



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 659 OF 2011

BETWEEN

KENYA PETROLEUM WORKERS UNION CLAIMANT

VERSUS

SECURE GENERAL CONTRACTORS..... RESPONDENT

Rika

J

CC.

Kidemi

Mr. Obure for the Claimant

Union

Mr Kennedy Ogendi for the Respondent

RULING

The memorandum initiating the claim was filed on 28th April, 2011. The Record indicates that Memorandum was drawn and signed by Mr Kennedy Onyangore Ogendi. This gentleman was at the time an Officer of the Kenya Petroleum Oil Workers Union. He was involved in the dispute in Court, and before.

The Court delivered an Award in favour of the Grievants, on 8th March, 2012.

On 23rd March, 2012 the Respondent made an application for review. The Respondent also filed what was described as a Memorandum of Appearance, stating that it would hence forth be represented by the Claimant's former Representative, Kennedy Onyangore Ogendi.

Mr Ogendi parted ways with the Claimant Union on 11th November, 2011, upon termination by the Claimant, of Ogendi's contract of employment.

The Respondent felt Ogendi would be best positioned, to retrieve what was granted to the employees, in this application for review. He promptly appeared in Court and obtained orders of stay of execution.

The matter was then moved to Mombasa Industrial Court. That Court did not see any ground to justify transfer. An order for re-transfer was made.

At the time the file was transferred to Mombasa, the Respondent had already argued its application for review, and even called a witness Mr Robert Mutuku. Mr Obure for the Claimant, and Mr Ogendi for the Respondent agreed to file submissions on 14th March, 2013, after the file was re-transferred.

Parties were advised the Court's Ruling would be rendered on notice.

The Court finds and Orders:-

1. The Respondent was initially represented by the Law Firm of Njeru Nyaga & Co Advocates. There was adequate opportunity granted to the Respondent to challenge the evidence presented by the Grievants. The Respondent gave legal arguments through its advocate, and the court made its findings on all issues, factual and legal, in the Award of 8th March, 2012.

2. There are no grounds falling within the review jurisdiction under Rule 32 of the Industrial Court (Procedure) Rules 2010, demonstrated by the Respondent in the application dated 23rd March, 2012. There are no new matters of evidence, that were not within the Respondent's knowledge, at the time of the hearing. There is no error apparent on the face of the record. There is no sufficient reason to revisit the Award of the Court.

3. It is unethical for Mr Ogendi, after representing the Grievants, in his capacity as an Officer of the Claimant, to change position and argue the case for the Respondent. Trade Union Officers appearing before the Industrial Court, must observe the minimum moral and ethical standards to which Advocates appearing before the same Court are subject. Advocates do not represent Plaintiffs today, and tomorrow, represent Defendants in the same dispute. It matters little that Mr Ogendi is now working as Respondent's Human Resource Officer, after being fired by the Claimant Union. The Court views the information entrusted to him by the Claimant and the Grievants at the time he was an Officer of the Claimant, as being privileged communication.

4. The application for review is technically incompetent. It was drawn in person. Njeru, Nyaga & Co Advocates have not been withdrawn from acting for the Respondent. Mr Ogendi was introduced to the Court through a Memorandum of Appearance. The Industrial Court (Procedure) Rules 2010 do not make a provision for such an Appearance.

5. The witness presented by the Respondent on review highlighted the contradictions of the Respondent's position. He confirmed the employees were in permanent, rather than casual jobs. The earlier submission by the Respondent's Advocates was that the employees were casual. The witness was unable to explain to the Court computation of terminal benefits. He agreed Mr Ogendi is now the Respondent's Human Resources Officer, but would not know if this Officer is the same man who did the computation of terminal benefits for the Grievants contained in the Memorandum of Claim. He alluded to discovery of gas valves that were hidden in a container at the workplace, appearing to suggest that employees lost their jobs because of some form of disciplinary lapses. The witness Robert Mutuku completely muddled any vestiges of evidence remaining in the Respondent's case. His evidence did not create any ground for review.

In summary:

a) *The Application by the Respondent dated 23rd March, 2012 is dismissed in its entirety.*

b) *The stay of execution orders granted to the Respondent are hereby set aside and Claimant placed at liberty to proceed with execution.*

c) *Costs of the application to the Claimant.*

Dated and delivered at Nairobi this 17th day of September, 2013

James Rika

Judge