REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1445 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

KENYA SHIPPING, CLEARING, FREIGHT LOGISTICS AND

WAREHOUSES WORKERS' UNION.....CLAIMANT

VERSUS

KAMILI PACKERS LIMITED.....RESPONDENT

RULING

Judgment in this case was delivered on 7th November 2019. By an application by way of motion dated 20th July 2020, the Applicant who was the Respondent in the suit seeks the following orders: -

1. Spent.

2. The firm of Mucheru Law LLP Advocates be allowed to come on record in place of Kamwaro and Company Advocates.

3. There be a stay of execution of the judgment and decree of this Court delivered on 7th November 2019 pending the hearing and determination of this application.

4. The decree herein be settled in the following terms and/or in the alternative the judgment herein be reviewed in the following terms:-

a) The Applicant has refunded the following Claimants the salary guarantee

i. Gideon Muruli

ii. Samuel Wabwire

iii. Timothy Munyifwa

iv. Yunusu Maina

v. Douglas Okwemba

vi. Edwin Mukhwana

vii. Felix Kipkorir

viii. Geoffrey Mukamani

ix. Ibrahim Omollo

x. Obindi Huxwell

xi. Arthur Tali

b) Simon Muteshi Otisa, Peter Manyonge Wanyama, Patrick Kokisi and Joseph Nyandika are not and have never been the Respondent's employees.

c) Timothy Wanjala had filed a case separately (NRB CMEL 137 OF 2019) where he claimed the said salary refund. The same has been paid into court as guarantee for an appeal.

d) Only two employees have their salary guarantee remaining as unpaid being Stephen Kimtai and Jotham Olipove Okwako who are owed sums of Kshs.6,000/- and Kshs.13,780/- respectively

5. Any other order be made as this Court deems fair and just.

The application is supported by the grounds on the face thereof and the affidavit of FAITH DAVID, the Applicant's Human Resources Manager.

In a nutshell, the applicant states that it has already refunded the salary guarantee to 11 of its ex employees claiming under the Claimant except for two (2) being Stephen Kimtai and Jotham Olipove Okwako who are owed sums of Kshs.6,000/- and 13,780/- respectively. That four (4) of the grievants are unknown to the Respondent and have never been its employees. Further, that one of the grievants being Timothy Wanjala had filed a separate case in which he had claimed a refund of the salary guarantee and the same was paid into court as security.

It further states that it was not aware about the judgment as its erstwhile Advocate did not inform it about the same. The Applicant further avers that the decree is irregular as the Applicant was not involved in the preparation of the same.

Lastly it seeks leave to replace the erstwhile Advocates Kamwaro & Company Advocates with Mucheru Law LLP Advocates who has filed the instant application.

In the submissions in support of the application, the Applicant reiterates the grounds on the face of the application and the affidavit.

It submits that under Order 9 Rule 9(a) of the Civil Procedure Rules it cannot change Advocates after judgment without an order of the court. That its efforts to trace its erstwhile advocates have been futile and as such, it has been unable to obtain the consent of the said advocates for its current advocates to take over the matter.

It further submits that under Order 21 Rule 8 of the Civil Procedure Rules the Claimant is required to obtain consent of the Respondent's Counsel on the decree, relying on the case of **Stephen M. Onyiengo v J.R.S. Group Security Ltd [2015] eKLR** where it was held that:

> *"On the issue of irregularity of decree, there is no letter on record, from the Claimant's Counsel requesting the court to prepare the decree. There is also no letter from the Claimant's Advocates forwarding a decree prepared by the Claimant's advocates to court for adoption. For this reason there is no proof that the decree was irregularly prepared by Claimant's counsel and adopted by the court without involving Counsel for the Respondent."*

It is further the submissions of the Applicant that under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules the court has powers to review its judgments or orders. That there are sufficient reasons to review the judgment herein in view of the fact that the grievants in whose favour judgment was entered have been paid, relying on annexure FD3 of the supporting affidavit of Faith David sworn on 30th July 2020, that the decree further includes individuals unknown to the Applicant, relying on annexure FD4 of the supporting affidavit and lastly, that the decree includes Timothy Wanjala who had already filed a case in a separate suit where he claims salary refund as in this instant suit.

It is the applicant's submissions that the above facts not being points of law are not subject of appeal.

Respondent's Case

The Respondent (claimant in the main suit) opposed the application through the replying affidavit of JAMES O. TONGI, its General Secretary sworn on 19th November 2020 and the submissions dated 20th November 2020.

