



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1130 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 29th October, 2020)

GAL ARBEL.....1ST CLAIMANT

NIR SHER.....2ND CLAIMANT

AMIR GRINBERG.....3RD CLAIMANT

VERSUS

BALTON CP LIMITED.....RESPONDENT

RULING

1. Before this Court is the Respondent's Notice of Motion Application dated 19/8/2020 seeking the following orders:-

a. This Application be certified urgent, service thereof upon the Claimants be dispensed with and the same be heard ex parte in the first instance. [Spent]

b. Pending the inter-partes hearing and determination of this Application, all other proceedings in this suit be stayed.

c. Pending the inter-partes hearing and determination of this Application, this Honourable Court be pleased to review, set aside, vary or vacate this Court's order issued on 27/6/2019 and order the Claimants to pay into a joint interest earning account of the parties' advocates:-

i. In respect of the 1st Claimant, the sum of KES 27,072,960 being claimed against him by the Respondent.

ii. In respect of the 2nd Claimant, the sum of KES 30,609,866.87 being claimed against him by the Respondent.

iii. In respect of the 3rd Claimant, the sum of KES 28,480,060.88 being claimed against him by the Respondent.

d. Pending the inter-partes hearing and determination of this Application, this Honourable Court be pleased to review, set aside, vary or vacate this Court's order issued on 27/6/2020 and order the Claimants to appear on a date and time to be fixed before this Honourable Court to show cause why they should not furnish such security as the Court may direct by way of money or property sufficient to answer the claim against the 1st, 2nd and 3rd Claimants in the sum of KES 27,072,960, KES 30,609,866.87 and KES 28,480,060 respectively.

e. Pending the hearing and determination of this Claim this Honourable Court be pleased to review, set aside, vary or vacate this Court's order issued on 27/6/2019 and order the Claimants to pay into a joint interest earning account of the parties' advocates:-

i. In respect of the 1st Claimant, the sum of KES 27,072,960 being claimed against him by the Respondent.

ii. In respect of the 2nd Claimant, the sum of KES 30,609,866.87 being claimed against him by the Respondent.

iii. In respect of the 3rd Claimant, the sum of KES 28,480,060.88 being claimed against him by the Respondent.

f. In alternative to prayer (e) above, pending the hearing and determination of the claim, this Honourable Court be pleased to

review, set aside, vary or vacate this Court's order issued on 27/6/2020 and order that the Claimants each furnish security for costs in the sum of KES 1,000,000 or in the alternative such other sums as the Court may assess as fair and reasonable, within 14 days from the date of such order and in default, the Amended Memorandum of Claim dated 13/12/2019 stand automatically dismissed.

g. This Honourable Court be pleased to make any other order that it deems just and fit in the circumstances; and

h. The cost of this Application be provided for in any event.

2. The Application is supported by the grounds set out therein and the Supporting Affidavits of Aviv Levi sworn 20/7/2020 and the Supplementary Affidavit of Andrew Baker sworn on 25/9/2020. The Application has been opposed vide the Replying Affidavit of Amir Grinberg sworn on 18/9/2020.

3. The Applicant's case is that it filed 3 applications each dated 23/10/2010 against the Claimants seeking to have their accounts frozen or they deposit security of costs with regards to the counterclaim and for the 3rd Claimant to show cause why he should not furnish security of costs.

4. However, this Court dismissed the Applications and declined to issue the order for security of costs on the ground that the Respondent had failed to prove that the Claimant were out of this Court's jurisdiction or that they had no property within this Court's jurisdiction.

5. The Applicant avers that there has been discovery of new and important evidence which was not within its knowledge despite exercising due diligence and could not be produced by the Respondent at the time the said Applications were heard. In particular, the 1st and 2nd Claimants and their families have left Kenya and their financial means are unknown. As such, any decree that this Court issues on the Respondent's counter-claim will be unenforceable.

6. As such, it is in the interest of justice that the orders sought be issued.

The Claimants' Case

7. The Claimants contend that the Application is grossly misconceived, misplaced, mischievous, frivolous, scandalous, vexatious and an abuse of the court process hence should be dismissed with costs. They further contend that the supporting affidavit of Aviv Levi consists of wild allegations that are not supported by any evidence.

8. It is the Claimants' position that the supporting affidavit has been sworn by a stranger to these proceedings. As such, the Application should be dismissed as it lacks a valid Affidavit.

9. The Claimants contend that the Application has not met the threshold for review. The 3rd Claimant avers that he is in Nairobi and any allegation to the contrary is a misrepresentation. It is averred that the Claimants reside in Kenya where they manage a number of businesses and have work permits in that respect.

10. It is contended that the relocation of the 1st and 2nd Claimants' families back to Israel was a fact well known to the Respondent at the time it was filing the Applications of 23/10/2018 as it was the Respondent who bore the costs of relocating the families.

11. It is averred that the 1st and 2nd Claimants travelled back to Israel to be with their families but were unable to come back due to the lockdown enforced by Israel. As such, they are unable to come back until the ban on international flights is lifted and it is safe to travel.

12. It is their contention that having a matter pending in Court does not bar them from traveling temporarily to stay or visit their families. Finally, the Claimants contend that the Applications of 23/10/2018 were not only dismissed on the ground that the Respondent had failed to prove the Claimant's alleged relocation to another jurisdiction but also on the following grounds:-

a. That even if the Claimants relocated from Kenya, this Court's judgment would still be enforced under the Foreign Judgments Enforcement Law, 1958 Laws of Israel.

b. That the Counter-claim was at cross-purpose because the Respondent's allegation that the Claimants did not have any assets in Kenya while still asserting that the Claimants were directors of companies who were the Respondent's competitors; suggests that the Claimants have roots in the Country and can settle any judgment award against them.

c. The Claimants have a strong defence on record as the Respondent has failed to prove the Claimants' cases are frivolous thus completely negating the Respondent's counter-claim.

d. The Respondent did not prove that the Claimants do not have any property within this Court's jurisdiction.

13. They urged this Court to dismiss the application.

The Applicant's Rejoinder

14. The Applicant filed a supplementary affidavit in response to the Claimants' replying affidavit. The Applicant contends that as the

Managing Director of the Respondent's subsidiary company, Aviv Levi was duly authorised to swear the Affidavit of the Respondent's behalf.

15. The Applicant reiterates that the Claimants' departure from the country is new and important evidence which it had been unaware of despite exercising due diligence. Additionally, until June this year, the Applicant did not know that the 2nd Claimant had remained outside the country.

16. The Applicant denies catering for the 1st and 3rd Claimants' travel or shipping costs but contends that the 2nd Claimant's shipping and traveling costs were paid before the Applicant discovered that the Claimants had breached the terms of their employment.

17. It is the Applicant's case that the ban on international flights was lifted on 1/8/2020 hence the Claimants' assertion that the 1st and 2nd Claimants failure to come back to the country is attributable to the travel ban, is false. Further, the 2nd Claimant does not have a work permit and that 1st and 3rd Claimants' work permits are expiring on 8/11/2020 and 24/10/2020 respectively.

18. It is averred that the Claimants have admitted that the 1st and 2nd Claimants relocated to Israel with their families and have not been back in the country or made any effort to come back despite the ban on international flights having been lifted. As such, there is a real risk that if the Claimants don't provide security of costs, the Respondent will not be able to trace them to execute this Court's judgment.

19. It is the Applicant's case that there is no reciprocal recognition of judgments between Kenya and Israel. Further, that there is no guarantee that any judgment in favour of the Respondent based in Kenya will be recognised and enforced. The Applicant urged this Court grant the orders sought.

20. The Application was disposed of by way of written submissions with both parties filing their submissions.

The Applicant's Submissions

21. The Applicant's submissions majorly reiterated the averments made in the Application and the affidavits in support thereof. The Applicant submits that since it knew of the 1st and 2nd Claimants' travel in June, it has satisfied the conditions for grant of an order of review and relies on the cases of **James Mwaniki Kamau vs. Republic [2018] eKLR** and **Francis Mwanzia Nyenze vs Charles Mutisya Nyamai & 2 Others [2008] eKLR**.

22. The Applicant submits that the Claimants' allegations that the supporting affidavit is incompetent for want of capacity and personal knowledge are not well founded and cannot be sustained. The Applicant contends that the affiant was the MD of the Respondent's subsidiary company and personally knew the Claimants as they worked in the same premises.

23. The Applicant further submits that the averments made by the affiant have been made under oath and can only be controverted by evidence to the contrary. As such, the supporting affidavit and by extension the review application were properly before this Court. The Applicant relied on the case of **Peter Onyango Onyiego vs. Kenya Ports Authority [2004] eKLR**.

24. The Applicant urged this Court to grant the orders for review as it had met the threshold required by rule 33 (1) (a). The Applicant relied on the case of **Alice Aloo Betty Were Thompson vs. Said Mohamed & 2 Others [2014] eKLR** where the Court ordered the Plaintiff to furnish security of costs since they had failed to provide proof of means.

The Claimants' Submissions

25. The Claimants' submissions was a reiteration of their Replying Affidavit. They submit that the Applicant's application does not meet the threshold set out in section 16 of the Employment and Labour Relations Court Act as read together with rule 33 (1) (a) of the Rules, and lacks merit. In particular, the Respondent has not adduced evidence to show that the Claimants have indeed relocated to Israel and contend that the reason the 1st and 2nd Claimants are not yet in the country is due to the travel ban and the safety risk posed by COVID-19.

26. It is submitted that the Applicant was aware that the 1st and 2nd Claimants' families had relocated by the time it was filing the Applications of 23/10/2018. Further, the Applicant delayed in raising the said issues for a period of two years. They rely on the case of **Gideon Mose Onchwati vs Kenya Oil Co. Limited & Another [2017] eKLR** where it was observed that a party is required to apply for review where there is discovery of new and important evidence, which was not within their knowledge when the decree was made.

27. It is the Claimants' position that the Applicant's allegations have been concocted with the sole intention of misleading this Court. They submit that the issue raised in the Application has already been litigated upon, determined and cannot be re-argued vide an Application for review as was held in the case of **Newton Wanjohi Mwai vs. Ephantus Ngari Njiraini [2011] eKLR**.

28. They urged this Court to disregard the supporting affidavit Aviv Levi as it raises allegations with no probative value and has been sworn by an individual who is not a party to this suit or an employee of the Respondent.

29. I have examined the averments of the Parties herein. Rule 33(1)(a) of the ELRC (Procedure) Rules 2016 states 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”.

30. The Applicants have approached this Court on account of rule 33 (1) (a) on the grounds that they have new and important matter or evidence that could not have been discovered by the time this Court granted its orders on 27/6/2019.

31. The important matter they aver they have discovered is that the 1st and 2nd Claimants have left the Court’s jurisdiction with their families and as such there is need for review of the previous orders.

32. They also aver that the 1st and 3rd Claimants’ work permits are due to expire in October and November 2020.

33. In response to the issue of the Claimants leaving this Court’s jurisdiction, the 2nd Claimant have deponed that they travelled to Israel and could not come back due to the lock down caused by Covid 19. 3rd Claimant indicated that he is in Kenya and that the Claimant’s manage a number of businesses in Kenya and have permits to that effect.

34. Indeed, it is true that the 1st and 2nd Claimants are out of the country and the Applicant even admitted that they facilitated the 1st and 2nd Claimants move to Israel. Indeed also the State of Covid 19 Internationally is also a matter that cannot be wished away.

35. Indeed, even at the time of filing the application on 23/10/2018, the fact of the 1st and 2nd Claimants relocation to Israel was well known to the Applicants. That then is not a new matter upon which this Court can grant orders of review sought.

36. On the contention that the work permits of the 1st and 3rd Claimants are due to expire, there is no evidence that these too cannot be renewed and there is no evidence that this cannot be done. This is also not a new issue because the time of expiration of these work permits was a mater in the know of the Applicants even before.

37. In this Court’s view, there is no new evidence or information which was not in the knowledge of the Applicants at the time orders sought to be reviewed were granted. In the circumstances, I find the application for review has no merit and the same is dismissed accordingly.

38. Costs in the cause.

Dated and delivered in Chambers via zoom this 29th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyachoti for Claimant/Respondents - Present

Zila Moka for Applicant/Respondent – Present