



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1515 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th July, 2020)

HENRY OWINO OBONYO.....1ST CLAIMANT/1ST RESPONDENT

ALLOICE ODHIAMBO LUMUTU.....2NDCLAIMANT/2ND RESPONDENT

VERSUS

KENYA AIRWAYS LIMITED.....RESPONDENT/APPLICANT

RULING

1. Before this Court is the Respondent's Application dated 24/1/2020 seeking the following orders:-

a. Spent.

b. This Honourable Court be pleased to review its judgment delivered on 9/10/2019 relating to the 2nd Respondent and set aside the resultant decree.

c. This Honourable Court be pleased to review its Ruling and resulting order of 16/12/2019.

d. This Honourable Court be pleased to stay execution of the Judgment and Decree of the Court (Hon. Lady Justice Hellen Wasilwa) delivered on 9/10/2019 pending inter partes hearing of this Application.

e. This Honourable Court be pleased to order the 2nd Respondent to refund all the earnings paid to him by the Applicant subsequent to the Judgment and decree of 9/10/2019.

f. This Honourable Court be pleased to find the 2nd Respondent guilty of the offence of perjury and order his committal to civil jail; and

g. The costs of this Application be provided for.

2. The Application is supported by the grounds set out therein and in the Supporting Affidavit of Grace Wamiti, sworn on 24/1/2020. The Application has been opposed vide the 2nd Claimant/Respondent's Replying Affidavit sworn on 6/2/2020 and 1st Claimant/Respondent's Grounds of Opposition dated 6/2/2020.

The Applicant/Respondent's Case

3. The Applicant avers that on 9/10/2019, this Court entered judgment and ordered for the reinstatement of the 2nd Claimant/Respondent without any loss of salary and benefits as well as ten months compensation for unfair and unjustified termination. It is averred that the basis for the 2nd Claimant/Respondent's reinstatement was that he was a trained specialist on aircraft types operated by the Applicant and had been unable to secure alternative employment.

4. However, the Applicant discovered new and important evidence on 10/12/2019 while the Application for stay was pending for Ruling, that the 2nd Claimant/Respondent had been employed by the Kenya Civil Aviation Authority and Jubba Airways after they terminated his employment.

5. It is the Applicant's position that the 2nd Claimant/Respondent had special knowledge of the facts of his employment with the two entities when he testified and submitted that he had been unable to secure alternative employment. As such, he perjured himself and misled this Court into believing that he was unable to secure alternative employment.

6. Additionally, this Court delivered a Ruling directing the Applicant to pay the Claimants/Respondents half the decretal sum and the other half deposited in an interest earning account held jointly by the Claimants/Respondents' Counsels, as a condition for granting an order for stay.

7. The Applicant avers that the 2nd Claimant/Respondent continues to benefit from his deceptive acts as they have currently employed him. It is therefore in the interest of justice that the Judgment and the Ruling be reviewed to take into account the new and important evidence.

The Claimants/Respondents' Case

8. The 2nd Claimant/Respondent avers that the Application is irredeemably deceptive, ill-founded and lacking of merit and consisting of falsehoods and bare averments intended to hoodwink this Court into retrying a matter which has already been heard and determined on merit.

9. The 2nd Claimant/Respondent avers that the Applicant has not withdrawn its notice of appeal or cross appeal in order to invoke the review process hence cannot pursue an appeal and review at the same time. Further, the Court of Appeal is seized of this matter and it would be fair and just for it to be allowed to determine the pending Appeals before it.

10. It is averred that the conditional orders granted on 16/12/2019 are yet to be fulfilled and the instant application is an attempt to frustrate the compliance of those orders.

11. The 2nd Claimant/Respondent contends that the new and important evidence allegedly discovered by the Applicant was within its knowledge during the hearing of the suit and could have been adduced in Court at that time.

12. Further, the 2nd Claimant/Respondent avers that the offer he received from Kenya Civil Aviation Authority after the termination of his employment was frustrated by the Applicant, who gave a negative and incriminating report during a background check. It is averred that all the contracts he secured were short term and which were terminated immediately it was discovered that the Applicant had terminated his employment. This evidence was never controverted.

13. The 2nd Claimant/Respondent avers that the Applicant has not demonstrated how the evidence had not been available during trial and the efforts exercised to obtain the same. It is his position, that the Applicant is thus introducing new evidence and ought to follow the appropriate appellate procedure.

14. It is averred that the 2nd Claimant/Respondent's inability to secure a job was not a factor or a ground that informed this Court's determination. The 2nd Claimant/Respondent denies giving any false evidence or misleading this Court.

15. The 2nd Claimant/Respondent is of the view that the Applicant is imposing that he should have maintained the Contract with Jubba Airways yet he did not know the terms of the employment he was being offered or if they matched the terms he was being offered by the Applicant.

16. He avers that there was inordinate delay in filing this Application, which has not been explained. Further, the Application has not met the threshold for granting review orders and is devoid of merit hence should be dismissed.

17. The 1st Claimant/Applicant's Grounds of Opposition is based on the following:-

a. The Applicant has not brought any new material evidence before the Court.

b. The evidence brought by the Applicant has been illegally obtained therefore inadmissible.

c. There is a pending appeal in this matter therefore the Applicant's right to review the Judgment is vitiated.

d. The Applicant has not challenged the fact that the termination was unfair.

e. Once the Court had established that the termination was unfair, it had the discretion to award any relief as it deemed fit and expedient.

f. The Application is frivolous and the same is an abuse of the process of the court aimed at delaying the execution of the judgment and preventing the Claimants from enjoying the fruits of the Judgment.

18. The Application was disposed of by way of written submissions with only the Claimants/Respondents filing their written submissions. There is no record of the Applicant's written submissions in the Court file.

19. However, there exists the Applicant's Case Digest dated 25/2/2020 in the Court file, regarding the Application where they have cited and enumerated the cases of **Sadar Mohamed vs. Charan Singh** [1959] EA 793, **Wangechi Kimita vs. Wakibiru** [1985] eKLR, **Muyodi vs.**

Industrial & Commercial Development Corporation & Another [2006] 1 EA 243, James Mulinge vs. Freight Wings Limited & 3 Others [2016] eKLR, Brinks Mat Limited vs. Elcombe [1988] 3 All ER 188 and Standard Limited vs. Alfred Mincha Ndubi [2018] eKLR.

20. The Claimants/Respondents submit that the moment the Applicant filed a Notice of Appeal it lost the right to review the judgment hence the application is bad in law. They rely on the case of **Serephen Nyasani Menge vs. Rispah Onsase [2018] eKLR** to support this position.

21. The Claimants/Respondents submit that the Applicant has not brought any new evidence that could not be produced at the time the judgment was being made as all the issues raised in the present Application, were raised and canvassed during the hearing and upon which the Court based its judgment. They rely on the case of **The Executive Committee Chelimo Plot Owners Welfare Group & 288 Others vs. Joel Langat & Others [2016] eKLR** to buttress this position.

22. It is submitted that the alleged new evidence cannot change the Court's finding that the reasons for termination were invalid and the process was unfair. In the absence of strong grounds that would warrant the re-opening of the case, the application is unmerited and should be dismissed. They rely on the case of **The Executive Committee Chelimo Plot Owners Welfare Group & 288 Others vs. Joel Langat & Others [Supra]** whose finding buttresses this position.

23. Further, this Court had the discretion on what relief to grant the Claimants including the relief of reinstatement, upon establishing that they had been unlawfully and unfairly terminated.

24. The Claimants/Respondents submit that the Application has been made with inordinate delay which has not been explained and relies on the case of **The Executive Committee Chelimo Plot Owners Welfare Group & 288 Others vs. Joel Langat & Others** cited above, where the Court observed that whereas 3 months appears not to be unreasonable, failure to explain the delay may nevertheless cause the delay to be construed as unreasonable.

25. It is submitted that the 2nd Claimant/Respondent's evidence has been consistent and contained no falsehoods. Further, the issue of his specialization was addressed conclusively in the judgement and the Applicant should seek redress on appeal if aggrieved, and not by review.

26. I have examined all the averments and submissions on the file. The Applicants seeks review of this Court's orders and judgement made on 9/10/2019 and ruling of 16/12/2019 on the grounds that they have new evidence, which would not have been availed at the time of the hearing. Indeed that is a good ground for review as provided for under the Employment & Labour Relations Court (Procedure) Rules 2016.

27. However, the Applicant must establish that it is only on the basis of the non-availability of the new ground or evidence that this Court reached the Judgment it rendered.

28. From the evidence of the 2nd Claimant, he indicated that he had attempted to get alternative employment in 2 different organizations and he was terminated after it was established that he had been terminated by the Respondent.

29. This is the evidence the Applicants seem to say is new when infact the 2nd Claimant had brought it out in his evidence.

30. The Court made its judgment with the knowledge of this information and therefore there is nothing new that is being brought to the attention of the Court to warrant review of its orders or judgement.

31. I find the application for review therefore has no merit and I dismiss it accordingly.

32. Costs to the Respondents in this application.

Dated and delivered in Chambers via Zoom on this 30th day of July, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Opakas holding brief Ohaga for Applicant – Present

2nd Respondent – Present

Kalume for 1st Claimant – Present