REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2152 OF 2017

LU YINI.....CLAIMANT

VERSUS

AVIC INTL. BEIJING (E.A) CO.LIMITED.....1ST RESPONDENT

CHEN ZHE.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th July, 2019)

RULING

The respondents filed on 21.06.2019 the notice of motion through Nyaanga & Mugisha Advocates. The application was under rule 33 of the Court's Procedure Rules, 2016, order 9 rule 9, order 45 rule 1, order 51 rule 1 of the Civil Procedure Rules 2010, sections 1A, 1B, and 3A of the Civil Procedure Act, Cap.21, regulation 28 of the Kenya Citizenship and Immigration Regulations, 2012 and all enabling provisions of the law. The substantive prayer is that the judgment delivered on 15.03.2019 be reviewed and set aside; and costs of the application be provided for.

The application is supported by the affidavit of Dennis Muchiri attached thereto and upon the following grounds:

a) The judgment ordered the respondent to pay the claimant USD 18, 750.00 plus Kshs.375, 000.00.

b) The 1st respondent has obtained new and compelling evidence which, even with exercise of due diligence, was not within the knowledge of the 1st respondent at the time of the prosecution of the suit and delivery of the judgment.

c) The evidence shows the claimant did not have a valid work permit and the contract of service was an illegality.

d) The claimant could not rely on a dependent pass in lieu of a work permit.

e) The judgment should therefore be reviewed and set aside.

f) The applicants rely upon exhibit DM3 being a letter dated 25.07.2017 by the claimant "**To Whom It May Concern**" stating that the applicants would apply for the claimant's work permit but failed to do so. The applicants submit that the letter was such new evidence and that since the claimant did not have a work permit, the contract of service was illegal.

The claimant filed on 27.06.2019 her replying affidavit through Stanley Henry Advocates. Her advocates also filed grounds of opposition dated 26.06.2019. The grounds of opposition are as follows:

a) The applicants have no right of audience before the Court for failure to pay USD 3,000 and Kshs. 60, 000.00 together with delivery of a certificate of service as per partial judgment by consent ordered on 10.12.2018 and not subject of the judgment the applicants wish to review.

b) The application for review falls outside rule 33 of the Employment and Labour Relations Court (Procedure) Rules.

c) No ground for review has been established.

d) The application is caught up by laches.

e) The application is frivolous and should be dismissed.

The Court has considered the parties' respective cases and material on record in that regard including the submissions.

The Court finds that indeed the applicant has not established any new or fresh evidence which with due diligence could not be availed at the hearing. The applicants have not disclosed when the alleged letter by the claimant dated 25.07.2017 came into their possession and the Court returns that the applicants must have had the letter throughout the time from around the date of that letter and after the filing of the suit on 30.10.2017. The Court also finds that the applicants rely on the letter to show the claimant did not have a work permit but do not deny it was their obligation to apply for such permit so that the Court returns that throughout the employment and at the hearing of the suit the applicants had the knowledge of the allegation that the claimant did not have a work permit. With due diligence, the applicants had the knowledge in respect of the alleged new evidence and the application must fail.

The Court further returns that the applicants never pleaded illegality and the application is calculated to reopen the suit or set aside the judgment on account of a matter which was never pleaded. It is trite law that parties must be bound by their own pleadings. Even if illegality had been pleaded, it is not in dispute that the applicants were obligated by statute to apply for the work permit and they cannot at their own instance seek to say the contract of service was void, null and unenforceable. The Court considers that at least, it would be voidable and therefore enforceable at the claimant's instance because she did not have the obligation to apply for the permit and the applicants as the employer were in charge of drawing the contract and conferring the claimant the minimum terms of service under the Employment Act, 2007. Further there is no statutory provision shown to suggest that a contract of service concluded and performed in circumstances whereby the employee did not have a work permit is null, void and unenforceable.

The Court follows the recent judgment in **Geoffrey Gitau Wainonga –Versus- Goal South Sudan [2019]eKLR** where the Court held, "**In the present case, the Court returns that the statute did not provide that the foreign contracts of service concluded in violation of the statutory provisions are null and void and therefore unenforceable. The Court has considered and found that by reason of the offence imposed on the employer under section 23 of the Act, the employer was obligated to comply and ensure that the statutory provisions are complied with. The Court has considered that the general policy of the Employment Act (Repealed) and even as currently enacted was to protect the employees by setting out minimum terms and conditions of employment to be upheld by employees as a matter of statutory duty. The Court finds that if the foreign contracts of service were to be declared null, void and unenforceable in every instance or case then the employees will be left exposed in a disproportionate manner. The Court therefore holds that the contracts would be voidable at the instance of the employee and liable to rectification towards ends of justice. The Court finds accordingly.**"

In any event Article 25 of the Constitution provides that despite any other provision in the Constitution, the following rights and fundamental freedoms shall not be limited, (and amongst those listed are as follows):

a) freedom from torture and cruel treatment or degrading treatment or punishment; and

b) freedom from slavery or servitude.

Accordingly, the Court returns that in the circumstances of the case and the reasons for termination, the Article applies and want of a work permit cannot operate to invalidate the contract of service and the ensuing unfair termination which was on account of an outlawed and unfair ground in section 5 and 46 of the Employment Act and Article 27, namely discrimination on account of pregnancy.

Thus the application is found to lack merits and it will fail.

In conclusion the application for review filed on 21.06.2019 is hereby dismissed with costs in favour of the claimant.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 19th July, 2019.**

BYRAM ONGAYA

JUDGE