REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1539 of 2010

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS, HOSPITALS

AND ALLIED WORKERS ……..……CLAIMANT

VERSUS

KENYATTA NATIONAL HOSPITAL …….....RESPONDENT

RULING

The Claimant has raised a Preliminary Objection (P.O.) to the Applicant's application Memorandum in support of Review dated 17-10-2012. The Preliminary Objection contained in the notice dated 22-10-2012 which raises seven (7) points:-

1. That the Application on the Memorandum are bad in law and an abuse of the process of the Court.

2. That the issue in dispute has already been the subject of conciliation and has been resolved in accordance with Section 68 of the Labour Relations Act, 2007.

3. That there is no provision in law to reopen a dispute that has been resolved after conciliation and agreement of the parties.

4. The application violates the provisions of Rule 16(2) of the Industrial Court Rules as read with Section 32(1) of the Industrial Court Act.

5. That the Application and the Memorandum violates the provisions of Rule 32(3) of the Industrial Court Rule read with Section 32(1) of the Industrial Court Act.

6. That the application for stay is *resjudicata.*

7. That the Application and the Memorandum is based on Wage Guidelines that have not been issued in accordance with Section 15(5) of the Industrial Court Act.

In response, the Applicant filed grounds of opposition to the Preliminary Objection contending

that:-

1. That there is sufficient reason to review the Award of the Court .

2. There has never been a dispute reported by the partiers herein to the Minister for Labour in terms of Section 62 of the Labour Relations Act regarding the award under review.

3. Consequently, there has never been a conciliation and settlement in terms of the relevant provision of the Labour Relations Act of the subject matter of the said Award.

4. That any purported resolution after conciliation and agreement of the parties constituted mistake of misrepresentation.

5. That contracts may be set aside on grounds of mistake, fraud or misrepresentation.

6. That the application has complied with Section 16 of the Industrial Court Act read with rule 16(2) and 32 of the Industrial Court Rules.

7. That it is fair and just to review the award as there is apparent error on the face of record, in that, the Report of the Central Planning and Monitoring Unit of the Ministry of Labour dated 18-8-2012 relied upon by the Court in reaching its verdict was riddled with errors. The report was manifestly inaccurate and/or exaggerated.

8. That in order for an error to constitute a ground for review, it must be one apparent on record that does not require any extraneous matter to show its correctness.

9. The award is in breach of written law particularly Section 15 of the Industrial Court Act.

10. That the Court has considered application for review in economic disputes as a matter of practice.

11. That the Preliminary Objection is baseless as it does not raise any points of law that have been pleaded or which arise from clear implications over pleadings or that has the potential of disposing the suit.

12. That it is trite law that the Preliminary Objection must be of fundamental matter as objection to jurisdiction of the court, plea of Limitation or submission that the parties are bound by the court giving rise to the suit.

The Preliminary Objection was argued on 26-10-2012 by Mr. Enonda and Mr. Okeche counsel for the Claimant and the Applicant respectively. They canvassed their aforesaid grounds in support of their respective cases and cited various statute and case laws.

I have carefully gone through the Motion, Memorandum, Preliminary Objection and grounds of opposition in reply and considered the submissions by the learned counsel for the two parties. The following are issues for determination in the present dispute:-

(1) Whether a person aggrieved by an award of this court can apply for review of the same.

(2) What is the procedure for bringing an application for review of an award.

(3) Whether the application dated 17-10-2012 has complied with the procedure provided by the law.

(4) Whether the application for stay is *resjudicata*.

(5) Whether the application for review is incompetent in view of the agreement dated 5-10-2011.

(6) Whether the Preliminary Objection ought to be allowed.

The answer to the first two questions lie in Rule 32 of the Industrial Court Rules. Rule 32(1) allows a person aggrieved by a decree or order of the court to apply for a review of the award, judgment or ruling on any of the following grounds:-

(a) Discovery of a new important matter or evidence which was not within the knowledge of the applicant after exercise of the diligence or could not be produced by that person at the time when the decree or order was passed.

(b) On account of some mistake or error apparent on the face of the record.

(c) On account of the award or judgment or ruling being in breach of any written law.

(d) If the award, the judgment or ruling requires clarification.

(e) Any other sufficient reasons.

The application dated 17-10-2012 seeks review on ground of breach of written law among other grounds. There is, therefore no doubt that the applicant has the right to apply for review as she did on 17-10-2012 and that this court has the necessary jurisdiction to entertain such application.

As regards the second and the third issues, the procedure to apply for review, Rule 32(2) provides that application for review on ground b, c, d, or (e) shall be to the judge who made the award under review. Sub Rule 3 provides that a party seeking review shall apply to court in form 6 in the First Schedule. An application under sub rule (3) shall be accompanied by a memorandum supporting the application in accordance with Section 26 of the Act.

In my view, the application dated 17-10-2012 has complied with the above provision of the law in terms of form. It is drawn under form 6 of the first schedule and it is accompanied by a memorandum in support. The two documents have been repeatedly mentioned in the Preliminary of Objection by the Claimant.

On the issue of the application for stay being *resjudicata*, I am not in agreement with the Claimant. The fact that I granted the parties a grace period within which to finalise signing the Collective Bargaining Agreement in issue did not mean *per se* that it was a stay in favour of the applicant. I am, therefore clear in my mind that the application for stay before me is the first of its kind after the award under review was made.

As regards the fifth issue, the question in my mind is whether there exists a valid agreement between the parties herein within the meaning of Section 68 of the Labour Relations Act 2007 binding them to implement the award under review?

The court was referred to Annextures 1 to the replying affidavit which is an agreement signed on 5-10-2012 between the parties herein as a compromise to a dispute before the Minister for Labour in the presence of the Conciliator. The dispute before the Minister involved the failure by the applicant to comply with clause 6.3(b) of the Collective Bargaining Agreement for 2008-2009 (Annexture 2A Replying Affidavit). The said clause provided that during the life of the said Collective Bargaining Agreement (1st July, 2007 – 30th June 2009) if the salary for Civil Service was reviewed, the same salary shall automatically apply to unionisable employees of the applicant.

Based on the above, the Claimant is said to have served a strike notice unless 17% salary increase was effected in order to harmonize the salaries with their counter parts in the Civil Service.

The dispute was subsequently reported to the Minister for Labour who in turn appointed a conciliator. After deliberations, the parties struck a compromise in terms of the agreement marked

annexture AN1 to the Replying Affidavit.

The agreement is on official letterhead of the Ministry of Labour and it is signed by the Secretary General and the Chairman, Works Committee of the Claimant Union on the one hand and Justus K. Mbui for the Management of the applicant on the other hand. The agreement is witnessed by James N. Ndiho, the Conciliator.

The agreement says:-

"the parties have mutually agreed on the following:-

1. The parties will conclude the signing of the Collective Bargaining Agreement for the period 1-7-2009-30-6-2011 on or before 30-10-2012 as awarded by the Industrial Court.

2. Upon implementation of the Collective Bargaining Agreement, the parties will review the salaries with a view to ensuring whether they are harmonized with the Civil Servants' pay.

3. The parties will endeavour to follow the laid down procedure for negotiations as provided for in the parties' Recognition and Collective Bargaining Agreement.

4. The Union will withdraw the strike notice to allow the parties to hold negotiations on the pending issues".

The Claimant contends that the agreement was made under Section

68 of the Labour Relations Act, 2007 and it cannot be questioned in Court. The applicant on the other hand avers that the agreement involved another matter and it was signed by an unqualified person on that Mr. Justus K. Mbui a junior manager without any authority to commit the applicant to any financial obligation. The question in my mind is, what has the applicant done to interfere with that agreement by her unauthorized junior manager? How did he end up at the meeting on 5-10-2012 which culminated in the said agreement to implement the court award? Under what circumstances was the agreement signed? The answer to the foregoing lies with the applicant and Mr. Justus K. Mbui. Until the contrary is proved, I am satisfied that there is a valid agreement between the parties herein dated 5-10-2012 binding the parties to sign the Collective Bargaining Agreement for 1-7-2009 to 30-6-2011 in terms of the award by this court. That the said agreement was a compromise to end a dispute reported to the Minister following a strike notice served by the Claimant unless salary for her members was harmonized with their counterparts in the Civil Service. The agreement does not, however mention the present case anywhere or the case number and date of the award intended to be implemented.

Considering the foregoing observation, it is obvious therefore that whatever orders the court makes on the Preliminary Objection or the review application before me, will have a direct impact on the agreement dated 5-10-2012 or the other case whose award was contemplated by the said agreement. It therefore calls for careful evaluation so as to avoid reviving the dispute resolved by the conciliator or contravening orders of the Court in another case.

The last question is whether the Preliminary Objection should be allowed as prayed. It is obvious that the Preliminary Objection fails on the grounds of procedure. I have already held above that the application for review complies with the rules and it is not *resjudicata*. That means that grounds 1, 4, 5 and 6 will fail. Ground 7 likewise fails because the Industrial Court Act applies the instruments made under the earlier repealed laws to this court.

The Preliminary Objection has also failed in ground 2 and 3. Although the Claimant has proved that the award under review is already the subject of settlement in another case before the Minister, she has not proved that the said settlement agreement affected the present matter. As already noted above, the said agreement does not mention the number of the present case in it or the date of the award to be implemented by 30-10-2012.

I will, therefore, not allow the Preliminary Objection as prayed by the Claimant in view of the above findings and observations especially the fact that the applicant has a legal right to apply for review.

I will however direct the same to be heard urgently and concluded within thirty (30) days of this ruling to enable the parties, avail more facts on the matter.

In the meanwhile and as a condition for stay pending the application for review, I direct the applicant to immediately give a backdated pay rise to the claimant's members (grievants) so as to put them at par with the employees in the Civil Service except where the grievants are better paid. In default of compliance, the stay shall lapse automatically after 30-11-2012.

The foregoing direction is guided by Clause 6.3(b) of the 2007-2009 Collective Bargaining Agreement Annexed as AN2B.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 16th day of November, 2012.

Onesmus N. Makau

JUDGE