REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 567 of 1999

JUSTUS CHANIA LYUNGA.....PLAINTIFF

-VERSUS-

STANDARD CHARTERED BANK LIMITED.....DEFENDANT

RULING

1. This application filed by Defendant/Applicant by way of Notice of Motion dated 28th of February 2012 seeks the review of the judgment of this honourable court issued on 29th day of September 2011. It is brought under the provisions of Order 45 Rule 1 of the Civil Procedure Rules 2010 and Section 1A and 3A of the Civil Procedure Act. It is opposed by the Plaintiff/Respondent's grounds of Opposition and Further Grounds of Opposition dated 3rd May 2012, and 4th day of May 2012 respectively.

2. The applicant is contesting the court's determination in its decree number (3) where the court held that:

"***The defendant shall pay to the plaintiff terminal dues and/or other benefits including 20 plus 5 years and 12 days' service benefits assessed at 11/4 of the annual salary for the entire period thus indicated in this paragraph; and same shall bear interest at court rate"***

The applicant argues that based on the above calculation the payment will amount to Kshs. 7,687,501.00 which award is absurd outcome.

3. The main contention by the Applicant is that there is mistake or error apparent on the face of record and that as a result of this the Plaintiff/Applicant is not entitled to terminal benefits in terms of 1 ¼ annual or salary for the period of 20 plus 5 years and twelve days. And therefore as a result of the foregoing there is sufficient reason to warrant a review of the said Decree.

4. Order 45 Rule 1 of the Civil Procedure Rules 2010 provides as follows;

"1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or(b) by a decree or order from which no appeal is hereby allowed,and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledgeor could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparenton the face of the record, or for any other sufficient reason, desiresto obtain a review of the decree or order, may apply for a review ofjudgment to the court which passed the decree or made the order withoutunreasonable delay".

5. On the other hand, Order 45 Rule 3 stipulates as follows;

"(1) Where it appears to the court that there is not sufficientground for a review, it shall dismiss the application.(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:Provided that no such application shall be granted on the ground ofdiscovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation". [See Order 45 Rule 3 sub-rule (1) and (2)]

Issues for Determination.

6. For an application for review to succeed under Order 45, the following parameters, which are the issues canvassed herein, must be satisfied.

a) That there is discovery of new matter or evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time the decree was passed or made.

b) That there is a mistake or error apparent on the face of the record

c) That there is any other sufficient reason.

Discovery Of New and Important Evidence.

7. This ground for review on account of discovery of new evidence above is not absolute. The qualification to it is that

"***Where the court is of opinion that the application for review should be granted, it shall grant the same:Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was notwithin his knowledge, or could not be adduced by him when the decreeor order was passed or made without strict proof of such allegation".***

8. It is important to note that the award is derived from the amended plaint dated 8th March 2002. In his submission the defendant/applicant counsel has however, proposed a calculation based on monthly basis, and seeks that the court's holding be reviewed to read 1¼ months for every year worked. Applicant further argues that the said proposed review is founded on the ***"discovery of new and important evidence" (See ground No. 2 of the Application).*** The applicant has argued that the formula that was applied by the court is improper as the same contravenes the formula that was applied to pay off departing staff. (See paragraph 11 of the Supporting Affidavit). In view of the forgoing the Applicant's arguments ought to fail due to the following reasons.

9.Firstly, according to Mulla,

"an application on this ground must be treated with great caution and as required by r 4(2) (b) the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. (See Mulla on Indian Civil Procedure Code, 15th Edition at pg 2726 which is pari material with our provisions.).

The applicant has alleged that the honourable court relied on a newspaper cutting on granting the contested terminal dues. (See paragraph 5 of the supporting affidavit.) No iota of evidence that was produced to support this argument. The said newspaper cutting was neither produced at the trial nor has it been annexed to the application for review.

10. Secondly, Before a review is allowed on the ground of discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; Thus:

"where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open o the court to admit evidence on the ground of sufficient cause." (See Mulla, supra.).

On the other hand our Civil Procedure Rules states that

"*...**and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passedor the order made...may apply for a review..."***

The applicant has deposed and annexed the purported correct formula that was used to pay off departing staff (terminal dues) dues as annexture No. RM 2.

11. In view of the foregoing, it is clear that the applicant is misguided. The respondent was awarded terminal dues as a result of unfair dismissal. Thus a formula for calculation of retirement benefits cannot apply. Secondly, the applicant has not clearly demonstrated why it could not produce these guidelines at the hearing and yet they were within their custody. It is apparent that these guidelines were within the applicant's knowledge but it failed to exercise due diligence and hence failed to produce the same notwithstanding that this was one of the issues for determination and in respect of which the respondent had pleaded and adduced evidence. This is a belated introduction of new evidence that was available ealier and ought to have been introduced at the trial. ***(See Simani vs. Magotswe [1989] KLR, 620.)***

12. In the case of *D.J Lowe & Company Ltd vs. Bangue Indosuez*, the Court of Appeal noted as follows;

"Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is the easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and give a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing." [See D.J Lowe & Company Ltd vs. Bangue Indosuez, Civil Appeal Nairobi, 217 of 98 (Unreorted) cited in the Kaiza case, infra] This particular holding precisely explains the situation in the instant case.

13. In the case of ***Rose Kaiza vs. Angelo Mpanju Kaiza***, the Learned Judges of Appeal in rejecting an application for review had this to say;

"The later contention is for rejection outright, because the Transfer was in possession of the Respondent long before the institution of the originating summons and it cannot be argued in our view that she or her adcvocate did not notice that it was not in the prescribed form." (See E.M Githinji, JA, P.N Waki, and A. Visram, JJA in Rose Kaiza vs. Angelo Mpanju Kaiza Civil Appeal (CA) Mombasa, No. 225 of 2008 (Unreported

Similarly, notwithstanding the fact that this matter was determined after a period of about 10 years, having been filed on 20th December 1999 and determined on 29th September of 2011, the applicant had an opportunity to adduce all evidence that it had. In this regard, one of the issues for determination *interalia* ought to have been as to whether the respondent was entitled to any benefits and if so, how much for that matter. The computation formula for benefits was in the Applicants' possession all along and therefore it does not amount to discovery of new evidence as contemplated by the law.

Mistake or Error Apparent On The Face Of The Record

14. The second argument advanced by the Applicant is that the honourable court be pleased to review the Decree herein on account of error apparent on the face of the record. The applicant through its counsel submitted that the damages awarded and computed as 1¼ annual salary for every year worked be reviewed to read as 1¼ month's salary for every year worked, (See Applicant's written submissions at pg 4 and para 14 of the Supporting Affidavit dated 3/02/2013). According to the Applicant the correct computation based on its proposed formula should amount to Ksh. 3, 082,352.10 and not Ksh. 7,

687,501.00 as prayed for by the Respondent. (See paras 7 & 8 of the Applicant's supporting affidavit dated 3/02/2011). Similarly, the Applicant's argument on this ground ought to fail due to the following reasons;

15. First, that an error apparent on face of record is not one which is to be established by a long drawn process of reasoning or on points where there could possibly be two points. ***(See A. Visrram JA, R.N Nambuye and D.K Mraga JJA. in John Peter Kamau Ruhangi vs. Kenya Reinsurance Corporation Civil Appeal (C A) Mombasa, No. 208 of 2006, Un Reported).*** In the instant case both parties are not agreeable on the formula to be applied in the computation of the terminal dues. The Respondent pleaded 1¼ annual salary for every year worked a formula that was upheld (adopted) by the court in its judgment while the Applicant proposes 1¼ month's salary for every year worked. This is not a case for review. ***[See also, Nyamogo & Nyamogo Advocatees vs. Kogo [2001]1 E.A 173, relied upon in Ruhangi case(ibid)]***

16. Second, that

"...an error or omission must be self evident and should not require an elaborate argument to be established..." (See National Bank of Kenya Ltd vs. Ndungu Njau, Civil Appeal (C A) No. 211 of 1996 (Unreported).

In the instant case it is evident that the proposition on formula to be used is contested and hence calls for arguments. This is not a position for review.

17. Third, that

"...an error on the face of the record is one that can be corrected under the slip rule whose jurisdiction is limited to correcting errors, mistakes or omissions in the ruling or judgment and does not permit anting orders not made or extending the scope of the ruling..." (See Court of Appeal of Nigeria, Peter Cheshe & Another vs. Nicon Hotels Ltd & Another, Appeal NO. CA/A/83/M/98.)

In the instant case the Respondent pleaded 1¼ annual salary for every year worked a formula which was upheld by the court. There is no mistake and or error in this computation formula that can warrant a review.

18. Fourth , that ***"...an erroneous view of law or evidence is also not a ground for review." (See Kaiza case, ibid at pg 10).***

Sufficient Reason.

19 The applicant has submitted that regardless of the two first grounds laid down in Order 45 of the Civil Procedure Rules, it has established "sufficient reason" warranting a review. Notably, this is the third ground for review as stipulated by Order 45(1) of the Civil Procedure Rules 2010. ***(the old Order XLIV Rule 1(1), See Orero vs Seko [1984]KLR pg 239- 242, at pg 239.)***

20. According to Mulla,

"Any other sufficient reason" means, "...that the reason must be one sufficient to the court to which the application for review is made and they cannot be held to be limited to the discovery of new and important evidence or the occurring of a mistake or error apparent on the record..." (See Mulla, supra at pg 2727) .

In support of his argument based on sufficient reason for review, the Applicant's counsel has cited Article 159 of the Constitution, section 80 of the Civil Procedure Act, Cap 21 and generally Order 45 of the Civil Procedure Rules 2010. The Applicant has also referred the honourable court to various authorities discussed below.

21. However, the gist of the forgoing provisions is to the effect that the court has unfettered jurisdiction to grant an application for review ***(See Sardar Mohamed vs. Charan Sigh Nand Sigh and Another 1959, E A at pg 793-796, at 793).*** This argument is correct but has got limits and or exceptions.

22. The said discretion must be exercised judiciously. The courts have repeatedly held that

''the words 'or any other sufficient reason' in Order XLIV rule 1(1) of the Civil Procedure Rules need not be analogous with the other two alternatives in this order in view of section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya which confers unfettered right to apply for a review..." (See Wangechi Kimita and Anothe vs. Mutahi Wakibiru, (1980-88)1KLR 977. filed herein by the Applicant)

In the case of *Official Receiver and Liquidator vs. Forwarders Kenya Limited [2000]eKLR (filed herin by the applicant)* the Learned Judges of the Court of Appeal, Gicheru, Akiwumi and O'Kubasu, echoed the same sentiments and noted that any other sufficient reason ought not to be *ejusdem generis* with the first two grounds established under Order 45 Rule 1(1) paragraph (b)

23. In view of the authorities cited above and the applicant's submissions, it is apparent that the applicant is urging the honourable court to consider reasons for review advanced by it as sufficient reasons without due regard to ground one and two above. There are only three grounds on which a party can seek review; one, discovery of evidence, two,mistake or error, and three, sufficient reason.

24. Under the head of sufficient reasons, the applicants argument fails on the basis of the following. As earlier stated sufficient reason is an independent ground and must not be held to be *ejusdem generis* with the first two. The applicant having pegged his argument on the first two grounds cannot in the same breath and without, more, rely from relying on the third ground of *'any other sufficient reason'*

25. As such the applicant has not established and or argued and or submitted any any other sufficient reason as contemplated under Order 45 Rule 1(1). All he has submitted is the alleged discovery of new evidence, and mistake/error apparent on face of the record. As shown, these two arguments/grounds were neither sufficiently proved by the applicant in accordance with Order 45 Rule 3(2), nor were they convincing enough to warrant a review.

26. The Applicant having failed to satisfy the court on any of the three limbs in its application, the same fails. Accordingly the application is hereby dismissed with costs.

25th March, 2013

R.M. MWONGO
JUDGE

Read in open court by:

Date 10th April, 2013.

Coram:

Judge: Hon. M. Odero

Court clerk: .....

In Presence of Parties/Representative as follows:

a).....
b).....
c).....

d)..