Kenya Union of Commercial Food and Allied Workers v Jetlack Food Limited (Cause 664 of 2019) [2024] KEELRC 2001 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2001 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 664 OF 2019

JK GAKERI, J

JULY 31, 2024

BETWEEN

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS ..... APPLICANT

AND

JETLACK FOOD LIMITED ..... RESPONDENT

RULING

1. Before the Court for determination is the Claimant/Applicant's Notice of Motion dated 4th April, 2024 filed under Certificate of Urgency seeking Orders That:-

    1. Spent.

    2. The Honourable Court be pleased to review, vacate, vary or set aside the judgment delivered and dated 21st November, 2023.

    3. The Honourable Court do find that arising from the Collective Bargaining Agreement covering the period 1st January, 2014 for twenty four months, the grievant is entitled to payment of gratuity based on 15 days of his last monthly basic pay for each completed year of service.

    4. The Honourable Court be pleased to correct the error at paragraph 45 of the judgment and replace Section 159 (1) with Section 59 of the *Labour Relations Act*, 2007.

    5. The Honourable Court find that the grievant served the Respondent continuously for twelve uninterrupted years with the first six (6) years being a regular casual employee and the remaining six (6) years being a permanent employee.

    6. An order issue that each party bear their own costs.

2. The Notice of Motion is premised on the grounds outlined on its face and the Supporting Affidavit sworn by Mr. Andrew Kinyua M'Mukiri on 4th March, 2024.

3. The Claimant union prays for review, vacation, variation or setting aside of the Judgment dated 21st November, 2023 on the premise that when the claim was filed in 2019, the Claimant mistakenly filed the CBA for the period 1st January, 2016 to 31st December, 2017 in lieu of the CBA for the period 1st January, 2014 to 31st December 2015, which it has now provided.

4. That the Claimant discovered, after exercise of due diligence and after judgment was delivered that the relevant CBA had not been filed and as a consequence the grievant was not awarded gratuity and the Claimant urges the court to review the judgment in the interest of justice and find that the grievant is entitled to gratuity as provided by Clause 14 of the CBA, the sum of Kshs.102,007/=.

5. That paragraph 45 of the judgment be corrected to replace Section 159 of *Labour Relations Act* with Section 59 of the Act.

6. The Claimant avers that the court should find that the grievant served the Respondent from August 2003 to July 2015, continuously for 12 years.

7. That the Claimant's mistake should not be visited on the grievant.

8. Finally, the Claimant apologises for the mistake.

Response

9. When the Notice of Motion came up on 8th April, 2024, the court directed the Claimant/Applicant to serve and the application be responded to within 14 days.

10. The Claimant/Applicant served the Notice of Motion on 11th April, 2024 at 11.41 am via email.

11. The Respondent did not respond to the Notice of Motion.

Claimant's submissions

12. According to the Claimant, the instant application was precipitated by the court's finding that the grievant was not entitled to gratuity and dismissed the suit which was occasioned by Claimant's error in filing the incorrect CBA and agrees with the finding of the court.

13. The Claimant urges the court to find that the 2014/2015 CBA covered the grievants terms of service at the time of resignation in June 2015 and paragraphs 44, 45, 46 and 49 of the judgment should be reviewed to find that the grievant is entitled to gratuity and the typing error in paragraph 45 be corrected.

14. Reliance is made on the provisions of Section 16 of the *Employment and Labour Relations Court Act*, 2011 and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

Analysis

15. The pith and substance of the Claimant/Applicant's Notice of Motion is that the judgment delivered on 21st November, 2023 ought to be reviewed, varied and/or set aside because the Claimant union mistakenly filed the CBA for the period 1st January, 2016 to 31st December, 2017 instead of the CBA for the period 1st January, 2014 to 31st December, 2015.

16. This according to the Claimant is necessary because based on the evidence on record, the court found that the Claimant was not entitled to gratuity as the CBA on record was inapplicable.

17. The principles governing review of judgments, orders or decrees are well settled.

18. Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides;

    1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgement or ruling –

        a. If there is 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 order made;

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

        c. If the judgement or ruling requires clarification; or

        d. For any other sufficient reason.

19. Similarly, in Yani Haryanto V. E. D. & F Man (Sugar) Ltd Civil Appeal No. 122 of 1992, the Court of Appeal stated as follows;

> " The facility of review under Order 44 of the Civil Procedure Rule is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence, or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review . . ."

