



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1530 OF 2015

PATRICK AMBURA ANGWEYE....CLAIMANT/RESPONDENT

- VERSUS -

KEL CHEMICALS LIMITED..... RESPONDENT/APPLICANT

(Before Hon. Justice Byram Ongaya on Friday 9th November, 2018)

RULING

The applicant filed on 23.07.2013 an application by way of a notice of motion under Rule 32(1) of the Court's procedure rules, section 16 of the Civil Procedure Act, the Constitution of Kenya and all the enabling provisions of law. The application was filed through Otieno, Maangi & Company Advocates. The applicant prays for orders:

- a) That the judgment on 22.06.2018 and all consequential orders be set aside and or reviewed and the matter be set down for hearing and be determined on merit by hearing both parties.
- b) That the defendant be given leave to cross examine the claimant and the matter be heard afresh.
- c) That judgment delivered herein be reviewed in accordance with the availed documents and submission.
- d) That any other order in the best interest of justice.
- e) That costs be in the cause.

The application was based on the supporting affidavit of Christine Atieno Otieno Advocate attached to the application and upon the following grounds:

- a) The matter was fixed for hearing on 28.05.2018 and the hearing date was fixed ex parte without inviting the respondent's advocate.
- b) The hearing notice was served but the respondent and respondent's counsel failed to attend court on the hearing date because counsel's clerk failed to indicate the same in the diary and the clerk had since left the advocate's office.
- c) The claimant was paid his May 2015 salary Kshs.13, 255.00 and he acknowledged receipt as per exhibit marked appendix C on the supporting affidavit. Thus, it is unfair that the Court awarded the claimant Kshs.11, 716.00 for May 2015 salary as was claimed.
- d) The respondent was not obligated to pay service for the period 1980 to 1996 because the CBA provided that service pay would be effective 01.01.1996 as per the CBA exhibited on the supporting affidavit. Clause 19 (1) of the CBA provides that the service of the employee shall be deemed to have commenced with effect from 01.01.1996 for existing employees employed prior to 01.01.1996 and with effect from the date of joining for those who join after 01.01.1996.
- e) The failure to attend court at the hearing was a mistake by counsel and the same should not be visited upon the applicant.

The claimant opposed the application by filing on 31.07.2013 the replying affidavit of Judith Ayako Kanyoko Advocate through Ameli Inyangu & Partners Advocates. The grounds of opposition are as follows:

- a) The case was listed for pretrial on 08.03.2018 and the respondent's counsel had been served with a pretrial notice. The matter was listed and fixed for hearing on 28.05.2018. The relevant hearing notice was served within 7 days as was directed by the Court. The

applicant and the applicant's Advocate failed to attend court on the hearing date. The claimant testified to support his case. The Court directed service of submissions and a mention notice by 04.06.2018 and the claimant's advocates complied. At the mention on 11.06.2018 judgment was set for 22.06.2018 and the claimant was directed to serve a judgment notice and which was served on 13.06.2018 and the applicant's advocates attended on delivery of judgment.

b) The present application was filed on 23.07.2018, about a month after delivery of the judgment so that it is an afterthought to delay execution of the decree. The application and supporting affidavit are dated 29.06.2018 and filed on 23.07.2018 without explanation and failure to exhibit the letters of protest referred to in paragraph 2 of the supporting affidavit are a manifestation of misrepresenting facts to the Court.

c) The application is in bad faith aimed at delaying execution. The applicant failed to act on the mention of 11.06.2018 to confirm filing of submissions and before judgment if indeed it wanted to be heard in defence of the suit.

d) The application does not meet the requirements of Rule 32 (Currently Rule 33) of the Court's procedure rules because the documents attached to the application are not new discovery which after exercise of due diligence, was not within the knowledge of the applicant or could not be produced by the applicant at the time when the decree was passed or order made. It is not alleged that the new evidence was out of the applicant's reach or knowledge. The applicant as the employer has always been in possession of the material it now seeks to introduce belatedly.

The Court has considered the parties' respective cases, the material on record including the submissions and makes findings as follows:

1) It is clear that the reason for seeking review is to introduce the CBA and to introduce the acknowledgement for receipt of the May 2015 salary. The claimant does not deny the two documents and the applicant's case in that regard. The Court finds accordingly. The Court considers that it would be manifest injustice for the claimant to be paid May 2015 salary and the service pay for 1980 to 01.01.1996 (as per the decree and judgment) in circumstances whereby it is clear that he does not deserve that payment. The Court returns that such is sufficient reason to allow review in the matter as per rule 33(1) (e) of the Employment and Labour Relations Court (Procedure) Rules 2016. A review would be allowed accordingly.

2) It is true that with due diligence, the applicant should have availed the two documents at the hearing of the suit but failed to do so. Further it is clear that despite service, the applicant failed to take steps to attend Court or to promptly seek to be heard prior to the delivery of Judgment. The Court finds that such is conduct that is inimical to the principal objectives of the Court in section 3 of the Employment and Labour Relations Court Act, 2011 for expeditious, just and proportionate determination of the disputes before the Court. The applicant failed to take prompt steps to participate in the hearing and while allowing a review, the Court returns that it will be just that the applicant pays the claimant's costs of the suit including costs of the application.

In conclusion the application dated 29.06.2018 and filed on 23.07.2018 is hereby determined and the review of the judgment and the decree flowing there from is hereby allowed with orders:

- a) the judgment, the decree and consequential processes are set aside; and
- b) the applicant to pay the claimant's costs of the suit including costs of the application.

Signed, dated and delivered in court at Nairobi this Friday 9th November, 2018.

BYRAM ONGAYA

JUDGE