



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 60 OF 2012

JOHN BISHICLAIMANT

VERSUS

HEDGE FARM LTDRESPONDENT

R U L I N G

The court delivered judgment on 12/4/2012 in favour of the respondent. On 15/5/2013 the respondent filed an application for review of the said judgment under Section 16 of Industrial Court Act Section (sic) 32(1) (a) (b) (d) (e), 32 (2) (3) (4) (5) (6) of the Industrial Court (procedure) rules 2010.

The application is supported by a memorandum and a supporting affidavit setting out the grounds upon which the review is sought. The claimant in response filed a replying affidavit opposing the application.

The application was heard on 16/6/2013 through oral submissions made by Mr. Nduna and Mr. Nyange learned counsel for the respondent and the claimant respectively. Mr. Nduna argued that this court has the power to review its decision. He had no issue with the judgment save for the court reliance on the exhibit 1 for the claimant in reaching the finding that the termination of the claimant's employment by the respondent was unfair. If I understood him, his argument was that the court erred in admitting the letter as an exhibit and also in relying on it to reach its conclusion on the issue of unfair termination of employment. According to him the exhibit is a forgery. He therefore prayed for the courts discretion in setting aside judgment because the claimant did not prove unfair termination. He also prayed for costs.

In response, Mr. Nyange opposed the application and prayed for the same to be dismissed with costs. He submitted that the issues of admissibility of the said exhibits 1 was tackled during the trial and the court made a decision. According to him any party dissatisfied with the decision was free to appeal but not to seek review.

He relied on Section 20(1) of the Industrial Court Act which bars the court from applying strict rules of evidence. In his view the court rightfully admitted the said exhibit 1. He went further to submit that the issue of termination by redundancy was not in dispute and that the respondent did not prove that it was lawful.

On a more technical approach, he submitted the application did not meet the threshold for review under the law. Firstly, he argued that the applicant did not prove discovery of anything new after the

judgment. Secondly, there is no mistake apparent on record demonstrated. Thirdly there is nothing on the judgment that requires clarification. Fourthly the judgment is not in breach of any written law and lastly, there is no any other sufficient reason shown to warrant the review sought.

I have carefully perused the application, the replying affidavit and the entire Court record. I have also considered the submissions by the two learned counsel aforesaid together with the cited provisions of the law. The threshold for reviewing a decision by the court is provided for in rule 32 of the Industrial Court (procedure) Rules 2010.

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 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, judgment or ruling being in breach of any written law; or

(d) if the award, the judgment or ruling requires clarification; or

(e) for any other sufficient reasons.”

With due respect, the applicant did not discharge the above burden. Instead her counsel strayed into the issue of admissibility of the said Exhibit 1 and the merits of the courts reliance on the same in reaching a finding that the termination was unfair. In my view that was a ground best suited for appeal and not review.

Interestingly the said exhibit and its admissibility did not rank high in the respondents concern during the trial. There was no objection to its admission and there were no many questions raised on the same during the cross examination of the claimant or in the examination in chief of the respondents witness. Even to a by-stander, the

application appears to be an afterthought. The allegation of forgery in the application even after the judgment is a mere allegation by a person who never testified during the hearing and who did nothing to prove that the document was a forgery.

Consequently, the court finds that the respondents application has fallen short of the threshold set by rule 32 of the Industrial Court (Procedure) rules 2010 for the court to review its own judgment and it is dismissed with costs.

Signed dated and delivered this 8th July 2013

ONESMUS MAKAU

JUDGE