



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND ABOUT RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1237 OF 2013

JOSEPH SOHELO MARIKO1ST CLAIMANT

CHARLES MUSEE MUOVA 2ND CLAIMANT

VERSUS

PANDYA MUKESH T/A RELISH RESTAURANT RESPONDENT

RULING

1. The Respondent, Pandya Mukesh as the Applicant by application and Notice of Motion filed on 15th December, 2016 and based on the provisions of section 12(3) and 16 of the Employment and Labour Relations Court Act and Rule 16 and 32 of the Industrial Court (Procedure) Rules 2010 [Employment and Labour Relations Court (Procedure) Rules, 2016] and seeking for orders that;

1. ...

2. *Spent.*

3. *This court be pleased to review, vary and or vacate ruling and or order issued on 18th December, 2016 namely that the application dated 3rd October 2016 is an abuse of court process.*

4. ...

2. The application is supported by the affidavit of the applicant, Pandya Mukesh on the grounds that there is a mistake and error apparent on the face of the record in that the court found that the Applicant in his defence admitted that he was the employer of the Claimant and on that ground dismissed the applicant's application dated 3rd October, 2016 on the grounds that this was an abuse of court process. That the said error is apparent, indisputable and self-evident. There is clear case of mistake and error which ought to be rectified by review of the ruling. There is therefore sufficient reason for review of the ruling and orders of the court.

4. In his affidavit, the Applicant avers that on 8th December, 2016 this court delivered ruling with regard to application dated 3rd October, 2016 and dismissed it as being an abuse of court process. The court observed that the Applicant had admitted being the employer of the Claimant a finding which has put the Applicant in danger. The Applicant admitted to being the managing director to the employer which is Relish Restaurant, and judgement was entered against the respondent, execution should follow relish restaurant and n the applicant. This finding that the Applicant was the employer is an error apparent on the face of the record.

5. Mr Mukesh also avers that the Claimant might proceed with execution any time hence seek the orders herein be set aside. Where there is execution he will suffer irreparable damage and loss as the goods sought to be attached belong to him and family and he is willing to assist the claimants to execute against their employer, Relish Restaurant who are now operating as Zar Restaurant.

6. On 18th January, 2017 the Applicant filed further affidavit and avers that it is not correct that the Applicant was employed as the managing director of Relish Restaurant but as a Supervisor and later as manager of the employer. He approached Nyakundi Kiage Advocate the former advocates for the Respondent and he accepted to make affidavit to clarify the fact that the Applicant was an employee of Relish Restaurant and thus instructions to defend the claim was not from him but from the employer.

7. The Applicant further avers that the admissions made in the descriptive part of the defence were for the purpose of service of court processes through the managing director and does not make him the same. CR 12 is he legal source of information on shareholding in the Relish Restaurant and the Applicant is not one such person.

8. Nyakundi Kiage also filed his Affidavit. That when he received instructions to file defence for the respondent, the Applicant appeared as an employee representative of Relish restaurant. The owners and directors of Relish restaurant can be obtained from CR 12 form.

9. In reply the Claimant filed the Replying Affidavit of Joseph Sohelo Mariko and avers that the Applicant being aggrieved by the ruling of the court on 8th December, 2016 is now seeking the court to seat on appeal against its own decision. The application does not follow the provisions with regard to Rule 32(3) (4) of the Court Rules. Under the rules for review an Applicant must make application under the right format with a memorandum which the Applicant has not complied with. There is no memorandum of review filed to justify the orders sought.

10. Mr Mariko also avers the absence of a memorandum of review, in terms of Rule 32 and section 16 of the Employment and Labour Relations Court Act, the court cannot entertain the application.

11. That the application has not demonstrated that the ruling of the court was contrary to the law; there was a mistake of law; or discovery of new and important piece of evidence that was not available at the time of hearing. The certificate of registration being relied upon by the Applicant was the same the Applicant relied upon in his previous application. The affidavit of Nyakundi Kiage, Advocate sworn on 12th January 2017 and applicant's further affidavit of equal date contradict at paragraph 5 to the effect that the restaurant closed therefore losing contact with them including the Respondent whereas the Applicant was able to get an affidavit from the same advocate.

12. That upon the court ruling on 8th December, 2016 the applicant's advocates engaged in negotiations with the claimants' advocates with the view to pay the judgement amount and while awaiting confirmations, the claimants were served with the current application and Notice of Change of Advocates. This is in clear demonstration that the respondents are keen to frustrate and annoy the claimants to avoid payment of the judgment amounts. The application should be dismissed with costs.

Determination

13. Before addressing the issues herein, I bring to the attention of the parties that the Rules of the Court have changed to Employment and Labour Relations Court (Procedure) Rules, 2016 published on 5th August, 2016. An application such as this one seeking review is now regulated under Rule 17 and 33 of the Rules. It is important for parties to be apprised with these Rules as they serve a useful purpose for proceedings before the court.

14. Order (3) of the Applicant set out above relates to the court addressing ruling of 18th December, 2016. I take this to be a mistake as the impugned order was read on 8th December, 2016. In any case, 18th December, 2016 was on a Sunday and the court was not seating on this date.

15. On the substance of the application, going back to application dated 3rd October, 2016 the subject of this application and which led to the ruling of 8th December, 2016, the Applicant was seeking to set aside the judgment of the court delivered on 29th July, 2016. The grounds supporting these prayers were that the respondent's previous advocates had failed to attend at the hearing and could not be traced to follow up on instructions. Going through the motions of hearing and assessment of the proceedings, the court made an analysis of the pleadings and made a finding of fact. The previous advocates, KK Nyakundi had filed a defence for the respondents and this was addressed by the court on its contents. Indeed the Applicant in his Further Affidavit filed on 18th January, 2017 avers at paragraph 3 that;

I approached Mr. Nyakundi Kiage former advocates for the Respondent and he accepted to swear an affidavit which has in fact clarified the fact that I was only an employee of Relish Restaurant and further those instructions to defend the claim never emanated from me.

16. To these averments, the Applicant also filed affidavit of Nyakundi Kiage who avers at paragraphs 2 and 3 that;

That the Respondent herein was a supervisor of Relish Restaurant who later became the manager.

That at the time of giving me instructions he presented himself as an employee of Relish Restaurant.

17. On these admissions, the court proceeded to hear the claimant's case on divers dates upon a confirmation that the respondents were served. The respondent, through its officers, supervisors, manager or managing directors, being employees and responsible officers place in authority accepted service and proceeded to give various advocates instructions to represent the respondent. Such instructions have been taken forward to this date. The application of 3rd October, 2016 was filed by the advocates for the Respondent. The current application and Notice of Change has been filed for the Respondent. As such, the respondent, its officers, directors or shareholders are well represented in this suit.

18. The court on 8th December, 2016 thus held at page 3 that;

... The Respondent cannot therefore hide behind the business name to negate the proceedings herein and avoid the process of execution. Where indeed execution has proceeded against the Respondent and he is of the view that a third party ought to be enjoined herein so as to bear the bulk of the judgement, there is a set procedure for such purpose. ...

19. For the Applicant to therefore move with the current application seeking review of the ruling of 8th December, 2016 and without taking into account the ruling in its entirety and only rely on a finding with regard to a single word used to describe his employment as a managing director and not as a supervisor or manager, is to simply import of the entire ruling and set in motion an application that does not meet the merits for the grant of an application for review.

20. The offer by the application to assist the claimants in executing judgement against Zar Restaurant though welcome must be taken in the context of the proceedings herein. Execution is a lawful process and where the Applicant is keen to offer this assistance, he must abide by the ruling of 8th December, 2016, enjoins Zar Restaurant as appropriate and the court will decide that on its merits.

On the application dated 15th December, 2016, I find no merit or justification for the grant of the order sought and the same is dismissed with costs.

Delivered in open court at Nairobi this 31st day of January, 2017.

M. MBARU

JUDGE

In the presence of:

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