



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 872 OF 2013

SHADRACK OTUOMA KHAMLA	1 st CLAIMANT
GEORGE OBILO OYIER	2 nd CLAIMANT
HENRY KUNANI SHEMEMA	3 rd CLAIMANT
JAQUELINE OKACH	4 th CLAIMANT
DAVID NZEKA KAMAMI	5 th CLAIMANT
BENARD OTIENO OTWAL	6 th CLAIMANT
JOSEPH NZAU NDETO	7 th CLAIMANT
ISAAC MUTIE KIMEU	8 th CLAIMANT
v	
ANIKET ENTERPRISES LTD	RESPONDENT

RULING NO. 2

1. For determination is an application dated 28 September 2018 by the 2nd and 3rd Claimants (applicants) seeking orders

1. ...

2. **THAT** this Honourable Court be pleased to review and/or vary of its judgment dated and delivered on 18th May, 2018.

3. **THAT** the 2nd and 3rd Claimants be included in the computation of the Honourable Court's awards against the Respondent.

4. **THAT** the judgment be entered for the 2nd and 3rd Claimants as against the Respondent as follows:-

1. **2nd Claimant**

(a) Notice pay.....Kshs 10,000

(b) Compensation..... Kshs. 20,000

2. **3rd Claimant**

(a) Notice pay..... Kshs. 10,000

(b) Compensation.....Kshs 20,000

5. **THAT** the Honourable Court do review, vary and/or set aside the order denying the Claimants costs of the suit and be substituted with an order granting the Claimants costs of the suit.

6. **THAT** the Honourable Court do issue such orders and directions as it may consider fit and just.

7. **THAT** the cost of this application be borne by the Respondent.

2. The grounds advanced in support of the application are that the Court erred in not awarding the 2nd and 3rd Claimants the reliefs sought as their terminal benefits were set out in the Memorandum of Claim; that the 2nd and 3rd Claimants were not issued with redundancy letters; that the deadline for filing submissions fell on a public holiday, and hence costs should not have been denied on that account and that the Respondent stood to suffer no prejudice.

3. The Respondent filed a replying affidavit in opposition to the application and contended that the application was incompetent; did not meet the threshold set by Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016; the issues raised were *res judicata* as the Court made specific findings against the 2nd and 3rd Claimants, and that the avenue available to the applicants was an Appeal.

4. The Court has considered the grounds on the face of the application, the affidavits in support and opposition.

5. When denying the 2nd and 3rd Claimants relief, the Court gave a reason at paragraph 39.

6. The reason was that no pay/terminal records for these 2 Claimants were produced during the hearing.

7. These 2 applicants now argue that the records were filed/produced by the Respondent.

8. The Court having given reasons for rejecting the claims by the 2nd and 3rd Claimants, it is the view of the Court that it is not open to the applicants to seek to re-open the litigation through the review jurisdiction.

9. The Court finds comfort in the passage by the Court of Appeal in ***Abasi Belinda v. Frederick Kangwamu and another (1963) E.A. 557 that***

a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal..

10. As urged by the Respondent, the proper route to challenge the conclusions by this Court is through an Appeal.

11. On the question of costs, the Court has confirmed the narration by the applicants and confirmed the same are correct. The order on costs is therefore set aside.

12. But just to mention that the Claimants whom the Court made awards in favour of had their employments terminated through letters dated 2 November 2012. The reason given for the terminations of contract(s) were *current market economical effects*. The 2nd and 3rd Claimants were however deemed to have deserted work through a letter dated 27 November 2012, and addressed to the District Labour Officer (the causes of action were different).

13. It was therefore incumbent upon the 2nd and 3rd Claimants to lead adequate evidence to prove their respective causes of actions.

14. The Court finds no merit in the application dated 28 September 2018 as it regards the 2nd and 3rd Claimants and orders that it be dismissed with costs to the Respondent.

15. The order denying costs of the main Cause to the successful Claimants is set aside and costs are awarded.

Delivered, dated and signed in Nairobi on this 13th day of December 2018.

Radido Stephen

Judge

Appearances

For applicants Nyabena Nyakundi & Co. Advocates

For Respondent Tariq Khan & Associates Advocates

Court Assistant Lindsey