



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 35 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 22nd February 2017)

VINCENT MUEMA MUTUKU CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS (KENYA) LIMITEDRESPONDENT

RULING

1. The Application before Court is the Notice of Motion dated 16/3/2016 where the Applicant seeks orders as follows:

- 1. This application be certified as urgent and be heard ex-parte in the first instance.***
- 2. This Honourable Court be pleased to stay the order given on 29th October, 2015 pending the hearing and determination of this application;***
- 3. This Honourable Court be pleased to review and set aside the order pursuant to the ruling delivered on 29th October, 2015;***
- 4. The Costs of this application be provided for.***

2. Prayer 1 and 2 were granted in the interim and what remains are Prayer 3 and 4.

3. The Application is premised on the following grounds:

I. The Respondent/Applicant is aggrieved by the order of this Honourable Court made pursuant to the ruling delivered on 29th October, 2015;

II. The Claimant in his application dated 28th April, 2015 had specifically sought for the following documents: (i) certified copies of the pay slips for Faith Kiura for the period when she was engaged as a management trainee in 2013 and for the three (3) months preceding the 29th October, 2014; and (ii) certified copies of the qualification papers for Faith Kiura;

III. The Honourable Court vide the ruling dated and delivered on 29th October, 2015 and the order issued on 17th February, 2016 directed the Labour Commissioner or an Officer delivered

by him to visit the Respondent's premises and be provided with employment records of the Respondent for the period under review for the preceding 36 months and that such Officer do examine salaries paid in the categories of employers vis a vis their academic credentials and analyse them per work done and submit a report within 60 days to Court without necessarily disclosing their names;

IV. The order issued by this Honourable Court on 17th February, 2016 goes beyond the pleadings of the parties, is at variance with the prayers sought by the claimant and is gravely prejudicial to the Respondent;

V. Section 74 of the Employment Act, 2007 does not specifically provide for keeping of records in respect of salaries and academic credentials of employees in anticipation of examination by the Labour commissioner or an Officer designated by him;

VI. The orders made pursuant to the ruling dated 29th October 2015 were accordingly beyond the jurisdiction of the Court and there is therefore an error on the face of the record;

VII. The enforcement of the orders will occasion a miscarriage of justice and there are therefore sufficient reasons for the grant of review of this Honourable Court.

4. The application is also supported by the supporting affidavit of Eunice Arwa the Respondent's Company Secretary deponed to on 16/3/2016. The deponent has averred that vide a ruling of this Court on 29.10.2015, the Court made an order that the Labour Commissioner or an officer delegated by him visit the Respondents premises and be provided with employment records for the period under review for the preceding 36 months and do examine the amount of salaries paid in the categories of employees vis a vis their academic credentials and analyse them for work done and submit a report within 60 days to Court without necessarily disclosing their names.

5. The Applicant avers that they got the ruling in March 2016 and proceeded to file this application. Their contention is that the ruling goes beyond what was sought for in the pleadings of the Notice of Motion dated 28th April 2015. This they submit is an error apparent on the record which needs review.

6. They also submit that the category of employers to be analysed is also not clear.

7. They have also averred that the order was made in excess of the provisions of Section 74 of the Employment Act 2007 which does not specifically provide for keeping of records in respect of salaries and academic credentials of employees in anticipation of examination by the Labour Commissioner Officers designated by him.

8. They seek review in this respect.

9. The Respondent opposed this application. He filed a replying affidavit dated 22-3-2016 where he avers that this Court examined its discretion properly in granting orders sought in order to have substantive issues addressed.

10. The Claimant /Respondent has further submitted that the ruling of the Court did not go beyond the ambit of the pleadings. They submit that the orders being sought can only be sought in an appeal and that the Applicants have come to Court late.

11. They want this application to be dismissed for lacking merit and an afterthought and aimed at delaying the Court process.

12. In submissions, the Applicant reiterated their pleadings. They **cited Nairobi City Council vs. Thabiti Enterprises Limited (1995-98) 2 EA 231** which stated that the Court has no power to decide an issue which had not been pleaded unless the pleadings were suitably amended.

13. They also state that the records being sought to be produced fall outside the ambit of Section 74 of Employment Act.

14. In their submissions, the Claimant/Applicant also reiterated the averments in their replying affidavit and also stated that the claim has no merit. They aver that the application was filed with inordinate delay and should not be entertained.

15. They have also submitted that the Applicants vide their supporting affidavit go to attack the merits of the ruling and thus sneaking an appeal through the review process.

16. They submit that the judicial discretion was properly exercised. They cite **Constitutional Petition No. 4 of 2015 Geoffrey Mworira vs. Water Reserves Management Authority & 2 Others (2015) Eklr³**. They want the application dismissed.

17. I have considered the pleadings and submissions of both parties. In exercising my discretion on whether to grant or not to grant the order of review sought I am alive to the fact that this Court has power to order review of its orders.

18. Under Rule 32 of the Industrial Court (Procedure Rules 2010 (now repealed):

“(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling:-

a) if there is a discovery of new an important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or

b) on account of some mistake or error apparent on the face of the record, or

c) on account of the award, judgement or ruling being in breach of any written law; or

d) if the award, the judgement or ruling requires clarification; or

e) for any other sufficient reasons”.

19. This Court can therefore grant orders for review where:

1) “there is a discovery of new an important matter or evidence and which was not in the knowledge of the Applicant at the time;

2) on account of some mistake or error apparent on the face of the record;

3) on account of the award, judgement or ruling being in breach of any written law;

4) if the award, the judgement or ruling requires clarification;

5) for any other sufficient reasons”.

20. In applying for review, the Applicants have submitted that there is an error apparent on the record in that this Court proceeded to grant orders for prayers not pleaded for.

21. The Respondents have submitted that the orders granted were discretionary and were pursuant to orders being sought.

22. It is true that the Respondent herein had sought orders to compel production of documents belonging to one Faith. In refusing to grant the said orders, this Court made orders to protect Faith and at same time

gave credence to the order by stating that documents to be granted will be in a general form. This in my view was in an attempt to do justice to the Applicant. This in my view is not an error on the record.

23. The Applicants have not cited any other reason why they seek review other than the apparent error on record and any other issues raised on this apparent error relates to why this Court should not have granted orders not pleaded for. This is on Section 74 of Employment Act. This in my view goes beyond the ambit of review to the arena of an Appeal.

24. The only error that appears in the ruling however is reference to "employer" instead of "employee" in paragraph 34 of the ruling which I accordingly correct and reiterate my ruling that the documents in respect of which the Labour Commission should provide will be in respect of employees in the category and period stated.

25. The application for review therefore fails.

26. Costs in the cause.

Read in open Court this 22nd day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Cherono for Claimant/Respondent – present

Oyombe for Respondent/Applicant