



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 372 OF 2014

SHANGA ENGINEERING LIMITED CLAIMANT

VERSUS

BONVENTURE WANJALA KIMASIS RESPONDENT

Mr. Omwakwe for the Respondent/Applicant

Mr. Olonde for the Claimant/Respondent

RULING

1. The Respondent/Applicant being aggrieved by the Judgment delivered on 20th December, 2013 by Hon. Justice D.K. Njagi Marete seeks to review the judgment on the grounds that it has new information that was not available at the time of hearing.

2. Rule 32(1) of the Industrial Court (Procedure Rules) 2010 reads as follows;

“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 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.”

New Evidence

Mr. Harvinder Singh the Managing Director of the Respondent, avers that the company has evidence that it applied for work through tender which was not awarded to them as expected causing the company to cut costs and terminate the Claimant/Respondent contract of employment.

3. The tender documents dated 5th August, 2010, 7th April, 2010, 31st August, 2010 and 13th October, 2010 are annexed to the Supporting Affidavit and marked “HS1”.

4. The Respondent/Applicant states that the honourable court delivered judgment in favour of the Claimant upon declaring that the Respondent’s defence was a mere denial. The Respondent now seeks to adduce the new evidence to show that indeed, it had unsuccessfully tendered for work hence the need to terminate the employment of the claimant.

5. The claimant was awarded Ksh.398,843.00.
6. The Applicant prays that court to review and/or set aside the Judgment of the court.
7. **Response**

The Claimant/Respondent has filed a Replying Affidavit deposed to on 13th February, 2014 in opposition to the Application.

8. The Claimant/Respondent cited economic uncertainty and unfair competition as the reasons for termination of his employment. That if indeed, the failure to win a tender was the reason for the termination, nothing would have been easier for the Applicant/Respondent than to state so. In any event, the Respondent/Applicant only terminated his employment and not of other employees, which would have been the case, if the new defence is indeed true.

9. That the parties agreed to proceed on the matter on the basis of written submissions and there is no reason given why this evidence was unavailable to the Respondent/Applicant at the time of the hearing of the matter to justify the same to be allowed by the court at this late hour.

10. The Claimant/Respondent submits that these documents may have been prepared in hide site to defeat the ends of justice and the court should dismiss the Application for review with costs.

11. **The issues for determination are;**

(i) Whether the Respondent/Applicant has possession of new evidence which if admitted by the court may cause the court to revise its judgment.

(ii) If the answer to (i) is in the affirmative whether the Respondent/Applicant has demonstrated that it was unable to obtain and present before court this evidence at the time of the hearing of the suit upon exercise of due diligence.

12. **Determination**

The Respondent/Applicant in the memorandum for review dated 10th February, 2014 and in the supporting affidavit of the Managing Director of the Respondent has failed to demonstrate that the evidence sought to be introduced now, was not in its possession between the time of the filing of the suit and its conclusion.

13. The Respondent/Applicant has also not demonstrated that, upon exercise of due diligence, it was unable to obtain the said evidence before the suit was concluded.

14. Lastly, the Respondent/Applicant has not demonstrated that this new evidence would have materially changed the decision of the court.

15. Upon a careful perusal of the Judgment of Marete J. delivered on 20th December, 2013, the court finds no reason to review and/or set aside the same. The award of Ksh.398,843.00 is therefore confirmed by the court. Costs to follow the outcome.

Dated and Delivered at Nairobi this 29th day of January, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE

