



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 232 OF 2012

(Before D.K.N. Marete)

TOM OTIENO OGONGO.....CLAIMANT

VERSUS

INSTARECT LIMITED.....RESPONDENT

RULING

This is an application by way of a Notice of Motion dated the 30th January, 2013 and seeks the following orders of court;

1. **THAT** the application herein be certified as urgent and service in the first instance be dispensed with.
2. **THAT** the Honourable Court be pleased to review the decision delivered on the 6th day of December, 2013, and that judgment be entered in favour of the claimant as prayed in the memorandum of claim.
3. **THAT** costs be in the cause.

It is based on the affidavit of Tom Otiemo Ogongo the applicant on the following grounds;-

1. **THAT** in delivering its award, the Honourable Court did not take into consideration that at the time of the alleged termination as issued to the claimant by the respondent, there was no employment contract in force.
2. **THAT** the award of the Honourable Court as delivered on 6th December, 2012 did not therefore reflect the culmination of the true state of affairs that led to the claimant being terminated unfairly by the respondent on the 18th April, 2011.
3. **THAT** the claimant had an arguable case that ought to be considered fully and a decision rendered upon the tendered evidence by the Honourable Court.
4. **THAT** the applicant was unfairly terminated for unknown reasons by the respondent.
5. **THAT** the applicant has moved this Honourable Court without any inordinate delay in the circumstances.

6. **THAT** it will be equitable to determine the cause on merit after both sides are heard.

The respondent opposed the application vide Grounds of Opposition dated the 6th March, 2013 as hereunder;

1. **THAT** the claimant/applicant is guilty of laches/delay.
2. **THAT** the application is bad in law as it does not disclose any of the grounds for the grant.
3. **THAT** the claimant/applicant ought to have filed an appeal against the judgement of Honourable Justice D.K. Njagi Marete of 6 December, 2012 instead of applying for review.
4. **THAT** the application is otherwise frivolous, vexatious and an abuse of the process of this Honourable Court and the same should be struck out with costs.

The application came to court on 11th March, 2013 when there was no appearance for the respondent and with the concession of the applicant, the matter was fixed for hearing on 19th March, 2013.

On 19th March, 2013 Mr. Malebe for the respondent submitted that he was not ready to proceed on grounds that the hearing date was taken *ex parte* and that he had another hearing before Kimondo, J. and this had been fixed prior to this and was involving. Additionally, there was a replying affidavit with his client and this was intended for filing the following Friday or even earlier. There being consensus by the parties, the matter was fixed for hearing on 27th March, 2013.

When the matter ultimately came to court on 27th March, 2013, Counsel for the applicant Mr. Kandere ably presented the application. He argued that at the time of termination of the claimant/applicant's contract of employment, the said contract was not in force as this was a fixed term contract that had not been renewed. The effect of this is that the termination is bad in law in that it lacked a basis in the absence of a valid contract. This is the basis of agitation for a review of the judgement. He sought to rely on rule 32 of the Industrial Court (Procedure) Rules 2010.

Mr. Malebe, counsel for the respondent submitted that the jurisdiction of the court on this subject is directed by section 16 of the Industrial Court Act, 2011 which section also refers to the rules.

From the onset, counsel faults the applicants memorandum in support of the application dated the 30th January, 2013 and filed on 5th February, 2013 from being based on non existing law in that the sections of the Labour Institutions Act relied on, and indeed the entire Part III of the Act are now repealed by section 31, Industrial Court Act, 2011. This is true. He further faults that memorandum for being out of shape and lacking compliance with Form 5 of the schedule to the rules and rule 32 (4) of the said rules. This again is true and flagrant of the rules of procedure.

Perhaps the most pertinent bit of the respondent's submissions is that the application does not fit into any of the criteria for review enunciated under rule 32(1) of the Industrial Court (Procedure) Rules.

32.(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 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, 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.

The respondent relies on the grounds of opposition and a replying affidavit sworn on 21st March, 2013 and filed the following day. Basically, he posits that all parties were read on documentary and oral evidence. The bone of contention in this application, the letter of contract dated 1st March, 2002 and the letter of termination were well scrutinized and thrashed in the formulation of the judgement. The issues the subject matter of this application for review are a point of law for which the applicant should have preferred an appeal and the application is indeed an attempt for the court to sit in appeal to its own judgement. Moreover, an erroneous conclusion on law is not a ground for appeal but review.

The law on subject is clearly expressed in the case of **Origo & another versus Mungala, [2005] 2 KLR 307** where the Court of Appeal laid out the criterion for cases for review in its holding as follows;

1. *A person who makes an application for review under the civil Procedure Rules order XLIV rules 1 has to show that there has been discovery of new and important evidence which after due diligence was not within his knowledge or could not be produced at that time; or that there was some mistake or error apparent on the face of the record or that there was any other sufficient reason. The applicant must make the application for review without unreasonable delay.*
2. *An erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal.*
3.

The respondent further submits that the application is unduly delayed having taken months to bring the application to court.

The court sails with the submissions of the respondent not for the sake of flexing, but because these are grounded on sound legal thinking and backing. It has not been demonstrated how the application carries the letter and spirit of rule 32 (1) of the Industrial Court (Procedure) Rules. These are determinate on the ground for review and must be pursued. The current application does not even faintly fit into these rules.

Secondly, the application is suffocated by inordinate delay in coming to court. This is not explained or excused by the applicant.

Lastly, and most clearly, the issues conversed full within the realms of an appeal and this is where the applicant would be best suited.

I am in the circumstances inclined to dismiss this application with costs to the respondent.

Dated, delivered and signed this 22nd day of May, 2013

D.K. Njagi Marete

JUDGE

Appearances.

1. Mr. Kandere instructed by S.K. Opiyo & Co. Advocates for the claimant/applicant.
2. Mr. Malebe instructed by Wekesa & Simiyu Advocates for the respondent.

