REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.27 OF 2018

(BEFORE D. K. N. MARETE)

RAYMOND KIPLANGAT KIRUI.....CLAIMANT

VERSUS

MOGOGOSIEK TEA FACTORY CO. LIMITED.....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 25th July, 2018. It seeks the following orders of court;

1. THAT this Application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in first instance.

2. THAT the Judgment issued by this court dated 29th day of June, 2018 and all consequential orders be reviewed to include an award gratuity and unpaid leave days.

3. THAT the Judgment issued by this court dated 29th day of June, 2018 and all consequential orders be reviewed to include an awards made with respect to Kericho ELRC Numbers 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 20, 22, 28, 29, 30 & 32 all of 2018.

4. THAT the Application at hand be heard and determined on a priority basis.

5. THAT further orders as ends of justice may require be made.

6. THAT the cost of this application be provided for.

It is grounded as follows;

1. Pursuant to the Judgment that was issued on the 29th June, 2018, this Honourable court did not take into account the claim for gratuity and unpaid leave days by the various claimants.

2. Pursuant to the Judgment that was issued on 29th June, 2018, this Honourable court did not pronounce it's self with respect to Kericho Elrc **Numbers 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 20, 22, 28, 29, 30 & 32 all of 2018** the claim at hand being the lead file.

3. That there has been discovery of new evidence that was not in the hands of the Claimants at the time of delivery of the Judgment at hand.

4. It is in the interest of justice that the application at hand is granted.

The respondent in a Replying Affidavit sworn on 14th January, 2019 opposes the application in the following deposition;

3. THAT I have read the Application dated 25th July, 2018, and I wish to respond as hereunder.

a. THAT in response to paragraph 2 of the supporting affidavit, the Applicant should not be heard blaming the court on the outcome of his case and ELRC NO. 7, 8, 9, 10, 1, 12, 14, 15, 16, 17, 20, 22, 28, 29, 30 & 32 ALL OF 2018, as by the court being competent court, delivered its judgment after considering all the facts tabled before it by the parties.

4. THAT in reply to paragraph 3 of the supporting affidavit, it is clear thereon, that nothing prevented the Applicant from obtaining a copy of collective bargain agreement from the union office, but instead chose to wait upon the court to make its findings first.

5. THAT in reply to paragraph 4, 5, 6, 7 it is obvious that the applicant wants to have a second bite of the cherry, yet she had all the time to prepare for her case before the same was settled for hearing.

6. THAT the Applicant all along knew of the existence of the collecting bargain agreement and nothing inhibited her from producing the same in court during hearing. The Applicant was merely indolent.

9. THAT the Applicant's application does not meet the requisite requirement for allowing review of judgment, but the same, is an abuse of court process and recipe for dismissal.

The applicant in her written submissions dated 25th December, 2018 supports her case for review by relying on the authority of Order 45, Rule 2 (1) as follows;

(1) Any person considering himself aggrieved-

1. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

2. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of judgment the court which passed or made the order without unreasonable delay

She further buttresses her case by relying on the authority of **National Bank of Kenya Ltd. vs. Ndungu Njau (Civil Appeal No.211 of 1996 (UR)** where the court observed as follows;

"A review may be granted whenever the court considers that is 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 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 ground for review."

The respondent did not file written submissions on the subject. It is however noted that they filed a cogent reply in opposition to the application.

It is notable and clear that at the onset of the determination of the issues in dispute in the claim, this court observed as follows;

The 1st issue for determination is whether there was a case of termination of the employment of the claimant by the respondent. **The claimant in his written submissions dated 20th June, 2018 and in support of his case of unlawful termination of employment introduces a new angle to his case. This is to the extent that the claimant was unionized with Kenya Plantation of Workers Union (KPAWU) and Central Organization of Trade Unions (COTU).** The respondent would on a monthly basis deduct and remit union dues in accordance with the subsisting CBA inter partes (emphasis/bold added.)

Where does this lead us to? The answer is all provided for in the respondents replying affidavit opposing this application. This is to the extent that the claimant/applicant had all this time an opportunity to present his case and evidence for an award of gratuity and unpaid leave but squandered the same as and when it was due and living. The claimant/applicant was exposed to all material and evidence of these claims but ignored to tender the same at the material time and space.

Further, the claimant/applicant's plea and submission of an error on the face of the record is not sustainable. It is not real. It is not demonstrated in fact or law.

This court heard the suit and made a determination on its merits. This was also determined in view of the respective cases of the parties as pleaded and presented.

I also agree with the respondent that the claimant/applicant in this merely attempts at a second bite of the cherry. Again, this does not meet the requisite for review and is an abuse of the process of court and therefore material for dismissal. The applicant does not display a case of new and emerging evidence that was not available at the time of trial.

Indeed, this is so. I dismiss the application for want of merit. Each party shall bear their cost of the application.

Delivered, dated and signed this 1st day of February, 2019.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mugumya instructed by P. Sang & Company Advocates for the claimant/applicant.

2. Miss Ngetich for the respondent.