORENCE GICHAGI, IRENE SYATTA AND WILFRED AKUKU, there is no proof of the payment of Union dues which they are supposed to pay and hence the reason The Claimant Union deduced the said dues from entitlement. (***Annexed hereto and marked JW '7' are copies of their payslips not showing any deduction of Union dues***).
18. ***THAT*** in failing to reveal all the above facts to this Honourable Court, the Grievants misled the Court and caused the Court to make orders which they were not entitled to and they have therefore failed to come to this Court with clean hands. We therefore pray that the orders given be set aside or reviewed.
19. ***THAT*** it is also clear that the Claimant Union does have a reasonable defence to the Grievants application and it would be mete and just for it to be granted an opportunity to ventilate the same and the application be determined on its merits.
20. ***THAT*** in the meantime, since the orders sought and granted were for the payment of monies, there is a very real threat that the Grievants may execute the same unless the orders herein are granted.
21. ***THAT*** I have brought this Application without delay and I therefore pray for the leniency of this Honourable Court which has jurisdiction to grant the Orders for stay so as to preserve the status quo until the application dated 19<sup>th</sup> October 2012 is heard on its merits.
22. ***THAT*** it is the prayer of the Claimant Union that the Orders given on 24<sup>th</sup> April 2013 be reviewed and/or set aside to allow the said Union to file a proper reply to the application dated 19<sup>th</sup> October 2012 and to be heard on the merits of the same, to enable his Honourable Court to make a ruling after having heard the concerned parties. The Claimant stands to suffer great prejudice if the Orders sought are not granted since it will be tantamount to being condemned unheard.
23. ***THAT*** I am ready to abide by any conditions this Honourable Court may give as a prerequisite for the granting of the stay Orders and I therefore humbly pray that this Application be granted.
24. ***THAT*** what is stated herein is true to the best of my knowledge information and belief save where it is otherwise stated.

At the onset, the matter came for hearing before Nduma, J. who issued orders in terms of prayers 1 and 2 above thereby certifying the application as urgent and interim orders for stay of execution.

The Grievants oppose this application in their Replying Affidavit sworn on 6th June, 2013 and filed on 11th instant. The affidavit is sworn by Eric Maurice Ochieng the Assistant Secretary General of the claimant.

Various arguments and submissions arise in this application both ways. The claimant's grounds in support of the application, inclusive of the supporting and supplementary affidavits sworn by one, Job Mucuha, the Secretary General of the Union all point out to a situation where the claimant is set out on an appeal against the orders of court made on 24th April, 2013. These affidavits are a coterie of facts on the subject and also a complaint that, one, Maurice Ochieng did not have the authorized capacity in dealing with the matter as he did on behalf of the claimant union.

The application does not lay out a case for review as established under O.45 and rule 32 of the Civil Procedure Rules and Industrial Court (Practice) Rules 2010.

32.(1) *A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgement 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, judgement 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 confirm 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.*

This is the equivalent and a derivation of Order 45 of the Civil Procedure Rules  
aforecited.

The claimant castigates the appearance of Ochieng in the matter and at the hearing also rubbishes he replying affidavit sworn by the said Ochieng in opposition to the application. From the onset, counsel for the grievants, one, E.N. Mugu objected to the introduction of the supplementary affidavits of Job Mucuha, Godfrey Mwangi and David Kibathi for not being compliant with the order granting leave for the filing of the same. These, he submitted were filed outside the timelines set out in the order of court. This prayer for striking out was sustained.

The application as hitherto expressed brings out a case against Maurice Ochieng. It argues and submits that he did not have authority to act for the claimant and further that the Replying Affidavit in opposition to this application sworn by himself should be struck out. It is further submitted that the said Ochieng has been and continues to undermine the authority of the registered officials of the union and therefore should not be taken seriously.

The respondent/grievants oppose the applicant and restate the authority of Ochieng in so dealing. They also submit that there is nothing new to warrant the setting aside of the original motion and orders of court as prayed therein.

As earlier expressed, the claimant Applicant in this application fell short of issuing the legal criterion for applications for review. He set out on an appellate configuration of the issues raised in her application. This is neither an appeal nor a retrial. In any event, the claimant admits that she was always aware of these proceedings with the Secretary-General even appearing in court at the onset of the proceedings. Why did she not find it necessary to intervene at this early court?

The law on the subject is settled. Review can only be had on the grounds raised in law at rule 32(1) above. None of these is demonstrated by the applicant and therefore this application must fail.

This application is not sustainable for want of compliance with the legal and procedural aspects of the process for an application for review. It must be dismissed on this ground. I therefore dismiss the application with costs to the grievant/Respondents.

Dated, delivered and signed this 26th day of September, 2013.

**D.K. Njagi Marete**

**JUDGE**

**Appearances.**

1. Ms Muigai instructed by E. Muigai & Advocates for the claimant/Applicant.
2. Mr. E. N. Mugu instructed by E.N. Mugu & Advocates for the grievants/Respondent.