



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO. 46 OF 2013

(Nairobi Cause No. 271 of 2012)

GLADYS MUTANU MUTELLAHCLAIMANT

VERSUS

BONIFACE KAMAU T/A

HIGHLANDS ANNEXE RESTAURANT

ALIAS HIGHLAND FOODS.....RESPONDENT

R U L I N G

By a Notice of Motion dated 13th of November, 2012 brought under certificate of urgency the applicants seeks a stay of execution of the judgment of this court pending the hearing of an application for review of the said judgment.

The application is supported by the affidavit of one Boniface Kamau who depones on the main that at the trial he was not represented by an advocate and that Judgment in the sum of Kshs.394,396 was entered against the applicant who has since hired an advocate and is desirous of having the judgment reviewed.

In what the applicant calls memorandum of review it avers that it has since entry of judgment discovered new evidence to the effect that the claimant was not earning Kshs.10,000 but Kshs.6,000 as gross salary which was gradually increased to Kshs.10,000.

Secondly, that the applicant has since discovered that the claimant utilised 9 days in respect of public holiday for the year 2011 and further that the claimant concealed material facts by failing to disclose to the court that every year the business closed for Christmas and Boxing day. The other paragraphs of the memorandum of review attack the judgment of the court by pointing out several areas where in their opinion the court erred in reaching the decision it did.

At the hearing of the application, Mr. Muthama for the applicant reiterated that the application was brought after the applicant discovered new evidence which was not brought before the court at the trial. He further adverted to the fact that the applicant was not represented at the trial. Of the new evidence, counsel submitted that the claimant sued the wrong party since the certificate of registration of business showed the correct party as Boniface Kamau and Lucy Nduta trading as Highland Foods while the claimant sued Mr. Boniface Kamau only, trading as Highland Restaurant. Counsel further claimed that the claimant failed to inform the court that at the commencement of her employment she was earning Kshs.6000 raised to Kshs.10,000. Counsel further submitted that although the court awarded the claimant house allowance no such claim was prayed for in the memorandum of claim. Further, the applicant

contended that it was erroneous to award the claimant 11 weeks overtime while there was no evidence tendered to support it. In conclusion, counsel submitted that all these new information was not presented because the applicant was not represented by counsel. In support of these submissions counsel drew the attention of the court to the cases of **Julia Wagacii Njunge and Another -vs- HFCK and Another [2005] e KLR, Equity Bank Ltd -vs- Capital Construction Ltd. & 3 Others and Kenya Bus Services Ltd. -vs- Festus Kibe Civil Appeal No. 535 of 2002.**

Mr. Kirimi who appeared for the claimant opposed the the application stating the application was misconceived and an abuse of the court process. According to counsel the application did not meet the threshold set by law in that it did not satisfy the requirement of section 31 of the Industrial Court Act and Rules. Counsel submitted that review is done when a new and important matter has been discovered. According to counsel no evidence has been shown which could not be diligently discovered during the trial. He submitted that the issue of not being represented by an advocate cannot warrant a review. On the issue of the right party before the court, counsel submitted that the court took precaution at the commencement of the trial to know from Mr. Thiongo who said he appeared for the respondent if he had full authority to give evidence on behalf of the respondent and he confirmed. Besides the said Mr. Thiongo stated that he was Mr. Kamau's partner and had full authority to deal with the matter since Mr. Kamau was overseas.

Regarding the claimant's pay, counsel submitted that terminal dues are calculated on the basis of the latest pay and the claimant's last pay was Kshs.10,000.

Counsel further submitted that an oral application to amend was made at the commencement of the trial and claim for house allowance introduced and even if the court were to err in making such an award it cannot be a ground for review.

In support of submissions counsel relied on the case of **Touring Cars Limited & Another -vs- Ashok Kumar Man Kanji Civil Appeal No. 78 of 1998 and National Bank Limited -vs- Ndungu Njau Civil Appeal No. 211 of 1996.**

The jurisdiction for review by this court is similar to that of the High Court and the principles are more or less settled in that a party seeking review must either demonstrate that he has discovered new and important matter of evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree sought to be reviewed was passed or that there is some mistake or error apparent on the face of the record or any other sufficient reason has arisen that in the interest of justice require the court to re-look at its judgment. The power of review in a sense implies that the court did not for good reason and after exercise of due diligence by a party, get the full facts or evidence at the time of making its determination or that the court made a mistake apparent on the face of the record in reaching the judgment sought to be reviewed. In an application for review the court is not being asked to sit on appeal on its own judgment. **(Equity Bank Ltd. -vs- Capital Construction Ltd. & 3 Others Civil Suit No. 645 of 2009).** In the case of **National Bank Ltd. -Vs- Ndungu Njau Civil Appeal No. 211 of 1996** the court of Appeal observed that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. That is to say misconstruing a statute or other provision of law cannot be a ground for review.

The applicant in this case appeared before me at the trial and I made a concious attempt to establish the relationship between Mr. Boniface Kamau t/a Highland Restaurant and Mr. James Mbugua Thiongo and was informed by the latter that he was an Assistant Director and partner of Mr. Boniface Kamau. He further informed me that he was fully competent to deal with the matter on behalf of Mr. Kamau who was overseas and indeed proceeded to do so by cross-examining the claimant and proceeding to give evidence on oath on behalf of the respondent.

Further, the respondent at the conclusion of the hearing prepared and filed submissions as directed by the court.

The jurisdiction and functions of the court is governed first by article 159(2)(d) of the Constitution which provides that in exercise of judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. Second, rule 24(3) of the rules of this court gives it unfettered discretion not to be bound by rules of evidence under the Evidence Act. It is useful to observe here that the court will not adopt procedures that are unconventional and inconsistent with practice obtaining in courts of law of similar jurisdiction; however as provided in the constitution, procedural technicalities and strict adherence to rules of evidence as stated in the rules, will be disregarded especially where such strict adherence may occasion injustice or undue delay.

This court has read the application for stay and review brought by the applicant and the issues raised appear to be mainly four. First that the applicant was unrepresented by an advocate, second that the court reckoned the respondent's terminal benefits on the basis of Kshs.10,000 instead of Kshs.6,000, thirdly the court awarded house allowance when the same was not pleaded for and fourthly that the claimant sued the wrong party.

Concerning the issue of non-representation by advocate, this cannot be a ground for review especially in a civil matter such as this and where the applicant is a business organization capable of hiring an advocate. Regarding the correct salary and house allowance, counsel for the respondent made oral application for amendment to incorporate these claims and these were never objected to by the applicant. In any event house allowance is a matter of statutory provision under Section 74 of the Employment Act and even if the court misapprehended the law in this respect, this is a ground for appeal and not review. The issue of the correct party before the court has adequately been addressed earlier in this ruling.

In Ndungu Njau's case referred to earlier in this ruling the court quoted the observations by Justice Wambilyanga while disallowing an application for review to wit:

“..... the Bank wanted him to reconsider the law and the evidence before him and come to a different decision which he could not do as it would be tantamount to sitting in appeal on his own judgment”.

I cannot agree more. Having looked at the application in its entirety, the court is of the view that no sufficient grounds have been demonstrated by the applicant to warrant a review of this court's judgment. The application is therefore dismissed with costs.

It is so ordered.

Dated at Nyeri this 25th day of June, 2013.

Abuodha J. N.

Judge

Delivered in open Court in the presence of Kariuki holding brief Kirimi for the Claimant and G. N. Mugo for the Respondent - absent.

Abuodha J. N.

Judge

