REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

CAUSE NO. MISC 11 OF 2015

KENYA ELECTRICAL TRADES &

ALLIED WORKERS LTD….....CLAIMANT

VERSUS

KENYA POWER & LIGHTNING CO.LTD..……..….RESPONDENT

Mr Onyony for Claimant/Applicant

Mr Makori for Respondent

RULING

1. By a Notice of Motion application filed on 26th June 2015, the Applicant seeks the court to review and set aside its ruling issued on 29th may 2015 in which the court found the suit to have been filed out of time in terms of Section 90 of the Employment Act, 2007 which provides 3 years limitation period for suits based on employment contracts.
2. The Applicant states that it has discovered new and important documents which had not been brought to the attention of the court that clearly demonstrate that the conciliation process on the dispute was commenced on 10th November 2010 when the dispute was reported to the Minister for Labour by the National General Secretary of the Applicant union and therefore the matter is not statute barred. The applicant also states that there is an error apparent on the face of the record which ought to be rectified.
3. The application is opposed vide grounds of opposition filed on 27th July 2015 by the Respondent. The Respondent states that the application is defective and an abuse of the court process in that;
    a. There is no error or mistake on the face of the record to justify a review of the court order
    b. The applicant has not shown that the new and important matter of evidence, after the exercise of due diligence was not within its knowledge or could not be produced by the applicant at the time when the order was made. The information which the Applicant says is new and important evidence was all along within the reach of the applicant or could easily have been obtained from its records. In the circumstances the question of discovery of new evidence does not arise at all.
    c. That the orders sought are in the nature of an appeal. The court cannot sit on appeal on its own decision.
    d. That in any event, if the reference to conciliation had been within time, the same should have been concluded within 30 days as provided by section 67 (9) (a) of the Labour Relations Act. The applicant has therefore not provided any or any reasonable explanation for the delay of over two years in commencing proceedings.

Determination

4. Rule 32 of the Employment and Labour Relations Court (Procedure) Rule 2010 provides;

   "a person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgement or ruling –

a. *If there is a discovery of new and 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, judgement or ruling requires clarification; or*
e. *For any other sufficient reasons"*

5. The Applicant relies on Rules 32 (1) (a) and (b) above. At the outset, the Applicant does not disclose what mistake or error is apparent on the face of the record considering the evidence presented to the court before making the ruling. This ground has no merit and the court disposes of it immediately.
6. The real issue for consideration is whether the documents attached to the application meet the requirements of Rule 32(1) (a) as cited above and if the same suffice to warrant the court to vary its ruling. In the Court of Appeal at Nairobi Civil appeal No 275 of 2010 between **Pancras T Swai Vs Kenya Breweries Limited (2014) eKLR** G.B.M. Kariuki, Kiage & J Mohammed JJ cited Chittalers and Rao in the Code of Civil Procedure (4th Edn) Vol. 3 Pg 3227 in explaining the distinction between a review and an appeal thus;

   "A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground of appeal".

7. In this regard, while the Learned Justices discussed Rule 1 of Order 44 (now order 45 in 2010 Civil Procedure Rules) which is similar to Rule 32(1) (a), (b) and (e) of the employment and Labour Relations Court (Procedure) Rules 2010, had this to say;

   "The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason relates to issue of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertaining of existing law which the court is deemed to be alive to"

8. In this case, clearly the new documents produced by the Applicant which were not in the court record at the time of the ruling show that the conciliation process started on 10th November 2010 when the dispute was reported to the Minister for Labour. The Conciliator Mrs Kahutha was appointed vide a letter dated 6th January 2011 but the officer was transferred from Nairobi and was unable to conciliate the dispute. Another Conciliator Mr R. Twaya was appointed vide a letter dated 11th January 2012 and the parties were called to a conciliation meeting to take place on 5th April 2012. The Conciliator provided the Applicant with a certificate of unresolved dispute on 3rd April 2014 stating that conciliation was not successful due to the management being unco-operative.
9. The suit was then filed on 27th February 2015 less than one year from the date the certificate of unresolved dispute was granted by the conciliator. This court has found in a series of cases to wit; **Industrial Court of Kenya Cause 91 of 2012, Kenya Plantation & Agricultural Workers Union -Vs- BASE per Abuodha J ; Industiral Court at Kisumu cause No 20A of 2013 Johnson Oduor Onyango -Vs- Maseno West Sacco society Ltd per Hellen Wasilwa J, Industiral court of Kenya at Nairobi Cause No 269 of 2011 Samuel Kinago -Vs- Kuehne**

Nagel Limited; per Nduma J that in Labour disputes conciliation and provision of a certificate of unresolved dispute is a necessary statutory pre-trial process. That resolution of Labour disputes out of court is in keeping with the best Labour relations practices and the court should not only encourage the same but should enforce Rule 6 of the Employment and Labour Relations Court (procedure) Rules 2010 and section 15 of the Employment and Labour Relations Court Act 2011 (as amended by Misc amendment Act, 2012 & 2014). It is also important to note that section 67(1) provides for the conciliator or conciliation committee to resolve a labour dispute refered to it in terms of section 65 (1) within;

"a) thirty days of the appointment;

or

b) any extended period agreed to by the parties to the trade dispute".

10. In the present case, the suit was filed within time upon provision of a certificate of unresolved dispute and the court cannot penalize the Claimant for the delay which is clearly not of the Claimants making.

11. The court is satisfied that this information was not in the possession of the Advocate of the Claimant when the matter was heard and the ruling delivered.

12. To this extent, the court is satisfied that the suit was filed within the limitation period and the review application succeeds to this extend. The main suit to take its normal course.
13. Costs in the Cause.

Dated and delivered at Nairobi this 6th day of May, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE