



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1763 OF 2015

JULIA COOPER RUST.....CLAIMANT

-VERSUS-

THE ACADEMY OF DANCE & ARTS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th June, 2020)

RULING

The Court delivered judgment in the suit on 31.05.2019 determining the claimant's suit and the counterclaim with orders:

- a) Each party to bear own costs of the proceedings.
- b) The respondent to deliver to the claimant a certificate of service by 01.07.2019 and as per section 51 of the Employment Act, 2007.

The respondent in the suit filed an application on 18.06.2019 through CM Advocates, LLP. The application was under Order 45 rule 1, order 51 of the Civil Procedure Rules, 2010; sections 1A, 3, and 3A of the Civil Procedure Act; section 119 of the Evidence Act Cap 80; Article 159 of the Constitution; and all enabling provisions of law. The applicant prayed for orders:

- a) That the Court be pleased to review part of its judgment dated and delivered on 31.05.2019 and be pleased to find and hold that the counterclaim was not filed as an abuse of court process in view of the order by consent withdrawing civil suit no. 1026 of 2015 in the Chief Magistrate's Court at Nairobi.
- b) The Court be pleased to review part of its judgment dated and delivered on 31.05.2019 and be pleased to find and hold that the applicant's entitled to the prayer for special damages to the tune of Kshs. 12, 255, 471.00 only with interest from the date of filing the suit.
- c) The costs of the application be borne by the claimant.

The application was based on the supporting affidavit of Pernille Duckworth and upon the following grounds as urged for the applicant:

- a) The Court found that the claimant had taken advantage of her position and RW1's prevailing personal problems to advance her own interests at the applicant's dance school. Further the Court found in the judgment that the claimant while in the applicant's employment she took advantage of that employment to advance the interests of the Dance Centre Kenya, the applicant's emerging competitor. The applicant made a demand in that respect through its advocates and filed Civil Suit No. 1026 of 2015 at the Chief Magistrate's Court on 03.03.2015 and the claimant filed a defence therein on 01.04.2015. Later after lapsing of a year from the date of her cause of action the claimant filed the present suit on 01.10.2015 and the applicant filed the response on 12.11.2015. The claimant then applied in the present suit to stay proceedings in Civil Suit No. 1026 of 2015. The parties filed a consent herein on 11.01.2017 that Civil Suit No. 1026 of 2015 at the Chief Magistrate's Court is withdrawn and consolidated as a counterclaim in ELRC 1763 of 2015, the present suit. The Respondent's Amended Response to the Claimant's Memorandum of Claim was therefore filed on 13.02.2017. The counterclaim was filed subsequent to the consent thereby dispensing with the suit in the Magistrate's Court.
- b) In the judgment the Court found that the claimant had abused her fiduciary position and indeed visited financial prejudice to the respondent as a result of her misconduct.
- c) The applicant tendered uncontroverted expert evidence demonstrating the financial statement hence the nature of the report before

Court.

d) The claimant never led the evidence of any financial expert nor any credible evidence if at all to controvert the evidence led by the respondent. That gave rise to a reasonably plausible presumption that indeed there were losses visited on the applicant as particularised in the introverted expert evidence adduced before Court, warranting the grant of the reliefs sought.

e) It is just and mete for the Court to review its decision and grant the orders sought in the application on sufficiency of the just grounds set out herein.

The claimant opposed the application by filing on 19.07.2019 the replying affidavit of Sheila Onyango Advocate and filed through Kaplan & Stratton Advocates. It was urged for the claimant as follows:

a) The claimant concedes that parties entered a consent for withdrawal of the suit in the Magistrate's Court and for filing of the counterclaim and the same amounts to a justifiable ground for review of the judgment herein but the same will not impact on the final orders as given in the judgment herein. The Court has considered that assertion by the claimant and returns that in view of the undisputed consent to withdraw the suit in the Magistrate's Court, prayer (a) of the application will succeed and the Court will not return to that issue.

b) For prayer (b) in the application it is urged that the applicant has not established any of the prescribed grounds for review. It is urged that there is no new evidence which with due diligence could not be made available at the hearing. Further the alleged financial losses were urged at the hearing as now urged in the application but no evidence had been provided to establish the same. Further the applicant's accountant had testified at the hearing that he had no evidence to show that the applicant's students left the applicant's school and went to Dance Centre Kenya.

c) The applicant should not be allowed a review on the grounds that the Court reached an erroneous conclusion of law in respect to the applicant's counterclaim because doing so would amount to asking the Court to sit on appeal on its own decision. A review should not be sought for a fresh hearing of arguments or correction of a supposed erroneous view. The power to review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate arguments being needed for stabling it. In the present case the only error established is with respect to prayer (a) and nothing more.

Submissions were filed for the parties. The Court has considered the written and oral submissions as well as the parties' respective positions. The Court makes findings as follows.

It is submitted for the applicant on account of rule 33(1) (b) and (d) of the Employment and Labour Relations Court (Procedure) Rules being that the review as prayed for is based on some mistake or error apparent on the face of the record and, for any other sufficient reason. On account of rule 33(1) (b) the Court has already found that prayer (a) in the application is allowable on account of mistake and as per the parties' consent.

With respect to the merits of the applicant's counterclaim the Court found as follows, thus, "**The 4th issue for determination is whether the respondent is entitled to the counterclaim as prayed for. The respondent counterclaimed that the claimant solicited parents and students to move to Dance Centre Limited in 2015 and that it incurred losses as a result. The respondent prayed for general damages for breach of fiduciary duty by the claimant. First the loss as alleged amounted to a liquidated loss which was not quantified, not specifically pleaded, and was not strictly proved and in the Court's opinion, the prayer for general damages was misconceived in view of the alleged injury. As submitted for the claimant, the Court of Appeal held in Abudi Ali Mahadhi –Versus= Ramadhani Saidi & Freight Forwarders Limited [1999]eKLR, that special damages must be pleaded and be strictly proved. The respondent's witness No. 2 (RW2) was the respondent's accountant. His evidence was that at the end of January and early February 2015, the students who had enrolled left and each had been expected to pay Kshs. 12, 000.00 per term. RW2 also testified thus, "I have no evidence that our students left and went to Dance Centre Kenya. There was no documentation." Further, RW2 testified that he had not filed the annual audit reports that informed his summary that had been exhibited. As submitted for the claimant, in Africa Line Transport Company & Another –Versus- Sylvester Keitany [2017]eKLR, a plaintiff is under a duty to present evidence to prove his claim. In the present case the Court finds that the respondent failed to discharge that duty.**"

The Court has revisited the submissions filed for the respondent and returns that there is no submission made on the quantum of the general damages for breach of fiduciary duty by the claimant, as was prayed for...."

It is submitted for the applicant that since the Court found that the applicant had sufficient reasons to terminate the claimant's contract of employment, the order disallowing the damages as claimed in the counterclaim should be reviewed under rule 33 (1) (d) of the Court's procedure rules. Further section 119 of the Evidence Act provides that the Court may presume the existence of any fact which it thinks likely to have happened, regarding being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Further the claimant led no expert evidence to rebut the expert evidence by RW2, the applicant's certified accountant. Thus under section 119 of the Evidence Act, the applicant should be presumed to have established its claim for Kshs. 12,255, 471.00. The applicant relied upon Stephen Gathua Kimani –Versus- Nancy Wanjira Waruingi T/A Providence Auctioneers, Civil Appeal No. 142 of 2012 where in considering the scope of "sufficient reason" the Court relied on Mulla in the Code of Civil Procedure that "sufficient reason" means "a reason sufficiently analogous to those specified in the rule" For the claimant it is submitted as well that sufficient reason must be one sufficiently analogous to those specified in the rule and further that the applicant has failed to establish such reason to justify a review as prayed for in prayer (b).

It is clear to the Court that in urging prayer (b) in the application the applicant is trying to buttress its case and asking the court to reconsider its analysis in the judgment that led to dismissal of the counterclaim. The Court returns that in proceeding as urged, the Court would be sitting in appeal on its own decision and as submitted for the claimant herein. The Court considers that it does not amount to a sufficient ground to review its decision upon a ground asking it to reconsider its analysis of the applicant's case as already found by the Court as such

does not amount to a reason analogous to the prescribed grounds for review as per rule 33 of the Court's rules of procedure. RW2 testified that there was no evidence to show that the students left the applicant's school to the claimant's newly established school and needless to state it was clear to the Court that there was therefore no link of causation between the figures in RW2's evidence of losses to the applicant and the claimant's conduct that led to claimant's termination – so that the presumption in section 119 of Evidence Act as invoked for the applicant was clearly misconceived in this case whereby the applicant had clearly failed to establish its counterclaim and prayers. As submitted for the claimant this revisiting of the judgment may easily amount to sitting on appeal and the Court will say no more about the issue.

The Court follows the holding by Mativo J in **Bethwel Omondi Okal –Versus- Managing Director KPLC & Co. [2017]eKLR**, upholding **National Bank of Kenya Ltd –Versus- Ndungu Njau (1996)KLR 469 (CAK) at Page 381** thus “**14. Also of useful guidance is the following excerpt from the judgment in the above cited case of National Bank of Kenya Ltd –Versus- Ndungu Njau [8] where the Court stated: “A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”** The Court finds that the applicant's alleged dissatisfaction with the findings and reasoning in the judgment with respect to prayer (b) in the application may constitute grounds of appeal and certainly not review towards urging the trial court to change its findings and reasoning in that regard.

Looking at the parties' margins of success each party will bear own costs of the application.

In conclusion the application for review filed herein on 18.06.2019 is hereby determined with orders:

- a) That the Court is hereby pleased to review part of its judgment dated and delivered on 31.05.2019 and finds and holds that the counterclaim was not filed as an abuse of court process in view of the order by consent withdrawing civil suit no. 1026 of 2015 in the Chief Magistrate's Court at Nairobi.
- b) That each party to bear own costs of the application.

Signed, dated and delivered in court at Nairobi this Friday, 5th June, 2020.

BYRAM ONGAYA

JUDGE