



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1005 OF 2013

REM OGODO OGANA.....CLAIMANT

VERSUS

KENYA SUGAR BOARD.....RESPONDENT

Mr Githinji for Claimant/Applicant

Mr Muriuki for Respondent

RULING

1. The court delivered judgement on 20th November 2015 in favour of the claimant/applicant. The claimant filed an application for review of the judgement on 12th January 2016 on the basis that there was an amended statement of claim filed on 14th March 2014 which had another prayer being;

‘b’ 12 months pay as damages for constructive unfair termination of Kshs 1,800,000”.

2. That leave to file the amended statement of claim was granted to the claimant/applicant on 12th May 2015.

3. That there is an apparent error on the face of the record in that the court did not make reference to the amended statement of claim or the prayer for damages for constructive unfair termination in error.

4. That Rule 32 (1) (a) permits review of the judgement of the court

“on account of some mistake or error apparent on the face of the record”.

Response

5. The respondent filed a replying affidavit sworn by Jude Chesire, legal manager of the respondent. The application for review is opposed on the grounds that;

6. The parties extensively submitted on the issue of constructive termination which the claimant applicant now wants an award for in form of damages.

7. That the court having rendered its judgement is now *factus officio*. That the respondent has lodged an appeal against the judgement set to be reviewed and the most procedural and legal way would have been

to file a cross appeal if the claimant felt aggrieved by the decision of the Honourable Court.

8. A further decision based on the application for review would lead to an awkward situation of having two appeals in the Court of Appeal instead of simply filing a cross appeal. The Notice of Appeal was filed on 25th November 2015 before the application for review was filed on 12th January 2016.

9. The Respondent prays that the application for review be dismissed with costs:-

Determination

10. The issues for determination are;

- i. Whether the notice of appeal (before the actual appeal is filed) precludes filing on an application for review subsequently.
- ii. If the answer to (i) above is in the negative, whether the application for review is meritorious.

Issue (i)

11. In the **HCC JR Misc application No 11 of 2012 ex-parte - Surgippharm Ltd Vs the Anti-Counterfeit Agency and 3 others [2014] eKLR J. V.Odunga J** relied on a Court of Appeal decision in **Haryato Vs E. D & F Man (sugar) Limited, Civil Appeal No 122 of 1992** as follows;

“.....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 under rule 58 and the inclusion of a memorandum of appeal”.

12. In the present case, even though a notice of Appeal has been filed the actual appeal has not been filed and therefore, the court has jurisdiction to entertain the application for review that was filed after the notice of appeal had been filed. The question is answered in the negative therefore.

Issue ii

13. Has the present review got any merit? From a reading of the judgement it is apparent the court overlooked the amended memorandum of claim and as a result did not consider the claim for constructive dismissal and payment of compensation introduced in the amendment. There is an error on the face of the record in terms of Rule 32(1) (b). The court did not apply its mind to the issue and therefore it is not *resjudicata*.

14. On the facts of the case, upon consideration of the facts of the case, it is clear that the claimant was employed on 14th July 2009 in the position of receiver manager. The claimant knew very well he was to manage an insolvent enterprise and his main responsibility was to turn its fortune around.

15. There were difficulties in realizing enough income to pay staff salaries including that of the claimant. The letter of appointment signed by the claimant on 27th July 2009 partly read

“you will be paid a salary of Kshs 150,000 per month which will be generated internally from your operations at SoC”.

16. The claimant was not paid salary for the months of April 2010 to April 2011. The respondent was in continuous breach of contract for the period and the court awarded the claimant Kshs 1,950,000 in respect of the unpaid salaries.

17. The court also found that the claimant owed the respondent Kshs 297,190.000 which he had paid himself while he awaited payment of salary from the respondent. The court found that the respondent had

failed to prove any misappropriation of funds by the claimant.

18. The claimant resigned from employment on 26th January 2011 giving the respondent three months' notice out of what he referred to in the original memorandum of claim as frustration. In the memorandum of claim filed on 2nd July 2013, the claimant did not plead a case for constructive dismissal and therefore did not seek compensation for termination of employment. However, in the amended statement of claim filed on 14th March 2014 the claimant introduced a new prayer as follows:

“12 month’s pay as compensation for constructive unlawful termination Kshs 1,800,000”,

19. No particulars of constructive unlawful termination were pleaded in the amended memorandum of claim. Indeed from a reading of the amended statement of claim there is no factual or legal basis for the prayer for compensation for constructive unlawful termination. The claimant only pleaded under paragraph 24 of the amended statement of claim;

“That the claimant out of frustration elected to resign on 26th January 2011 giving the respondent 3 months’ notice in terms of the appointment letter”.

20. Indeed the letter of resignation, attached to the original statement of claim does not state at all that the claimant regarded his voluntary resignation to be constructive termination of employment. In the letter, the claimant acknowledged that SOC (in receivership) had failed to generate enough resources to pay its staff and/or to come out of receivership. In light of the above the claimant stated in the letter of resignation;

“I humbly request the Board to release me from my appointment as the SOC Receiver Manager. Should this request be approved, I would be grateful if this letter is accepted as my written three months’ notice of termination of my appointment with effect from Tuesday the 1st February 2011”.

21. In **Nairobi Industrial Cause No 1519 of 2014, Max Masound Roshankar Vs Sky Aero Limited** as consolidated with **Nairobi Industrial Cause No. 1518 of 2014 Mawara Onica Vs Sky Aero Limited**, the court observed;

“Apart from termination, constructive termination is a concept now appreciated and applied by the Industrial Court as it occurs within employment and labour relations. Constructive dismissal also called constructive discharge occurs when employees resign because their employer’s behavior has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntarily, it is in effect termination”.

22. Whereas this is a proper position of the law, it is the court’s finding that a case for constructive dismissal or termination must be specifically pleaded setting out the specific particulars which the employee believes pushed him/her out of employment involuntarily even though the employer did not actually terminate the employment relationship.

23. It is the court’s finding that the claimant did not make out a case of constructive dismissal from the amended pleading nor in his oral testimony under oath.

24. The application has no merit and the same is dismissed with costs.

Dated and delivered at Nairobi this 1st day of July, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE