



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 709 OF 2016

CHRISPIN OCHIENG OMONDI.....CLAIMANT

VERSUS

FIVE FORTY AVIATION LIMITED.....RESPONDENT

RULING

1. By an amended application filed in court on 26th September 2017, the Claimant seeks the following orders:

- a. That the judgment dated 25th November 2016 be reviewed, set aside, varied and/or substituted;
- b. That the matter herein proceeds for hearing and determination by way of viva voce evidence;
- c. That the costs in this application be in the cause.

2. The application which is supported by an affidavit sworn by the Claimant on 25th September 2017 is based on the following grounds:

- a. That the Claimant's claim herein dated 25th April 2016, is for redress emanating from among others, unfair termination of employment;
- b. That the Statement of Claim having been duly served upon the Respondent, and there being no response within the prescribed time frame, the Claimant filed a Notice of Motion dated 13th June 2016, seeking to have the claim disposed of by way of written submissions pursuant to the then Industrial Court (Procedure) Rules, 2010 (now repealed);
- c. That the Respondent filed Grounds of Opposition to the said application alongside a Statement of Response on 20th June 2016;
- d. That on 13th July 2016, at the hearing of the aforesaid application, and with a view to having the suit expeditiously dealt with, the Claimant consented to the Statement of Response being admitted on record as properly filed even though late, while the Respondent consented to prayer No. 1(a) in the application that the matter proceeds by way of written submissions;
- e. That both Counsel honestly believed that the matter would be expeditiously dealt with by

proceeding by way of written submissions;

f. That the Court in paragraphs 18 and 20 of its judgment dated 25th November 2016, dismissed the claim for want of *viva voce* evidence on the part of the Claimant

g. That the Court is not bound by consent of the litigants regarding directions as to the hearing and determination of matters before it, and may issue such orders and/or directions as it may deem fit for the attainment of the ends of justice;

h. That unless the orders sought herein are granted, the Claimant stands to suffer great irreparable injustice based on what now appears to have been a mistaken belief as to the mode of disposing of the matter by both Counsel for the litigants;

i. That the Court has jurisdiction and powers in the wider interest of justice, to grant the orders sought;

j. That no loss or prejudice will be occasioned to either party by reason of granting the orders sought herein.

3. In its Grounds of Opposition dated 10th October 2017 and filed in court on 11th October 2017, the Respondent states the following:

a. That the Claimant's application is frivolous, mischievous and an abuse of the court process;

b. That the grounds upon which the application is anchored do not meet the provisions of Rule 33 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Claimant has not advanced any ground to warrant a review of judgment;

c. That the mistaken belief alleged by the Claimant is not the mistake or error apparent on the face of the record of the court envisaged in Rule 33(1)(b) of the Employment and Labour Relations Court (Procedure) Rules, 2016;

d. That the need for the Claimant's testimony in court was or ought to have been within the knowledge of the Advocate on record when he made a formal application vide a Notice of Motion dated 13th June 2016 since it is a procedure of law and practice. There cannot be a mistake of law, particularly by a practicing Advocate. The alleged mistake was not a mistake of fact;

e. That the Claimant has not denied having instructed his Advocate on record to file the Notice of Motion dated 13th June 2016 whose prayer 1(a) was that the matter be disposed of by way of written submissions;

f. That it is mischievous for the Claimant to allege mistaken belief by his Advocate on record and continue to retain the same Advocate. It is an absurdity for a party to turn around and complain of being granted prayers sought because that party cannot live with the consequences arising therefrom;

g. That the attempt to seek to justify the application herein on the basis of delay in filing the Respondent's pleadings is mischievous;

h. That the application is bad in law, lacks merit and ought to be dismissed with costs.

4. The Claimant's application is based on Rule 33(1) (b) of the Employment and Labour Relations Court (Procedure) Rules which provides as follows:

33. (1) A person who is aggrieved by a decree or an order of the

Court may apply for a review of the award, judgment or ruling—

a.

b. *on account of some mistake or error apparent on the face of the record;*

5. The Claimant also relies on sub rule (d) which generally allows for review for sufficient reason.

6. The Claimant came to court by formal application asking to be allowed to exercise his right under Rule 20 of the Rules, which allows for trial by way of written submissions. The Respondent agreed and the Court granted the Claimant's wish. At that point, the Claimant who was duly represented by Counsel, was expected to have weighed his case and satisfied himself that he could discharge his evidential burden by way of written submissions.

7. It seems to me that what the Claimant refers to as an error on the face of the record is his own decision not to testify before the Court. With much respect, I think this is a complete misapplication of Rule 33(1) (b) which is intended to cure evident errors, inadvertently made by the Court. What the Claimant is asking for is to '*have a second bite at the cherry*' so to speak and neither the law nor the Procedure Rules have any provision for this.

8. The Court therefore finds the Claimant's application unmeritorious and proceeds to dismiss it with costs to the Respondent.

9. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Shijeje for the Claimant

Mr. Kimetto for the Respondent