



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2089 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 6th May, 2016)

MURIEL OGOUDJOBI.....CLAIMANT

VERSUS

MARA ISON TECHNOLOGIES KENYA LIMITED.....RESPONDENT

RULING

1. There are two Applications before me. The 1st Application before Court is the one dated 11th March 2015. The Application was filed through a Notice of Motion filed under Section 12 (3) (i) and 16 of Employment & Labour Relations Court Act and Rule 16(1) & (2) and Rule 32 of the Industrial Court (Procedure) Rules 2010 and all other enabling provisions of the law.

2. The Application herein seeks orders for review of this Court's Judgment of 3rd December 2015 and that the sum of USD 13,845 be included in final award in respect of accrued leave pay.

3. This Application is premised on the grounds that:

1. There is a mistake and error apparent on the face of the record in that the claim in respect of USD 13,845 in respect of accrued leave was omitted from the summary of the claim set out at page 6 of the Judgment and was thereby omitted from the final Award despite being admitted by the Respondent.

2. The said error is indisputable and self-evident.

3. This is a clear case of a mistake and error apparent on the face of the record which ought to be rectified by review of the impugned decree.

4. Considering the matter in totality, there is sufficient reason for review of the order.

5. It is in the interest of justice to allow the application as prayed.

4. The Application is supported by the affidavit of Muriel Folake Ogoudjobi sworn on 27th January 2016. In the affidavit of the Applicant – she avers that the amount in question was admitted in her termination letter dated 21.8.2014 which was produced at page 40 of the Respondents bundle of documents. That similarly in the submissions filed by Respondent on 23.11.2015, the Respondents made a similar

admission.

5. The Respondents opposed this Application and they filed a replying affidavit dated 12.2.2016 sworn by Sophia Wanjiku Gathoni, the Respondent's Legal Affairs Manager. They aver that there is nothing to be reviewed as there was no error apparent on the face of the Judgment for not awarding leave pay. They also aver that the Application sought is an abuse of the Court process as it amounts to an appeal and seeking to have this Honourable Court sit on appeal on its own Judgment. They want this Application dismissed accordingly.

6. The 2nd Application was filed by the Respondents on 16/12/2015 through a Certificate of Urgency filed through a Notice of Motion filed under Rule 31(2) of Employment and Labour Relations Court (Procedure) Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 42 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

7. The Applicant sought the following orders:

1. THAT, for reasons to be recorded the Honourable Court be pleased to certify this application as urgent.

2. THAT, service of this application be dispensed with and the Respondent/Applicant be heard ex-parte in the first instance.

3. THAT, pending hearing and determination of this application interpartes this Honourable Court be pleased to grant a stay of execution of the Judgment of Hon. Lady Justice Wasilwa delivered on 3rd December 2015 and any resultant decree or consequential orders there from.

4. THAT, there be a stay of execution of the Judgment of Hon. Lady Justice Wasilwa delivered on 3rd December 2015 and any resultant decree or consequential orders therefrom pending hearing and determination of the Respondent/Applicant's intended Appeal on the said Judgment on such terms as the Court considers just.

5. THAT, the Respondent/Applicant be at liberty to apply for such further order and/or directions as this Honourable Court may deem fit and just to grant.

6. THAT, the costs of the Application be provided for.

8. The Application was based on the following grounds:

1. By judgment of this Honourable Court delivered on 3rd day of December, 2015, the Honourable Court (Hellen S. Wasilwa J.) entered judgment against the Respondent/Applicant and awarded the following for unfair termination on account of redundancy:

a. 12 months salary as damages for unfair and unlawful redundancy US\$ 84, 480.

b. Salary not paid from July 2015 to 25th August 2014 US\$ 7,040.

c. Severance pay being 15 days salary for each year worked as per Section 40(1) (g) of Employment Act US\$ 10,560.

d. Telephone expenses as submitted and approved according to the emails submitted in Court US\$ 12,699.

e. Expatriate relocation expenses US\$ 5,000.

f. One (1) month's salary as notice pursuant to Section 40(1) (f) US\$ 7,040 US\$.

g. A return ticket to Claimant's Country of origin (France) for Claimant and her family or an equivalent amount based on the cost of the ticket at the date of payment.

h. Market shares allocated to the Claimant in Respondent's ESOP being 75% of 800 shares based on current market value.

i. Claimant be issued with a Certificate of Service.

j. Respondent to pay costs of this suit.

3. The amount awarded attracts interest at Court rates with effect from date of this Judgment.

2. The Respondent/Applicant disagrees with the said award and has filed a notice of appeal, requested for typed proceedings and a certified copy of the Decree to enable it file an appeal from the same to the Court of Appeal as soon as possible.

