



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2500 OF 2016

JUSTINA NZULA MBAU.....CLAIMANT

-VERSUS-

RACHEAL WANJIKU KIMANI.....RESPONDENT

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th January, 2019)

RULING

1. The Application before this Court is the one dated and filed in Court on 29th June, 2018 through a Notice of Motion filed under Order 45 of the Civil Procedure Rules 2010, Rule 33 (1), (2), (3) of the Employment and Labour Relations Court Rules, 2016 and all enabling provisions of the law.

2. The Application was brought under Certificate of Urgency and the Application seeks the following Orders:-

1. THAT this matter be certified urgent and be heard ex-parte in the first instance.

2. THAT the Honourable Court be pleased to review and/or vary the Judgment delivered herein on the 5th of June 2018 in order to set aside orders made leading to the Claimant/Applicant Memorandum of Claim to be dismissed.

3. THAT the costs of this Application be in the cause.

3. It is grounded on the following grounds:-

a) That the Honourable Judge delivered Judgment on 5th of June 2018 in favour of the Respondent and the Memorandum of Claim was unopposed.

b) The aforementioned Judgment was delivered without the Honourable Court having an opportunity to consider material evidence in the Applicant's possession since the Respondent herein was served with the Memorandum of Claim, Affidavit of service was on record, the Respondent entered the appearance and there was no response to this suit nor crucial evidence for the Honourable Court to dismiss the matter in favour of the Respondent.

c) The Applicant is of the opinion that the Honourable Court made an error that is capable of correction by allowing Claimant's/Applicant's prayers sought on Memorandum, of Claim be granted as prayed according to the award/judgment of this Honourable Court attached as an exhibit on the supporting affidavit.

d) That if there was no evidence which was adduced by the Claimant during hearing and cross-examination, it was the responsibility of the Honourable Court to enquire such evidence from the Claimant according to Section 173 of the Evidence Act.

e) It is in the interest of justice that the Judgment delivered on 5th of June 2018 be reviewed and be set aside and judgment be entered in favour of the Applicant/Claimant.

4. The Application is supported by the Affidavit of JUSTINA NZULA MBAU sworn on 29th June, 2018 in which they reiterate the averments made in the Notice of Motion Application.

5. The Respondent did not file any response to the instant Application now before this Honourable Court.
6. In disposing of the instant Application, the Court directed the Claimant to file her written submissions to the Application.

Claimant's/Applicant's Submissions

7. The Claimants'/Applicants' in their submissions urged the Court to allow the instant Application as it was the duty of the employer to issue letters of appointment and payslips to the Claimant and the burden of proof of employment is on the Employer/Respondent. Section 10 (6) & (7) of the Employment Act, 2007 provides that the employer shall keep the written particulars of a contract for a period of five years after the termination of the employment.
8. It is further submitted that where an employer fails to produce a written contract or written particulars for contract, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer; and not on the employee.
9. The Claimant/Applicant for emphasis relied on the authority of **Cause Number 267 of 2012** where Lady Justice Monica Mbaru held that *it had carefully considered the Claimants submissions in evidence before the Court. It was not in dispute that the Claimant was a house help for the Respondent and that the Claimant earned Kshs. 11,000/= a month. The Court noted that many employers fail to issue their employees with a contract of service and this acts in their detriment as none issue of this document leaves the Court to interpret the relationship between the parties which would have been well outlined by the mutual agreement of the Claimant that based on the oral contract between the parties, the claimant's terms and conditions of work were that the Claimant was serving as a house help.*
10. Further the Claimant/Applicant relied on the case of **Cause No. 720 of 2017** where the Court held that failure by the Respondent to enter appearance and file its defence the suit was not disputed, all the prayers sought by the Claimant were granted plus costs of the suit a total of Kshs. 450,000.
11. The Claimant/Applicant urged the Court to allow the instant Application and enter judgment in favour of the Claimant herein as the Respondent herein entered appearance and there was no response despite the Respondent being served with mention notices, hearing notice and return of service were on record.
12. The Claimant/Applicant further urged the Court to set aside the judgment delivered on 5/6/2018 and re-enter new judgment against the Respondent.
13. I have considered the averments of the Applicant in this Application. It is my view that the Applicant wants this Court to sit on appeal on its own judgement, which is not the purpose of a review. No new evidence has been tendered before this Court.
14. There is no error on the face of the record and I have no jurisdiction to reverse my own judgement. I do not find this application merited and I dismiss it accordingly.

Dated and delivered in open Court this 30th day of January, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Parties