



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 313 OF 2013

MAYEGA CHAGARA..... CLAIMANT

v

RAI PLYWOOD (KENYA) LIMITED..... RESPONDENT

RULING

1. On 9 May 2014, Ongaya J delivered judgment in which the Cause herein was dismissed on the ground that the Claimant did not tender any evidence to support his cause of action.
2. The Cause had been heard on 25 March 2014 and 2 April 2014. Before the hearing commenced, Mr. Odande holding brief for Ms. Orina informed the Court that Ms. Orina did not intend to call any witness and would rely on the pleadings and statements on record.
3. The Respondent on its part indicated that it would call oral evidence and it called two witnesses. The witnesses were cross examined by the Claimant's counsel.
4. On 1 October 2014, the Claimant filed an application for review of the judgment and this review application is the subject of this ruling.
5. The grounds for the review application are that the Court did not advise the Claimant against opting to rely on pleadings and documents filed; that the Claimant's were shocked that the Cause was dismissed for failure to give evidence; that the Court should have directed the Claimant to give evidence orally or to file an affidavit; that the Court did not consider the Claimant's written submissions; that the Respondent's evidence was unsubstantiated, hearsay and not admissible; that the Respondent did not prove it complied with procedural fairness requirements of the law; that an award of gratuity was mandatory under the Employment Act, 2007; that the decision not to call the Claimant to testify was not that of the Claimant but his advocate; that the Court failed to analyse and consider the Claimant's pleadings; that the dismissal was in contravention of article 159(2)(d) of the Constitution and that the application was brought without undue delay.
6. The Respondent opposed the application. It contended that the Claimant had not shown sufficient reason to warrant the review and that the Claimant was seeking to reopen the Cause.
7. It was also submitted that the Claimant was ably represented when directions were taken and that the Claimant had the opportunity to present oral evidence but opted not to and that admissibility of evidence

did not fall under the review jurisdiction; the judgment was not in breach of any written law and there was inordinate delay.

7. The Courts' power of review is anchored in section 16 of the Employment and Labour Relations Court Act and rule 32 of the Industrial Court (Procedure) Rules, 2010. The jurisdiction is wider than the one obtaining under the Civil Procedure Act regime.

8. It is trite that an application for review should be brought without inordinate delay. What is inordinate delay would depend on the circumstances of each case.

9. In the instant case, the impugned judgment was delivered on 9 May 2014. The review application was only filed on 1 October 2014, some 6 months later.

10. To my mind, this was inordinate delay. No explanation was tendered by the Claimant as to why it took him about 6 months before seeking review. On this ground alone, the application falls for dismissal.

11. But a few words on the contention that the Court should have advised or directed the Claimant to call oral evidence.

12. When matters come up for directions, it is the primary responsibility of the parties to disclose to Court how they intend to proceed or the directions they seek. It is only after the disclosure that the Court may give directions.

13. Further, it is a litigant and or his counsel who plan and strategise on how to conduct their cases. The Claimant herein took a decision through his advocate on record to proceed the way it deemed fit because it knew the case it had to present and the statutory burden, legal or evidentiary to discharge. The Court cannot be faulted.

14. Any legal practitioner knows that pleadings are meant to state the facts forming the cause of action and must be proved through evidence one way or the other and in this regard by dint of section 47(5) of the Employment Act, 2007, an employee/claimant is under a statutory burden to prove that an unfair termination or wrongful dismissal occurred before an employer is called upon to justify and prove the reasons for dismissal.

15. On the issue of admissibility of hearsay evidence, the Claimant was ably represented at the hearing and did not raise any objection at the appropriate time.

16. The Claimant has failed to bring himself and or satisfy any of the conditions for review of judgment as provided for in the applicable rule.

17. The upshot is that the review application is dismissed with costs to the Respondent.

Delivered, dated and signed in open Court in Nakuru on this 13th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimant Ms. Gacanja instructed by Manyoni Orina & Co. Advocates

For Respondent Mr. Maritim instructed by Kalya & Co. Advocates