REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.78 OF 2015

GEOFREY SHAKWIRA.. 1ST CLAIMANT

STEVEN EMOJONG KIZIRA..2ND CLAIMANT

GILMO GIDO KIZIRI..3RD CLAIMANT

MARY MUTHONI GITAGIA...4TH CLAIMANT

MARGRET WACHEKE KAMANDE...5TH CLAIMANT

JULIUS MUNYOKI MUSYOKI..6TH CLAIMANT

VERONICA NJERI GITAU..7TH CLAIMANT

EDNAH MORAA NYANGARESI...8TH CLAIMANT

ESTHER MORAA KIMONDE...9TH CLAIMANT

BEATRICE MOTHO KIMANI...10TH CLAIMANT

GABRIEL OILE WASIKE..11TH CLAIMANT

MILLY KASANDI ADIKA..12TH CLAIMANT

CATHERINE WANJIRU NGIGI...13TH CLAIMANT

ALICE CHEROTIN KEBENGWA...14TH CLAIMANT

LEAH NYABORO KARANJA..15TH CLAIMANT

VERONICA MATINA EKWENYE...16TH CLAIMANT

HANNA WANJIRU KAMAU..17TH CLAIMANT

CATHERINE KANYIUA MWANZA..18TH CLAIMANT

VERSUS

NANCHANG FOREIGN ENGINEERING COMPANY LIMITED...............RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 7th April, 2016)

RULING

The court delivered judgment on 13.11.2015 in the suit and entered judgment for the claimants against the respondent for:

a. The declaration that the respondent's action to summarily dismiss the claimants from employment was illegal, unlawful, unfair and inhumane.

b. The respondent to pay the claimants their terminal dues and compensatory damages as pleaded in paragraph 7 of the memorandum of claim totaling to **Kshs.6, 338, 757.00** by 01.01.2016 in default interest at court rates to be payable thereon from the date of this judgment till full payment.

c. The respondent to pay the claimants' costs of the claim.

The respondent being dissatisfied with the judgment has filed on 04.02.2016 a notice of motion through its advocates MJD Associates Advocates. The application is under sections 1A and 1B of the Civil Procedure Act, Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Rule 32 of the Industrial Court (Procedure) Rules 2010 and all other enabling provisions. The application is supported with the affidavit of Liwen Hua filed together with the application. The supporting affidavit exhibited huge bundles of documents setting out the employment records in the matter. The grounds in support of the application are as follows:

a. The court misdirected itself in law in finding that the claimants' dismissal was illegal, unlawful, unfair and inhumane because the 7th, 12th, 14th, and 16th respondents have at all material times been working for the applicant while the remaining respondents simply absconded from duty where they had been engaged as casual workers at the applicant's construction site in Kiambu. The 1st claimant claimed to have worked for the applicant since April 2012 yet the applicant entered into a contract with the developer of the Kiambu site on 25.02.2013 so that the applicant could not therefore in anyway have engaged the 1st respondent in 2012 for work that was non-existent.

b. Even if the claimants' dismissal was illegal, unlawful, unfair and inhumane, the court had failed to apply the principle of proportionality in awarding the 12 months' compensation.

c. The court found that the parties had filed submissions whereas there were no submissions filed for the respondent, the applicant.

d. Counsel for the applicant (the respondent) at all material times was negligent by failing to file in court the relevant documents and the final submissions. The documents had been provided to counsel by the respondent for that purpose. Due to counsel's negligent mistakes, the court was misled to make wrong decisions in the case. The applicant had learned about the judgment when their advocate on record served them with a notice of appeal. That was on 09.01.2016; and the judgment was forwarded by counsel to the applicant on 11.01.2016.

In the application, the respondent prayed for substantive orders thus:

1. That the honourable court be pleased to set aside or review its judgment delivered on 13.11.2015.

2. That subsequent to the setting aside or review, the court be pleased to hear the claim *de novo*.

3. That costs of the application be in the cause.

The claimants have opposed the application by filing on 15.03.2016 the grounds of opposition through Namada & Company Advocates. The grounds are as follows:

a. There is no proved error apparent on the face of the record or judgment.

b. There is no new evidence which by due diligence could not be placed before the court before or at the time of the hearing and when availed could enable the court to arrive at a different finding.

c. New allegations outside the original pleadings cannot found a valid ground for review; nowhere was it pleaded that the claimants absconded duty or were still in employment. The pleading at paragraph 4 was that the claimants had been dismissed. The employees alleged in the application to be at work have filed replying affidavits to say they are in fact not at work as they were dismissed. The claimants relied on the replying affidavits of 1st, 7th, 12th, 14th, and 16th claimants to show that the 7th, 12th, 14th, and 16th claimants had indeed been dismissed and they were not re-engaged or in continuing employment as was alleged for the applicant in the application.

d. There is no correspondence or other evidence in court to show that the applicant forwarded the bundles of documents to its counsel at the material time and counsel failed to use or file the same in court. The new evidence being produced after judgment should not be allowed. Allegations of negligent mistake of a previous counsel are therefore misplaced and only meant to assist the respondents to avoid paying the judgment money. No letter of complaint against the said advocates has been exhibited.

e. The applicant is an international and multinational construction conglomerate and should not suffer prejudice in paying its Kenyan employees their dues and as ordered by the court.

f. The application is a vexatious abuse of the court process.

g. The honourable court evidently gave the respondents all necessary space to file all their pleadings and documents before the hearing of the case. There is no cause for reopening of any part of the case.

The court has considered the submissions and documents filed for the parties and make the following findings on the application.

1. The court record is clear. As submitted for the claimants, the parties were given opportunity to file pleadings, affidavits, documents and finally submissions. The parties filed the relevant affidavits, the agreed mode of disposing the suit. In particular, the affidavit of Liwen Hua in opposition of the claim was filed on 24.09.2015 or 23.09.2015. Accordingly, the court returns that no reasonable ground has been established to show that the applicant, with due diligence, could not have availed all the evidence before or at the hearing. The material on record and the court's notes show that the applicant was given all the chance to urge its case in opposition to the claim and as it turns out to be the case, the judgment having been delivered, there is no valid ground to reopen the case on account of fresh evidence as it has not been showed that there is such fresh evidence which with due diligence, could not be made available at the hearing of the suit.

2. As submitted for the claimants, there is no evidence to establish professional negligence on the part of the initial advocates for the applicant as there is no complaint showed to have been made to the relevant authorities in that case. It has not been shown that the advocate on record for the respondent at all material time had failed to implement the respondent's instructions. In fact, the correspondence show that there was a notice of appeal and indeed such notice of appeal was filed on 21.12.2015. It is settled law that a party dissatisfied with a judgement and decree elects to apply for review or to appeal. The notice of appeal having been filed on 21.12.2015 and dated 21.12.2015, the application for review filed on 04.02.2016 is clearly vexatious and a gross abuse of

the court process.

3. The court finds that the applicant was seriously mislead or mistaken in urging that the court erred in finding that parties filed affidavits and submissions. The court returns that that was in fact the case as per the court record. For avoidance of doubt the applicant filed the submissions on 06.11.2015 and as earlier highlighted in this ruling, an affidavit in opposition of the claim on 24.09.2015 or 23.09.2015. At hearing of the application counsel for the applicant confirmed that she had not perused the court file prior to filing of the application and it is therefore not surprising that the applicant made such misleading submissions.

4. As submitted for the claimants, it cannot be a valid ground for review for the applicant to introduce new pleadings that the claimants had absconded duty or that some were still in employment.

5. The court returns that there is no reason to doubt that since the claimants were dismissed, all of them had never continued or returned to work as set out in the replying affidavits.

6. The court returns that taking into account all the circumstances of the case and the need to advance fair labour practices in employment relationships like between the parties in the present case and as envisaged in Article 41 of the Constitution and section 37 of the Employment Act, 2007, the orders made in the judgment were proportionate and fair. In particular, there was no mitigating factor for the respondent to impose casual terms of service against the claimants and the claimants were clearly entitled to the minimum terms of service under the Act and in terms of section 37 of the Act so that the compensation as ordered was just as it was necessary to meet the ends of justice in the case.

In view of the foregoing findings, the court returns that the application for review has failed to establish any of the grounds for review as provided for in Order 45 of the Civil Procedure Rules, 2010 or Rule 32 of the Industrial Court (Procedure) Rules, 2010. Accordingly, the application will fail.

In conclusion, the application filed on 04.02.2016 for the respondent in the suit, is hereby dismissed with orders that the applicant will pay the claimants' costs of the application.

Signed, dated and **delivered** in court at **Nyeri** this **Thursday, 7th April, 2016.**

BYRAM ONGAYA

JUDGE