REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

CAUSE 52 (N) OF 2010

EMMA CAROL WANJIRU…….……CLAIMANT/RESPONDENT

VERSUS

AIRWORKS (K) LIMITED…...…….. RESPONDENT/APPLICANT

RULING

1. The respondent/applicant filed an application to review the judgement of the court delivered on 21st August 2015. The application was filed on 30th October 2015. It is also important to note that the respondent had earlier filed a notice of Appeal against the same judgement on 10th September 2015. Therefore, serving before court is a notice of appeal and an Application for review.
2. The nub of the application for review is that the termination of the employment of the claimant occurred on 20th September 2007, whereas The Employment Act, 2007 came into effect on 2nd June 2008. It is the applicant's contention that the court erred in applying the provisions of Employment Act 2007 retrogressively in the matter.
3. That the court ought to have applied the provision of the Employment Act 226 (repealed) to the matter. The applicant states that the remedy under section 49 of the Employment Act 2007 were therefore not available to the claimant and should be set aside.
4. That the award be reviewed so as to apply the provisions of employment Act 226(repealed) applying Kenya shillings and not US Dollars since his salary was payable in Kenya shillings. In this respect the applicant submits that the claimant ought to be awarded 50% of his monthly pay Kshs 295,200 instead of USD 4000 awarded by the court.

Response

5. The claimant filed a notice of preliminary objection dated 8th December 2015 in that the court lacks jurisdiction to entertain an application for review where an appeal has already been filed.
6. That the applicant has not sought any specific prayers in the application for review and therefore the application for review lacks merit and it should be dismissed with costs. That the applicant does not rely on any grounds provided for review under Rule 32 of the Employment and Labour Relations Court (procedure) Rules 2010.

Determination

i. Is it lawful for a court to consider an application for review of a judgement in respect of which a notice of appeal has been filed but the actual appeal has not been filed?
ii. If the answer to (i) is in the affirmative, does the application for review have merit?

Issue i

7. The claimant filed a preliminary objection to wit; that this court lacks jurisdiction to entertain the application for review relying on order 45 Rule 1 (b) of the Civil Procedure Rules which reads;

   "(1) any person considering himself aggrieved-

   (a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or

   (b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time which the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or order may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.

2. *A party who is not appealing from a decree or order may apply for a review of judgement notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when, being respondent he can present to the appellate court the case on which he applies for the review.*

Response

8. These provisions are based on section 80 of the Civil Procedure Act cap 21 laws of Kenya which states as follows:-

   "any person who considers himself aggrieved –

a. *By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
b. *By a decree or order from which no appeal is allowed by the Act, may apply for review of judgement to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit"*

9. It is opposite that applications for review in this court are brought in terms of Rule 32(1) of the Employment and Labour Relations Court (Procedure) Rule 2010 which provides;

   "(1) 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 a new and important matter or evidence which, after the exercise of due diligence was not with 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.*

10. The provisions of Rule 32(1) are wider than those of order 45 rule 1(b) and 45(2) from a plain reading of the two provisions. It is to be noted that rule 32 does not fetter an applicant on the basis of existence of an appeal. However, these rules are subservient to the provisions of section 80 of the Civil Procedure Act cap 21 Laws of Kenya. It follows that Rule 32 of the Employment and Labour Relations Court (procedure) rules 2010 is to be read subject to section 80 of the Civil Procedure Act cap 21 of Laws of Kenya regarding whether or not a person may file an application

for review from an order from which an appeal is allowed but from which no appeal has been preferred or from a decree or order for which no appeal is allowed.

11. The decision of the High Court at Nairobi in **JR Miscellaneous Application No 11 of 2012, Exparte Applicant Surgipharm Ltd Vs the Anti-Counterfeit Agency & 2 Others [2014] eKLR is on point G.V. Odunga** discussed the matter as follows;

"The first issue for determination is the effect of the filing of a Notice of Appeal before an application for review. In **Nairobi High Court Civil Division Civil Case No 1100 of 2003 between Christopher Musyoka Musau Vs Dally & Figgis** I expressed myself as follows;

"Before I deal with the merit of the application I wish to deal with the preliminary issue raised. It is clear from the foregoing that the review remedy is only available to a party who is not appealing. **See Orero Vs Seko [1984] KLR 238.** Who then is a party who is appealing? There are two contradictory decisions from the Court of Appeal. In **Kisya Vs Attorney General (supra)** the Court held that a party who has filed a notice of appeal cannot apply for a review but if application for review is filed first the party is not prevented from filing appeal subsequently even if a review is pending. However, in **Yani Haryanto Vs E.D F. man (sugar) Limited civil appeal No 122 of 1992,** the Court of Appeal was of the following view;

"the facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed ….What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review….An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal"

In light of the two decisions emanating from the same Court of Appeal, this Court is entitled to adopt either of the two decisions. In my view the Haryanto Case reflects the true legal position. A Notice of appeal is not an appeal but just a formal notification of an intended appeal. In fact under Rule 77(1) of the Court of Appeal Rules it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where that happens I cannot see how such a Notice which has not even ben lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review….However, the same court in **The Chairman Board of Governors Highway Secondary School Vs William Mmosi Moi Civil Application No. 227 of 2005** had this to say:

12. In the present case the respondent/applicant lodged a Notice of Appeal on 10th September 2015 against the decision of the court delivered on 21st August, 2015. The respondent/applicant then subsequently filed an application for review on 30th October 2015. As at the time, the ruling was reserved, the memorandum of appeal had not been filed as the respondent awaited the typed certified proceedings of the court.
13. Going by the aforesaid expose of the law the applicant was within its right to file the application for review and the court has jurisdiction to hear and determine the same.

Issue ii

14. The next issue for determination is whether the application for review has merit.
15. In the matter, the court identified two issues for determination as follows;

1. Was the claimant unlawfully dismissed from her employment or did her contract of employment end by effluxion of time and
2. Is the claimant entitled to salary for September 2007 in the sum of USD 4000 and a similar amount in lieu of notice?

16. In resolving the first issue, the court relied wholly on an evaluation of evidence adduced by the claimant and by the respondent and came to the conclusion that;

"The respondent realizing that the claimant was pregnant and could not secure a pilot licence for the period of advanced pregnancy simply abandoned her to her own devices. The claimant lost her job for an unlawful and unfair reason being her pregnancy. The respondent was under an obligation to put her on ground duties for the short period she could not fly and during her maternity leave"

This is a finding of fact by the court on which the whole case turned in favour of the claimant. If the applicant is aggrieved by this finding the proper course of action is to file an appeal. No ground to review this finding of fact is disclosed in the application. The applicant may only appeal this finding of fact if it is dissatisfied with it.

17. The other finding by the court was based on the interpretation of and application of the contract of employment between the parties. That the claimant was paid a monthly salary of USD 4000 per month in terms of the contract. This is a fact not in dispute. It follows that she was entitled to payment in lieu of one month's notice in the sum of USD 4000 basing on the finding that the claimant's employment was terminated without notice. Having found that the claimant's employment was unlawfully and unfairly terminated the remedies sought by the claimant automatically followed.
18. The court made a finding of fact that the claimant was not paid salary for the month of September 2007, a period she was simply kept in the dark having left Juba on 13th September 2007, went on fourteen (14) days off and was thereafter not recalled back to work having requested to be put on ground duties.
19. It makes no difference whether the law applicable in respect of the aforesaid findings of fact and the consequent award to the claimant is the Employment Act cap 226 of the laws of Kenya which was repealed with effect from 1st January 2008 or it was the Employment Act 2007.
20. Whereas it is correct that the court erroneously referred to the provisions of the Employment Act, 2007 in paragraphs 60 to 62 at this point, the court had already made factual findings. It was wrong for the respondent to terminate the employment of the claimant on the basis of her pregnancy.
21. This position remains the same whether the court had relied on the provisions of the Employment Act, cap 226 of the Laws of Kenya (repealed) or the Employment Act No 11 of 2007. Whereas the error is noted, it does not in the courts view vary the outcome of this case from which the applicant was at liberty to appeal against.
22. In the final analysis the application is dismissed with costs.

Dated and delivered at Nairobi this 24th day of June 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE