



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1694 OF 2014

FRANCIS MWAURA GITAU.....CLAIMANT

VERSUS

NYALA TEA ESTATE LIMITED.....RESPONDENT

RULING

1. This is an application for review of the award delivered by the Court on 19th February 2016 in which the Claimant's claim was dismissed for lack of evidence of an employment relationship between the Claimant and the Respondent.

2. The application which is supported by the affidavit of Wathome Ndanu, Advocate is based on the following grounds:

- a) The Court in its award dismissed the Claimant's claim for failure to establish an employment relationship between the Claimant and the Respondent;
- b) The Claimant failed to produce bank statements to show that he used to receive his salary from the Respondent through the bank since he was required to pay a bank activation fee which he was unable to raise before delivery of the award;
- c) The Claimant has managed to secure the bank statements which show that there existed an employment relationship between himself and the Respondent;
- d) It is in the interest of justice that the application be allowed;
- e) The Claimant will suffer irreparable loss and damage if the application is not allowed.

3. In the supporting affidavit sworn by Wathome Ndanu, Advocate on 11th April 2016, he depones that prior to filing submissions he had informed the Claimant to provide documentation in the form of a bank statement and NSSF statement to prove an employment relationship between himself and the Respondent but the Claimant only supplied the NSSF statement which was not sufficient to establish an employment relationship.

4. Counsel further depones that after discussing with the Claimant the reasons why the Court had dismissed his case, the Claimant informed him that he could not provide a bank statement because he could not raise Kshs. 3,704 required to activate his bank account which had been dormant.

5. The Claimant's Advocates on record provided the account activation fee upon which the Claimant was supplied with the required bank statements which clearly show that the Claimant was being paid a salary by the Respondent with remittances being made on the 28th of each subsequent month.
6. Inability to present the bank statements as part of evidence during the hearing was said to be due to the fact that the Claimant was unable to pay the account activation fee due to financial constraints.
7. Counsel states that the Claimant is a man of straw whose life had taken to the worst after the termination of his employment which was his only source of livelihood.
8. The application is opposed by a replying affidavit sworn by the Respondent's Manager, Jared T. Kamau on 31st August 2016. He depones that by the Claimant's own admission the evidence he seeks to introduce was within his knowledge all along and is therefore not new evidence.
9. Kamau further depones that having proceeded *ex parte*, the Claimant had all the time to conduct due diligence and produce evidence in support of his claim and that it was improper for him to seek to do so after judgment.
10. It is the Respondent's case that the Claimant's application is an attempt to restart the case.
11. The power of the Court to review its own decision is donated by Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Procedure Rules. Rule 33(1) provides 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 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, judgment or ruling being in breach of any written law; or**
 - (d) if the award, judgment or ruling requires clarification; or**
 - (e) for any other sufficient reasons.**
12. The Claimant's application is premised on sub rule 1(a) which provides for review upon discovery of new evidence which was not previously available to the party seeking review.
13. The new evidence in this case is contained in statements of the Claimant's personal bank account. The Claimant states that he could not produce the statements at the hearing because he was required to pay account activation charges which he was unable to raise. This predicament was not disclosed at the time and the Court finds that the evidence which the Claimant seeks to introduce cannot be said to have been unavailable to him at the time he presented his case.
14. This application is therefore an attempt by the Claimant to have his case retried on the basis of weaknesses cited by the Court in its judgment already rendered. This is clearly an abuse of the court process.
15. For this reason the application is declined with no order for costs.
16. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER 2016.

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JUDGE

Appearance:

Mr. Wathome for the Claimant

Mr. Kimetto for the Respondent