



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.196 OF 2017

HILDAH MWANGALE.....CLAIMANT

VERSUS

FIYABI RISIQUOT.....RESPONDENT

RULING

The respondent herein, Fiyabi Risiquot by application and Notice of Motion dated 31st October, 2017 is seeking for orders that;

1. *Spent.*
2. *Spent.*
3. *The court be pleased to review and/or vary and/or modify the judgement of the court delivered on the 08th day of June 2017 by establishing who the employer is against whom the judgement is to be enforced.*
4. *The respondents' filed defence be traced from the Court registry or a copy be availed to the court by the respondent and placed on the file for consideration by the court.*
5. *The claimant's testimony adduced at the hearing be expunged from the record as it is not contained in her pleadings filed in this court.*
6. *Upon review, judgement be entered in favour of the respondent against the claimant*
7. *The claimant be subjected to a suitable trial for serially perjuring themselves, lying to the court and misleading the court into reaching an erroneous judgement.*
8. *The court do make such further orders as it may deem just and fit in the circumstances*
9. *Costs of this application.*

The application is supported by the affidavit of the respondent and on the grounds that she filed defence herein but the judgement delivered on 8th June, 2017 states that such defence was never filed and which is erroneous. Had such a defence been put into consideration, it would have been apparent that at paragraph 4 the respondent denied ever employing the claimant.

Other grounds in support of the application are that the identity of the employer is in issue as the claim is that there claimant was employed by a male adult who was not brought before the court whereas the respondent is a female adult ad who is wrongly sued.

The claimant amended the pleadings fundamentally without the leave of the court and without filing any record. The judgement herein is not founded on any pleadings but on a fabricated story presented at the hearing and without pleadings. The pleadings on record related to a different party that the one called in defence.

There is an error apparent on the face of the judgement stating that the respondent did not deny the claims. The claimant perjured herself serially at the ex-parte hearing and thus misleading the court into reaching an erroneous judgement based on facts not pleaded.

In the affidavit in support of the application, the respondents avers that in the claimant's pleadings at paragraph 2 and 4 show that she was employed by a male employer while the respondent is female. The defence filed set out these facts which the claimant ignored. The claim was defective and failed to disclose the person who was the employer.

There was no employment between the parties herein as the claimant claims that she was employed on 2nd October, 2014 when the respondent had not arrived in Kenya and had never been to the country before such date. The respondent was not able to attend at the main hearing on 6th June, 2017 but the claimant proceeded to perjure herself and proceeded to alter the pleadings without leave at the prejudice of the respondent.

In reply, the claimant filed her Replying Affidavit on the 15th November, 2017 and avers that the application by the respondent fails to disclose material facts and thus made in bad faith and should be dismissed.

The application dated 2nd November, 2017 I a replica of application dated 16th June, 2017 which has never been set down for hearing. The interim orders which had been granted were vacated.

The claim herein was filed following the wrongful termination of employment by the respondent. The claim was filed on 2nd February, 2017. The respondent entered appearance on 27th February, 2017. When the matter came up for mention and hearing of the application on 23rd March, 2017 the court directed the respondent to file a Reply to the Statement of Claim within 14 days and to serve the claimant who had 7 days right to reply thereto. Each party was also directed to file witness statements. By consent a hearing date was fixed for 6th June, 2017.

A defence was filed on 6th June, 2017.

During the hearing date as scheduled by consent, the respondent failed to attend. Judgement was delivered on 8th June, 2017 after the claimant had testified and the case closed. The respondent's advocate was present in court when judgement was delivered but chose to walk out. On 16th June, 2017 the respondent filed application seeking to set aside the judgement on the grounds that they had not diarised the matter for hearing. Subsequently, the respondent took part in the taxation of the bill of costs. The current application is therefore an afterthought and should be dismissed.

Both parties filed written submissions.

I have put into account the application dated 2nd November, 2017 and the written submissions by the parties and the issues which arise are;

Whether there the court should review the judgement delivered on 8th June, 2017;

Whether the defence filed should be traced and put into account herein; and

Whether the evidence on record by the claimant should be expunged.

The application before court is premised on the provisions of Rule 33 of the Employment and Labour Relations Court Procedure Rules, 2016 and on the grounds that there should be a review of the judgement herein due to errors apparent on the face of the judgement. Rule 33 allow for the court to review its judgement on account of discovery of a new and important matter which was not available at the time of judgement or that there is error or mistake in the judgement.

Both parties agree to the extent that on 23rd March, 2017 when the court issued hearing directions, the respondent was able to file the Reply and or defence to the claim by the claimant. The claimant has acknowledged this fact in paragraph 14 of the Replying Affidavit dated 13th November, 2017.

The record of the respondent's Reply to the Statement of Claim filed on 10th April, 2017 is not in the court file. This is now attached to an application filed by the respondent and dated 16th June, 2017.

For reasons beyond the court appreciation, the missing record has not been traced. I however note the claimant was served with the same and take it the court stamp now evident on the same is a clear indication that the respondent complied and indeed filed the statement of defence.

At the time of writing judgement, the filed defence was not a matter apparent to the court. As noted above, such record is not on file. Taking into account all else, the attached record now bearing a court stamp for 10th April, 2017 the day being on the court to keep its records safe and available to the judge before the writing of judgement, I find there exists a good reason and ground to review the judgement which at paragraph 8 sets out that the respondent failed to file defence to the claim. Such error on the face of the records now filed and supported by both parties to exist should be rectified. Such defence should be taken into account.

Such resolves the first two issues set out above.

With regard to expunging the claimant's evidence on record, the respondent has submitted that there was perjury and alternation of evidence as pleaded and such is prejudicial and thus judgement should be entered for the respondent against the claimant. On the record, both parties were in court on 23rd March, 2017. Hearing directions were given by the court. A hearing date was allocated in the presence of both parties.

Following the directions issued on 23rd March, 2017 the respondent filed defence on 10th April, 2017. There was no attendance at the hearing as scheduled. Hearing proceeded and the claimant closed her case. The defence was not urged. Such absence of the respondent at the hearing has not been explained.

The claimant attended court as required and argued her case. There was no challenge to such evidence as the respondent opted to remain absent. Such absence has its legal consequences. By failing to challenge the claimant's evidence during the hearing, the respondent cannot turn around and make claims or assertions which ordinarily should have been argued in cross-examination. To expunge the claimant's evidence would be to visit injustice on her and thus prejudicial to her case as presented when the court had given each party a fair chance to attend at the hearing and the respondent opted to partly comply with some directions but failed to attend at the hearing.

Where the respondent failed to attend court on the date set for hearing, the claimant got her chance to be heard. Had the respondent been in court then, it would have been apparent the issues set out in the claim and defence are at variance. Such can be cured by the respondent arguing the case. To recall the claim in whole will be to put the claimant in an unfair position. The evidence by the claimant shall therefore be maintained and the record preserved.

Accordingly, putting the error apparent on the judgement at paragraph 8 where the record of the defence by the respondent was not put into account, such shall be corrected by;

- a) Judgement herein is set aside to allow for the call of the defence and its case;**
- b) The claim and the evidence by the claimant is hereby preserved as part of the court record;**
- c) The Respondent shall make a copy of the filed Reply to the Statement of Claim available to the court as part of its formal records;**
- d) Costs herein awarded to the claimant.**

Delivered in open court at Nairobi this 18th day of May, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant:

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