3. The Respondent/Applicant's Appeal raises serious issues to be tried and is arguable with great probability of success.

4. On the date of Judgment no orders were obtained for stay pending the filing of this formal application for stay of execution pending appeal and the award is attracting interest at Court rates from 3rd December 2015 hence the Respondent has promptly moved the Court upon obtaining a typed copy of the judgment on 10th December 2015.

5. The Respondent/Applicant is apprehensive that Claimant shall enforce the Judgment/Decree in its favour as against the Respondent and the Respondent/Applicant's Appeal will be rendered otiose.

6. The Respondent/Applicant is apprehensive that if the Claimant/Respondent receives any monies from the Respondent (in enforcement of the decree), the Respondent will be unable to recover any sums back should it be successful in its Appeal.

7. Unless orders of stay are granted, the Applicant stands to suffer substantial financial loss and/or damage that may eventually render the appeal nugatory should the appeal succeed for the following reasons:

a. The sums awarded are substantial and interest has been further awarded at Court rates from the date of judgment.

b. The Claimant is not a Kenyan national and has no known assets in Kenya that can be used to recover any amounts paid to her in the event that the appeal succeeds.

c. The Claimant's financial status is otherwise unknown.

8. The intended appeal discloses a serious issue to be tried and arguable with a high chance of success.

9. The Application is further supported by the supporting affidavit of Sophia Wanjiku Gathoni the Applicant's Legal Affairs Manager.

10. The Applicants have deponed that they are dissatisfied with this Court's Judgment and award and have since filed an appeal. They therefore seek orders of stay. They also aver that they are willing to abide by any condition of stay that may be set by the Court including depositing partial funds in a joint interest earning account in the names of the Advocates for the parties herein.

11. In disposing of these Applications, the parties agreed to file written submissions.

12. In relation to the 1st Application for review, I note from the pleadings that the Claimant had prayed for accrued leave of USD 13,845 under paragraph 4 of the Memorandum of Claim being 59 days accrued leave.

13. It is apparent that in the Memorandum of Defence filed by the Respondents where they attached the Claimant's termination letter at page 41, they admitted that they owed the Claimant 59 days accrued leave translating to US 13,845. This too was admitted in the submissions filed by the Respondents. The termination letter read as follows: -

“In accordance with your existing terms and conditions of service and the Employment Act 21007, you are entitled to the following:

- 1. Salary upto and including the 25th July 2014 US\$ 5,866.***
- 2. Two (2) month pay in lieu of notice US\$ 14,080.***
- 3. Severance pay at a rate of fifteen (15) days for each completed year of service in the company US\$ 10,560.***
- 4. Payment in lieu of your earned leave of fifty nine (59) days US\$ 13,845.***
- 5. Provision of Certificate of Service and/or reference letter.***

14. The issue of accrued leave was therefore an issue agreed upon which the Respondents are obliged to settle. It is true, I omitted in my Judgment to include this prayer which I regret. However, all is not lost since this Court has inherent powers to review its orders and Judgment as provided for under Rules 32(1) of Employment and Labour Relations Court (Procedure) Rules 2010 which state as follows:

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, judgment or ruling being in breach of any written law; or**
- d. if the award, the judgment or ruling requires clarification; or**
- e. for any other sufficient reasons.**

15. It is my view that under Rule 32, I can review my order on account of mistake or error apparent on the face of the record which I now do. I also find that this is not sitting on appeal on my own Judgment as it is not an issue I have to reconsider but an issue that is settled but which is an innocent mistake omitted in the Judgment. I therefore review my Judgment and now include an order for accrued leave of 59 days being US 13,845. The Claimants Application is therefore allowed as prayed.

16. Turning to the Respondents Application for stay, the law is clear. Under Order 42 Rule 6(2) of the Civil Procedure Rule 2010, No order for stay of execution shall be made under subrule (1) unless:

- a. “the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- b. such security as the court orders for the due performance of such decree or order as may**

ultimately be binding on him has been given by the applicant.

17. The Respondent/Applicant have filed a Notice of Appeal and have shown to this Court why it will be difficult to recover any payments from the Claimant who is not a Kenyan National if the appeal succeeds. This is a good reason to allow the stay so that the appeal if successful will not be rendered nugatory, since the Respondents are also willing to adhere to any conditions set by this court, I will allow the stay on the condition that $\frac{1}{2}$ the decretal sum is released to the Claimant through her Counsel and the balance to be deposited in an interest earning account operated by Counsel on record. Since both applications are successful, each party will bear their costs of the application.

Read in open Court this 6th day of May, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Anyonye for Claimant – Present

Miss Omondi for Respondent – Present