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Nanchang Foreign Engineering Co Ltd v Shakwira & 17 others (Civil Appeal 141 of 2017) [2023] KECA 199 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 199 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 141 OF 2017

W KARANJA, J MOHAMMED & KI LAIBUTA, JJA

FEBRUARY 17, 2023

BETWEEN

NANCHANG FOREIGN ENGINEERING CO LTD .... APPELLANT

AND

GEOFFREY SHAKWIRA .... 1ST RESPONDENT

STEVEN EMOJONG ICHODI .... 2ND RESPONDENT

GILMO GIDO KIZIRI .... 3RD RESPONDENT

MARY MUTHONI GITAGIA .... 4TH RESPONDENT

MARGARET WACHEKE KAMANDE .... 5TH RESPONDENT

JULIUS MUNYOKI MUSYOKI .... 6TH RESPONDENT

VERONICA NJERI GITAU .... 7TH RESPONDENT

EDINHA MORAA NYANGARESI .... 8TH RESPONDENT

ESTHER MORAA KIMONDE .... 9TH RESPONDENT

BEATRICE MOTHO KIMANI .... 10TH RESPONDENT

GABRIEL OILE WASIKE .... 11TH RESPONDENT

MILLY KASANDI ADIKA .... 12TH RESPONDENT

CATHERINE WANJIRU NGIGI .... 13TH RESPONDENT

ALICE CHEROTIN KABENGWA .... 14TH RESPONDENT

LEAH NYABORO KARANJA .... 15TH RESPONDENT

VERONICA MATINA EKWENYA .... 16TH RESPONDENT

HANNA WANJIRU KAMAU .... 17TH RESPONDENT

CATHERINE KANYIUA MWANZA .... 18TH RESPONDENT

(Being an appeal from the decree and ruling of the ELRC Court at Nyeri (B. Ongaya,J.) dated 7th April 2016 in ELRC Case No. 78 of 2015)

JUDGMENT

1. This appeal emanates from a ruling of the Employment and Labour Relations Court at Nyeri (the ELRC) (B Ongaya, J), on a review application dated February 4, 2016, delivered on November 13, 2015. The dispute before the ELRC was instituted by the respondents by way of a memorandum of claim dated May 12, 2015 seeking orders as follows:

   a. 'A declaration that the respondents' action to summarily dismiss the claimants from employment was illegal, unlawful, unfair and inhumane.

   b. An order for the respondent to pay the claimants their terminal dues and compensatory damages as pleaded in paragraph 7 of the memorandum of claim totalling to Kshs 6,338,757.00

   c. An order for the respondent to pay the claimants costs of the claim plus interest.'

2. The appellant resisted the respondents' claim vide its response dated May 28, 2015 and urged the court to dismiss the claim and declare, inter alia, that the termination of the claimants' employment by the respondent was lawful, justified and fair. Parties filed their respective rival affidavits and submissions and, with the consent of the parties, the court relied on these to arrive at its decision without any viva voce evidence being taken. After considering all the evidence placed before it, the court rendered its judgment, now impugned, whereby it allowed the claim and granted the following orders:

   a. A declaration that the respondents' action to summarily dismiss the claimants from employment was illegal, unlawful, unfair and inhumane.

   b. The respondent to pay the claimants their terminal dues and compensatory damages as pleaded in paragraph 7 of the memorandum of claim totalling to Kshs 6,338,757.00 by January 1, 2016 in default interest at court rates to be payable thereon from the date of the judgment till payment in full, with costs to the claimants.