It is the Respondent's case that the application does not meet the threshold for grant of the orders sought. It submits that on 7th November 2019, this Court delivered judgment in open Court, to the extent that the orders granted were to the effect that the Applicant was ordered to refund salary guarantees as sought in the memorandum of claim;

That on 16th January 2020, the Union forwarded a letter dated 15th January, 2020 to the Applicant through her advocate, (vide email) to M/S Kamwaro & Company Advocates, 1st Floor, Ole Yusufu House, P. O. Box 318 – 20500, Email: ntiine.kamwaro@gmail.com/Phone: +254 722 752 156, forwarding a draft decree, which was acknowledged. That accordingly and after this Court was satisfied with the Union's decree extraction request, it properly extracted/issued the Decree on 6th March 2020. That the averments pleaded and submissions made by the Applicant that the decree was irregularly extracted is baseless, not true and therefore it constitutes a misconception or/ and misapprehension of law.

That the Applicant has not in any way demonstrated that she complied with Orders of this Court granted on 17th August 2020, which required that the current Applicant's advocate on record be served with this application and participate herein. It is submitted that it is not true that the Union did not forward a draft decree to the Applicant, the Union forwarded the decree to the Applicant's advocate on record, there is no evidence tendered before this court that the law firm of M/S Kamwaro & Company Advocates, 1st Floor, Ole Yusufu House, P.O. Box 318–20500, email: ntiine.kamwaro@gmail.com, phone: +254 722 752 156, has ever ceased to act for the Applicant.

That the allegations by the Applicant over the extraction of the Judgment Decree, suffers from lack of particularity and focus, the Applicant has not been able to point out gaps or excesses captured in the said decree and how the decree differs from the Court judgment. That the Applicant is seeking amendments to a decree which she is alleging to be faulty, or/and irregularly processed. That this position contradicts the Applicant and it is self-defeatist and at the same time it vindicates the claimant union.

That allegations that the Applicant lost contact with its erstwhile advocate on record is a rumour, gossip and speculation. The allegations have not been supported or/and packed up by any material evidence. In any case, the Applicant has not substantiated such claims in any manner known in law. No communication/ correspondences was tendered before this Court demonstrating that indeed its erstwhile advocate refused to respond to the demands or instructions given by the Applicant. That although the Applicant is submitting that it was not possible to have a consent signed between its erstwhile advocate and the incoming advocate because she lost contact, there is no evidence tendered before this court of even such purported consent being forwarded to the current advocate on record.

That the cases laws/judicial authorities relied upon by the Applicant herein, are different and distinct, and therefore inapplicable, and this Court must find and hold so.

That the Applicant's actions and conduct herein are marred with serious mischief and conspiracy to defeat justice. That the deponent by the name Faith David and who has described herself as the Respondent's Human Resource Manager, (though without any evidence), was also the one who fully participated in litigating this matter prior to its Judgment. There is no explanation offered or tendered herein by the Applicant as to why the purported evidence tendered now before this Court was not tendered then. That this is an attempt by the Applicant to manufacture documents for purposes of defeating justice.

That the argument and issued frames for determination were not issues advanced or/and framed by the Applicant during the trial of this case prior to its judgment. It is also imperative for this Court to note that the Applicant did not controvert or challenge witness statements by the grievants properly executed and filed before this Court. That any attempt to review this Court's judgment delivered on 7th November 2019 shall unfairly deprive grievants (who are jobless now) fruits/benefits of their Judgment. The Applicant has not met the threshold required by law to enable this Court to reopen and review its judgment.

That the Applicant has not pointed out that its erstwhile advocate on record failed to offer sufficient representation in court, leading to the judgment in favour of the Union.

That consequently, the issues framed for determination at paragraph 9 of the Applicant's written submissions should fail, as orders or reliefs sought are not available.

That the Applicant has not even attempted to explain or substantiate that the information being brought to this Court and relied herein and in terms of refunds of salary guarantees and the list of former employees affected and covered under the judgment were not available at the time she argued this case and before the judgment was entered. That the Applicant has not demonstrated to this Court that the information it is tendering now was not important then, but rather, it is important now.

That the Applicant has failed to prove her case and satisfy to Court to grant orders sought. That what the Applicant is trying to do amounts to forum-shopping or an afterthought act, which is not permitted in law. That the Applicant has introduced a new case and new matters for determination. That the averments, pleadings, submissions and argument that salary guarantee which this Court made a finding that was unlawfully deducted was refunded even before this case was brought to this Court and judgment entered is laughable and not practical in the circumstances. That this is an attempt to mislead this Court and it must be refused and prayers denied.

Analysis and Determination

I have considered the application and the grounds and affidavit in support thereof. I have further considered the replying affidavit and the submissions by both parties.

The issues for determination are whether the Applicant meets the threshold for grant of the orders sought and whether the prayers sought should be granted.

The Applicant seeks several district orders. The first is that Mucheru Law LLP Advocates be allowed to come on record for the Applicant in place of Kamwaro & Company Advocates.

Order 9 Rule 9 of the Civil Procedure Rules provides as follows:-

> **[Order 9, Rule 9.] Change to be effected by order of court or consent of parties.**
>
> **When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**
>
> **(a) upon an application with notice to all the parties; or**

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

There is no evidence that the Applicant ever contacted Kamwaro & Company Advocates. No letter to the Advocates has been filed by the Applicant to prove that it has not been able to get into contact with its erstwhile Advocates. Further, no affidavit of service has been filed in court to show that the Advocate was served with a copy of this application. Order 9 Rule 9 of the Civil Procedure Rules is not a cosmetic provision. It is intended to protect advocates who have toiled for litigants from being dismissed before their fees are paid. A client who wishes to ditch an advocate after judgment must therefore demonstrate that either the Advocate has consented to the change or the Advocate must be given an opportunity to come to court and demonstrate why the client ought not to be allowed to change advocates, so that if there is any outstanding fees, the same is settled.

In **S. K. Tarwadi v Veronica Muehlemann (2019) eKLR**, the Judge observed that –

> *"… in my view, the essence or Order 9 Rule 9 of the CPR was to protect advocates from mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him …"*

In view of the fact that there is no evidence that the Applicant was unable to trace the previous advocates, and that this application was served on the said advocates, this court declines to grant leave to Mucheru & Company Advocates to come on record.

This is sufficient ground to strike out the application herein. I will however also consider the other prayers in the application, so that in case the Applicant wishes to file any other application, it is properly advised.

The second prayer in the application is to set aside the decree on grounds that it is irregular and or defective. The Applicant's reasons for so deeming is that the same was never shared with its advocates before being confirmed by the court as provided for under Order 21 Rule 8 of the Civil Procedure Rules which provides as follows: -

> **[Order 21, rule 8.] Preparation and, dating of decrees and orders.**
>
> **(1) A decree shall bear the date of the day on which the judgment was delivered.**
>
> **(2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.**
>
> **(3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.**
>
> **(4) On any disagreement with the draft decree any party may file the draft decree marked as "for settlement" and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.**
>
> **(5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the subrules shall refer to magistrate.**
>
> **(6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in 111cc manner as a decree.**
>
> **(7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.**

The Applicant further relies on the case of **Stephen M. Onyiego v R. S. Group Security (supra)**.

As has been demonstrated by the Respondent, it complied with the provisions of Order 21 Rule 8 of the Civil Procedure Rules. The Applicant has produced evidence of such service in the exhibits filed with its replying affidavit.

The claimant has further demonstrated that after the decree was confirmed by the court it served a copy thereof upon the Applicant's then advocates together with its tabulation.

I therefore find no merit in the said prayer.

The last order sought is for review of the judgment on grounds that there was an error in the judgment because

> *(a) The judgment has not taken into account that the Respondent has already refunded the salary guarantee to 11 of its ex employees claiming under the Claimant except for Stephen Kimtai and Jotham Olipove Okwako who are owed sums of Kshs.6,000/- and 13,780/- respectively.*

(b) The decree erroneously includes for individuals known as, Simon Muteshi Otisa, Peter Manyonge Wanyama, Patrick Kokisi and Joseph Nyandika, who are unknown to the Respondent and have never been its employees.

(c) The decree includes Timothy Wanjala who had already filed a case separate where he claimed the said salary refund and the same was paid into court as security for an appeal.

As submitted by the Respondent, this is new evidence, which was not before the court at the time of hearing. The deponent of the affidavit in support of the application Ms. Faith David is also the one who depend the affidavit in opposition to the application filed by the Respondent. The court further notes from the record that no defence was filed for the applicant who relied on the replying affidavit of FAITH DAVID sworn on 15th November 2018 and wherein the evidence now produced before the court was not tendered.

Rule 33(1)(a) is clear that only the discovery of new and important evidence, which after due diligence was not within the knowledge of the person who wishes to tender the same could not have produced at the time of hearing can be accepted for purposes of review.

The Applicant has not pleaded that this evidence is new, or that it was not available at the time of hearing of the claim.

There is no mistake apparent on the face of the record as what the Applicant relies on is evidence which was never tendered and which was in the possession of the Applicant. The Applicant cannot be allowed to re-litigate its case in the guise of an application for review.

Conclusion

For the foregoing reasons, I find no merit in the application. The same is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF APRIL 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE