



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 546 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa 4<sup>th</sup> February, 2020)**

**JULIUS MBALUKA MICHAEL.....CLAIMANT**

**VERSUS**

**TOSHA PETROLEUM (K) LIMITED.....RESPONDENT**

**RULING**

1. Before this Court is the Claimant's Application dated 28<sup>th</sup> May 2019 seeking the following orders-

**i. THAT this Honourable Court be pleased to review and vary its judgment dated and delivered on 6/5/2019.**

**ii. THAT the judgment which dismissed the Claimant's claim delivered on 6<sup>th</sup> May 2019 be and is hereby set aside and varied.**

**iii. THAT the Honourable Court be pleased to declare and it is hereby declared that the Claimant was an employee of the Respondent.**

**iv. THAT the Claimant be and is hereby awarded the sum of KShs. 731,903.00 as claimed in the statement of claim or such other sum as the Honourable Court may deem fit and just to grant.**

**v. THAT the Honourable Court do issue such orders and directions as it may consider fit and just to grant.**

**vi. THAT the costs of this application be in the cause.**

2. The Application is supported by the grounds on the face of the motion and the Applicant's Supporting Affidavit sworn on 28<sup>th</sup> May 2019.

3. The Applicant avers that on 6<sup>th</sup> May 2019, this court delivered a judgment where it was found that there existed no employment relationship between the Applicant and the Respondent and thereafter the claim was dismissed.

4. The Applicant is of the position that the determination was an error apparent on the face of record and an error in fact as there is new evidence to prove that it remitted NSSF payments on his behalf hence proof that the Respondent employed him.

5. The Applicant avers that he has discovered new and important evidence that was not within his knowledge or could not be produced at the time the judgment was delivered. As such, the Court did not consider his oral evidence, which were on record or ought to have been on record that would have made the Court reach a different decision.

6. The Applicant avers that he was an employee of the Respondent from August 2015 and served as a pump attendant, a fact that was admitted by the Respondent's advocate in their reply of 28/3/2017, to the Applicant's demand letter.

7. It is averred that the letter came after the filing of this suit and could not have been included in the Applicant's bundle of documents. It is his position that the letter was not considered by this Honourable Court.

8. The Applicant deposes that the orders issued were prejudicial to him as he had been unfairly terminated and denied his terminal dues.

9. The Respondent has opposed the Application vide the Replying Affidavit of Abdisirat Ali sworn on 11/10/2019. The Affiant contends that the Application is bad in law and an abuse of the Court process.

10. The Respondent is of the position that for an applicant to claim discovery of new material information, they have to demonstrate that:-

**a. They did not have possession of the information or evidence when the decision was made.**

**b. They exercised due diligence before the decree was issued but could not find the information or evidence.**

11. The Respondent contends that the Applicant has not demonstrated any of the above elements since the information alleged to be discovered was within his knowledge and he chose not to submit it in Court.

12. The Respondent also contends that the Applicant only annexed his demand letter and has failed to demonstrate how difficult it was to obtain the documents he seeks to rely on. As such, the application is an attempt to appeal the court's decision without following due procedure.

13. It is contended that an error apparent on the face of record must be so obvious that there cannot be two opinions about the alleged error.

14. The Application was disposed of by way of written submissions.

#### **Submissions by the Parties**

15. The Applicant submits the court erred by delivering judgment based on an issue that was not disputed by the parties because it was not called upon to make a determination on whether the Applicant was employed by the Respondent. As such, the decision should be reviewed and the Applicant awarded the reliefs sought in the claim. The **Kenya Shell Limited vs. Kileleshwa Service Station Limited; Civil case 594 of 2004** has been relied upon to support the Applicant's case.

16. I have examined all the averments of both Parties. For this Court to review its judgement, or order, Rule 33 of the Employment and Labour Relations Court (ELRC) Rules 2016 provide as follows:-

**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 judgment 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 the order made;**

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

**c. if the judgment or ruling requires clarification; or**

**d. for any other sufficient reason.**

**2. An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.**

**3. A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.**

**4. The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.**

**5. Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.**

**6. An order made for a review of a decree or order shall not be subject to further review.**

17. The Applicants seek review on the ground that there is an error on the face of the record, this error being, an omission to produce the response to their demand letter admitting that there was an employment relationship between the Claimant and the Respondent.

18. Indeed the letter points out that there was an employment relationship between the Claimant and the Respondent which information was in the knowledge of the Claimant before filing this suit.

19. The Claimant has not explained the difficulty he had in producing this letter in Court for it to resurface after the case has been determined.

20. There is no indication that the Claimant exercised due diligence but could not get the information he now seeks to introduce to Court.

21. The Applicant seeks to open a pandora's box in this case because the Court would then be forced not only to consider a portion of the said letter but the whole including other information that would then be used against the Claimant. I find therefore that this application has no merit. I dismiss it accordingly.

**Dated and delivered in open Court this 4<sup>th</sup> day of February, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Khaduli holding brief Nyabena for Claimant

Miritu holding brief Musungu