20. Puzzlingly, neither the grounds on which the Claimant's Notice of Motion is grounded nor the Supporting Affidavit is explicit on the specific provision of Rule 31 of the Employment and Labour Relations Court (Procedure) Rules, 2016 is relied upon.

21. The alleged mistake by the Claimant in the availment of the relevant CBA would, in the Court's view fall under sub-rule (1) of Rule 33 of the Rules as it relates to evidence before the court.

22. The Claimant's case is that as it has now availed the correct CBA (2014-2015), the court ought to review its findings on the issue of gratuity and hold that the grievant was entitled to gratuity.

23. It is instructive to indicate that Rule 33(1)(a) of the Employment and Labour Relations Court (Procedure) Rules, 2016 is explicit that the applicant must demonstrate that he/she discovered new and important matter or evidence after exercise of due diligence. Secondly, the new matter or evidence must not have been within the Applicant's knowledge and could not have been produced earlier.

24. Intriguingly, neither the grounds in support of the Claimant's Notice of Motion nor the Supporting Affidavit make reference to discovery of new and important matter or evidence or the exercise of due diligence and equally none allege that the CBA was not within the knowledge of the Claimant and could not be produced during the hearing of the suit.

25. Having been privy to the CBA 2014-2015, the Claimant/Applicant was at all material times aware of its existence and its retrieval and filing ought to have been a matter of course.

26. This suit was filed on 8th October, 2019, before the Covid-19 Pandemic and was heard on 12th July, 2023, almost 4 years later, which gave the Claimant/Applicant ample time to review the file and the case generally to ascertain readiness for the hearing.

27. Clearly, sub-rule (a) of Rule 33(1) leaves no doubt that unless the evidence sought to be adduced by the Applicant for review falls within its parameters or four corners, it is unavailable to the Applicant and cannot be relied upon as a justification for review.

28. The foregoing finds support in the sentiments of G.V. Odunga J. (as he then was) in HA V LB (2022) eKLR as follows;

> "Whereas under Order 45 rule 1, a person aggrieved by a decision whether an appeal is allowed or not but who is not appealing, is at liberty to apply for review of the decision, that provision in my respectful view, is not a carte blanche for abuse of the process of the court".

29. (See Stephen Somek Takwenyi & another v David Mbuthia Githara & 2 others HCCC No. 363 of 2009).

30. From the submissions, it is evident that the Applicant examined the provisions of Section 16 of the Employment and *Labour Relations Act*, 2011 and Rule 33(1) of the Rules on which the review or judgment, orders, awards and decrees is anchored but made no effort to contextualize its application leaving it to the court, perhaps because it did not fit within any of the sub-rules of Rule 33(1).

31. It is essential to emphasize that review jurisdiction is limited in scope as it is only available in the circumstance outlined in Rule 33(1).

32. It is not an avenue for appeal against the finding of a court as the case here. Court findings of fact are typically challenged by way of appeal not review.

33. For the foregoing reasons, it is the finding of the court that the Claimant/Applicant has failed to show that a review of the judgment delivered on 21st November, 2023 is merited.

34. Significantly, prayer number (iv) of the Claimant's Notice of Motion requested the court to correct the error at paragraph 45 of the Judgment and to replace Section 159 with Section 59(1) of the *Labour Relations Act*, 2007.

35. Rule 34 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that;

    The Court shall, either at the request of the parties or on its own motion cause any clerical mistake, incidental error or omission to be rectified and shall notify the parties of such rectification.

36. This rule confer upon the court jurisdiction to correct errors in judgments, rulings and orders suo motu or on request of the parties.

37. From the judgment on record, it is clear the clerical mistake pointed out by the Claimant is real and requires rectification.

38. Paragraph 45 of the Judgment is grounded on the binding nature of the Collective Bargaining Agreement (CBA) and ought to have referred to Section 59(1) of the *Labour Relations Act*, 2007 as opposed to Section 159 of the *Labour Relations Act*, 2007.

39. Having so found, the court is persuaded the request is merited and is granted as prayed.

40. In the upshot, the Claimant's Notice of Motion dated 4th April, 2024 is partially successful and is granted in the following terms;

a. Paragraph 45 of the Court's judgment delivered on 21st November, 2023 is rectified to read Section 59 (1) of the *Labour Relations Act*, 2007 in lieu of Section 159 (1) of the *Labour Relations Act*, 2007.

b. Rectified copy of the Judgment dated 21st November, 2024 be forwarded to the parties.

c. All other prayers are declined.

41. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the ***Civil Procedure Act*** **(Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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