3. According to the appellant, it was not made aware of the delivery of the judgment until several months later and instead of pursuing an appeal against the said decision, the appellant opted to seek review of the judgment under Order 45 of the *Civil Procedure Rules*, section 16 of the Employment and Labour Relations Court Rules, and Rule 32 of the Industrial Court Procedure Rules, 2010. The memorandum of review was predicated on grounds that:

   a. The honourable court misdirected itself in law in finding that the respondents' dismissal was illegal, unlawful, unfair and inhumane for the reasons that:

      i. The 7th,12th,14th and 16th respondents had at all material times been working for the applicant whilst the remaining respondents simply absconded from their duties where they had been engaged as casual labourers at the applicant's construction site in Kiambu.

      ii. The 1st respondent claims to have worked for the applicant since April 2012 yet the applicant entered into a contract with the developer of the Kiambu site on February 25,

2013. The applicant could not, therefore, in any way have engaged the 1st respondent in 2012 for work that was non-existent.

b. That the honourable court misdirected itself by failing to apply the principle of proportionality in awarding the respondents compensation for unfair dismissal.

c. That the honourable court misdirected itself on the applicable law and principles in the evaluation of evidence adduced and thereby arrived at a wrong decision in its judgment.

4. The appellant urged the court to review its judgment on the above grounds and for orders, inter alia, that:

i. The application for setting aside and or review be allowed and the judgment of November 13, 2015 and decree of December 2, 2015 be set aside and the claim be dismissed and, in the alternative, the claim be heard de novo.

ii. There be stay of execution of the judgment and decree issued and all proceedings consequential thereto pending inter parties hearing and determination of the application.

In support of the motion was an affidavit sworn by Liwen Hua who reiterated the said grounds. He further deponed that the company entered into a contract with Maha properties Limited for the construction of the proposed Runda Paradise Development, which was to commence on April 1, 2013, the respondents were among the casual workers and, therefore, they were not engaged before April 2013. The applicant had averred that the respondents were required to issue the company with KRA pin numbers, NSSF, NHIF numbers for statutory deductions, which they declined. Later in November 2014 while the project was on-going, they absconded their duties and, therefore, they were neither declared redundant nor unfairly dismissed as alleged.

5. Opposing the application, the respondents filed grounds of opposition and a replying affidavit sworn by Geoffrey Shakwira, Veronica Njeri Gitau, Milly Kasandi Adika, Alice Cherotin Kebengwa, Veronica Matina Ekwenye, on March 14, 2016. They averred that the application and the memorandum of review lacked merit; that it was founded on wrong principles of law and that the ingredients necessary to satisfy setting aside the judgment or review had not been proved; that there was an error apparent on the face of the record or judgment; that it had not proved that there was any material which by due diligence could not be placed before court at the time of hearing that could have made the court arrive at a judgment different from the one it delivered; that the review or setting aside could not be based on introducing new allegations which never formed the basis of the pleadings at the time of the hearing; that a setting aside or review cannot be based on a false after thought; that there was no communication showing a forwarding of the documents from the company to the former counsel on record and that therefore, the allegations of mistake of a previous counsel were misplaced. Lastly, the respondents contended that the appellant is an international and multi-national construction conglomerate and thus it cannot suffer any substantial loss.

6. The respondents, in their affidavits, stated that they were employed as masons in April, 2012 at the appellant's construction site in Ruiru until April, 2013 when he was transferred to Runda estate where he worked till November, 2014. The respondents contend that the appellant was trying to re-open the case when they had already been given the opportunity and time to produce their documents during the trial, the claim having been instituted on May 12, 2015.

7. Upon hearing the application by way of written submissions, in his ruling dated April 7, 2016, the subject of this appeal, the learned Judge held that the parties were given an opportunity to file pleadings, affidavits, documents and submissions, and they had even agreed on the mode of disposing the suit, an affidavit of Liwen Hua was also filed in opposing the claim, and therefore no reasonable grounds had

been established to show that the appellant with due diligence could not have availed all the evidence before the hearing.

8. Judgment having been delivered, there was no valid ground to re-open the case on account of fresh evidence. Further, that no professional negligence on the part of the initial advocates had been established, the correspondence on record shows that the Notice of appeal was filed on December 21, 2015, the application for review filed on February 4, 2016 was vexatious and a gross abuse of the court process since a party dissatisfied with a judgment of the court can either review or appeal against the decision. The application for review was dismissed with costs.

9. Being aggrieved by the said ruling, the appellant filed this appeal proffering grounds, inter alia, that the learned Judge erred in finding that all the respondents had been unfairly terminated whereas the appellant produced incontrovertible evidence that some of the respondents, specifically the 7th,12th , 14th and the 16th, had at all times been working for the applicant; that the replying affidavit sworn by five respondents on the March 14, 2016 had been properly executed, yet the signatures were inconsistent with the pleadings in the main claim, and or are suspect to say the least; in failing to consider that the statutory dues claimed by the respondents in their statements of claim, more specifically, the NHIF and NSSF contributions had been remitted by the appellant on behalf of the respondents; and by holding that the amount of compensation awarded to the respondents in the judgment of November 13, 2016 for the sum of Kshs 6,338,757.00 was proportionate and fair.

10. Parties filed submissions in support of their rival positions. When the matter came up for hearing on the virtual platform, learned counsel Mr Mulani and Mr Namada appeared for the appellant and the respondents respectively. They both adopted the contents of their submissions and made brief oral highlights.

11. Counsel for the appellant urged that it had established the three limbs necessary for the grant of a review pursuant to Order 45 rule 1 of the Civil Procedure Rules. According to the appellant, they had demonstrated before the trial court the three ingredients required for an application for review to succeed, namely: that there was discovery of new and important matter or evidence which after due diligence was not within their knowledge or could not be produced at the time when the decree was passed; that there was misrepresentation and nondisclosure and/or nondisclosure of material facts by the respondents; and that there was error on the face of the judgment as the learned Judge had failed to acknowledge that the respondents had not been sacked. They placed reliance on this Court's decision in *Pancras T Swai vs Kenya Breweries Limited [2014]eKLR*.

12. The appellant urged the court to review its judgment on three issues: that the respondents were not unfairly terminated as some of the respondents were still working for the respondent at the time of filing the claim; whether the respondent remitted the respondents' statutory dues to the National Social Security Fund (NSSF) as prescribed in section 35(6) of the *Employment Act* and, therefore, the respondents were not entitled to service pay as part of their terminal dues; and whether the respondents were deserving of the compensation as awarded by the trial court.

13. It is further urged that this Court finds that the respondents were not entitled to gratuity as part of their terminal dues because the contract did not provide for such. To buttress this argument, they relied on the decision in *Benedict Mbithi Kingo'o vs Director St Monica Girls High School & 2 others [2019] eKLR.*

14. In addition, it is urged that the trial court erred in awarding damages as prescribed under section 49 of the *Employment Act*, as having been declared redundant, the respondents were only entitled to one months' notice pay as damages. The appellant maintained that the court failed to follow the correct

procedure, and that it erred in converting the respondents' employment from casual to permanent under section 37(1) of the *Employment Act*.

The appellant has urged the Court to allow the appeal in its entirety.

15. On his part, learned counsel for the respondents submitted and urged that the appellant, in its application for review, fell short of the threshold, and that the trial Judge was right in dismissing the application. The grounds that the respondents were still in employment with the appellant at the time of filing suit, the principle of proportionality in awarding compensation and the ground that the former counsel failed to file some documents in court are not grounds that the court could consider in the review application. Counsel urged that the appellant had in-fact pleaded that the respondents had been dismissed and, therefore, they were trying to introduce new pleadings, yet the same did not arise in their defence and replying affidavit. Counsel contended that the appellant in its review application was asking the court to sit on appeal on its own judgment, and that the application for review had been properly dismissed, and that this appeal should face the same fate.

16. In rejoinder, Mr Mulani invited the Court to refer to section 45(1) and rule 2 of the Industrial Court Rules to find that the grounds on review were met, and that the appeal should be allowed as prayed.

17. We have considered the record of appeal in its entirety, the written and oral submissions by counsel along with the authorities cited to us by the parties. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination by this Court with reasons for such determination pursuant to Rule 31(1) (a) of the *Court of Appeal Rules*.

See also *Gitobu Imanyara & 2 others vs Attorney General [2016] eKLR*, where this Court stated:

> ' an appeal to this court from a trial by the high court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.'

18. From our appreciation of the matter before us, we decipher the issues for determination to be: whether the application for review met the threshold prescribed by law; and whether the ELRC was justified in dismissing the application.

19. Review applications in Industrial and Labour matters is governed by section 16 of the *Employment and Labour Relations Court Act* and Industrial Court Procedure Rules 2010. Section 16 of the *Employment and Labour Relations Court Act* provides that a court shall have power to review its judgment, awards, orders or decrees in accordance with the rules.

20. A review application is provided under Rule 32 of the Industrial Court and Procedure Rules 2010, which provides:

> ' (1) A person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgment 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 the award, judgment or ruling being in breach of any written law or.

c. If the award, the judgment or ruling requires clarification or

d. For any other sufficient reasons.'

21. In his Ruling, the learned Judge had observed that the appellant herein had filed a Notice of appeal against the judgment and also filed the application for review, which ought not to happen. We note, however, that the said Notice of appeal had been filed out of time and without leave of the court, and it had no legal effect and could not bar the appellant from moving the court on review. That was nonetheless a peripheral issue as the application for review was determined on its merit.

22. The matter before us is not an appeal against the judgment of the ELRC. It is an appeal against the learned Judge's discretion to disallow the application for review. We have set out earlier the requirements that need to be met for an application for review to succeed, and we note that the threshold set in the relevant rules and caselaw is not in contention. The question is, did the application for review meet the said threshold?

23. On the issue of discovery of new and important matter or evidence that was not available to the appellant and could not be discovered after exercise of due diligence, we note that the evidence the appellant put forth as new was that some of the respondents such as the 7th, 12th, 14th and 16th were still working for the appellant; and that the appellant had been remitting statutory deductions as required and, therefore, the respondents were not entitled to gratuity nor the service pay. In our view, that was not new evidence as it must have been in the custody of the employer. Records pertaining to payment of NSSF and other dues was also not new and must have been accessible to the appellant as it was the one which used to remit the said dues. It was incumbent on the appellant to present all the evidence it deemed relevant to its case before the trial court to persuade the court not to grant the orders sought by the claimants. We think it is apposite to point out here that, in its defence to the respondents' claim, the appellant had actually averred that the respondents had refused to provide their KRA pins and NSSF and NHIF numbers for purposes of making the necessary remittances. That was the evidence that was before the learned Judge when he made the impugned ruling.

24. We hold the view that the evidence the appellant claimed was new and not within its knowledge and could not be discovered with due diligence was always under the appellant's nose. The requirement of discovery of new and important material that was not within the appellant's knowledge has not been demonstrated to the required standard.

25. The mistake or error on the face of the record complained of has also not been demonstrated. The fact that the learned Judge made his decision in absence of evidence that was not presented to the court cannot be an error on the part of the court. On the issue of the award of damages being in contravention of section 49 of the *Employment Act*, that is not a mistake. If the learned Judge misapprehended the provisions of the law, then that can only be a ground of appeal and not review. We find that the issues raised on review fell short of rule 32 of the Industrial Court Procedure Rules as well as Order 45 of the Civil Procedure Act and Rules.

26. It appears to us that the appellant wanted to relitigate the claim before the ELRC by bringing on board the evidence which in its view cost it a judgment in its favour by bringing evidence which it had failed to adduce, but which evidence was always in its custody. That is not what is contemplated by the law

on review. We reiterate our position in Pancras T Swai vs Kenya Breweries Limited (supra) where the Court expressed itself in the following terms on the issue under consideration:

> ' It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction.'

We concur with the learned Judge that there is no reason advanced by the appellant to grant review of the orders sought.

27. We think we have said enough to demonstrate that the learned Judge exercised his discretion judicially and we must decline the appellant's invitation to interfere with the said exercise of discretion.

Accordingly, the appeal fails in its entirety and the same is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

W.KARANJA

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JUDGE OF APPEAL

J.MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

....

JUDGE OF APPEAL *

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR