



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO. 11 OF 2015

SAMSON FURAHA KAZUNGU.....CLAIMANT

VERSUS

MABATI ROLLING MILLS.....RESPONDENT

R U L I N G

Introduction

1. The application before me is the claimant's Notice of Motion dated 28/6/2017 and brought under Rule 33 of the employment and Relations Court procedure rules. It seeks review of the judgment of this court delivered on 27/1/2017. The grounds upon which the Motion stands are that there is discovery of new and very important matters and /or evidence which after due diligence was not within the knowledge of the claimant; that the claimant's counsel poorly drafted the pleadings and misadvised him against amending them; that if the review is declined the claimant will lose his terminal benefits which are provided in the Collective Bargaining Agreement (CBA); and that the review will *not prejudice the respondent since the relief sought had been in several occasions brought to her attention and acknowledged while the matter was before the court.*

2. The Motion is supported by the affidavit sworn by the claimant on 29/6/2017. The gist of the application is that the by the impugned judgment the court made a finding that the claimant's contract of service was unfairly terminated but declined to award damages/gratuities on grounds that the same had not been pleaded specifically and proved. The claimant blames his advocate for negligence and misadvised. He lodged appeal against the said judgment but abandoned it after realizing that it lacked chances of success and then sought this review in order to benefit from the exit clause in the CBA. He has annexed a memorandum to the application outlining the quantum of damages specifically.

3. The application is opposed by the respondent vide the replying Affidavit sworn by her Corporate Legal Affairs and compliance Manager Mr. Antony Kong on 18/7/2017. The gist of the objection is that the alleged new evidence/matter discovered after judgment has not been demonstrated; there is no mistake or error apparent on the face of the record and that all what the claimant is doing is to accuse his counsel of negligence.

Analysis and determination

4. There is no dispute from the motion, affidavit, submissions, and the entire court record that the applicant brought this suit through J.K. Mwarandu & Company Advocates on 19/1/2015 claiming the following reliefs:

- (i) A declaration that the respondent unlawfully and unfairly terminated the claimant's employment.
- (ii) An order that the respondent do make payment of gratuity to the Claimant for the period he worked for the company.
- (iii) Costs of the suit and interest thereon at court rates.
- (iv) Any other further relief the honourable court may deem fit and just to grant.

5. On 27/1/2017, I rendered my judgment on the matter whereby after careful consideration of all the materials presented to the court, I granted the declaratory order sought plus costs. However, I declined to award gratuity as prayed because no basis, either in law or evidence, was demonstrated to warrant the grant of the relief and the quantum had not been pleaded specifically. I also observed that despite leave to amend having been granted on 24.4.2015, the claimant had abandoned it and swore an affidavit on 14.9.2015 to say that he was not interested in amending his pleadings.

6. The issue for determination herein is whether the application herein meets the threshold for the grant of review order as prescribed under

Rule 33 of the employment and Relations Court procedure rules, that is to say,

- a) there is discovery for a new and important matter or evidence, which after exercise due diligence was not within the knowledge for the applicant or could not be produced by the person at the time when the decree was passed or order made, or
- b) there is some mistake or error apparent on the face of the record, or
- c) the award, judgment or ruling needs clarification or,
- d) There is sufficient reasons to warrant review.

In my view the claimant's motion is grounded on (a) and (d) above.

Discovery of new and important matter or evidence

7. The burden of proving discovery of a new and important matter or evidence lies with the applicant. The said burden extends to proving that the matter or evidence could not have come to the knowledge of the applicant before the impugned decision was passed. In this case I agree with the respondent that the applicant has not demonstrated discovery of any new and important matter or evidence, which was not within his knowledge as at the time when the impugned judgment was passed. Several reasons reinforce the foregoing finding.

8. Firstly, one of the grounds upon which the review is sought is that the respondent will not be prejudiced by the review because she made aware the entitlement in many occasions. Secondly, the applicant has deposed in his supporting affidavit that he was a member of a trade union which had concluded a CBA with an elaborate exit clause for employees like him. Lastly, the claimant sought and obtained leave to amend his claim on 24.4.2015, but later abandoned it and swore an affidavit on 14.9.2015 to say that he was no longer interested in amending his pleadings. Consequently, the first ground of the motion must fail.

Any other sufficient cause for review

9. The claimants contends that he was misled by his counsel through poor drafting of pleadings and in swearing affidavit to abandon the leave to amend his claim. According to him, that conduct of his counsel was the reason for the quagmire he now finds himself in. There is no dispute that the claimant was initially represented by counsel in this suit until 29/ 10/2015 when he filed a Notice to act in Person. However, I once again agree with the respondent that the remedy for professional negligence by counsel to his client is not review of the decision of the court. Consequently, I find and hold that professional negligence on the part of a litigant's counsel is not a sufficient cause to warrant the exercise of court's discretion to review its decision.

Disposition

10. For the reason stated above, it is my considered opinion that the application falls below the threshold for ordering review of a judgment, and I dismiss it with costs.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JANUARY, 201

ONESMUS MAKAU

JUDGE

DELIVERED AT MOMBASA THIS 22ND DAY OF FEBRUARY, 2018

LINNET NDOLO

JUDGE