



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 2449 OF 2012

HENRY KAKAI.....1ST CLAIMANT
ANTHONY PETER.....2ND CLAIMANT
SAIRUS ZIMULI.....3RD CLAIMANT
DAN CHOGO.....4TH CLAIMANT
JUSTINE TIMOTHY MATE5TH CLAIMANT
FRANCIS KITHENDU.....6TH CLAIMANT
JOHN KAKAI.....7TH CLAIMANT
JOHN KARANJA.....8TH CLAIMANT
ROBERT MUTHANGYA.....9TH CLAIMANT
DICKSON KEVOGO.....10TH CLAIMANT
BERNARD VUNDI.....11TH CLAIMANT

VERSUS

DEBENDRA KAMAT T/A

SWADISH FOODS.....RESPONDENT

RULING

This is a ruling following a Notice of Motion filed by the Respondent herein dated 11th July 2013, brought under Rule 32(1)(b) of the Industrial Court (Procedure) Rules and Order 51(1) of the Civil Procedure Rules and Section 3A of the Civil procedure Act. The application is seeking a review of the judgment herein dated 5th July 2013 and the same is supported by the annexed affidavit of Grace Njihia, an Accountant at the respondent's business. The Claimants filed a Replying Affidavit sworn by Anthony Peter, the 2nd claimant dated 24th July 2013. The claimant filed Preliminary objection dated 24th July 2013.

The court heard the application together with the Preliminary objections as filed by the respondent and the claimant respectively.

The review sought relate to awards made in the judgement dated 5th July 2013, where notice pay granted to 3rd, 4th and 10th claimants should be set aside as well as what the 3 claimants were awarded as admitted amounts and off-duty awards. That the respondent had a counter-claim that the court failed to consider.

This application is based on the grounds that the court judgement had a mistake apparent on the face of the record in that notice pay was awarded to 3rd, 4th and 10th claimants whereas the court had already found that the 3 claimants were not entitled to notice pay. That the court based its finding on admitted amount, which had been amended and confirmed by the court and by awarding this admitted amounts, it was an apparent error and by awarding these amounts, the claimants will receive a double payment. Equally that the award of off duty to 3rd, 4th and 10th claimants was erroneous as the 3 claimants had not claimed these amounts and noting that an equal amount had been awarded while the 3 had not been employed at the same time, the court was in error. The court failed to make a finding on the counter-claims which should have been an off-set to the total awards due to the claimants.

The claimant in reply stated that the claim as filed was for kshs.4, 151,764.80 and upon hearing the court made an award all amount to Kshs.804, 417.85 together with costs of the case. None of these monies have been paid by the respondent and the review being sought is meant to delay the claimants from enjoying the fruits of their judgement. That the application as filed is erroneously supported by the affidavit of the respondent witness Grace Njihia who is not a party to the proceedings without locus standi and therefore cannot be aggrieved by the judgement or decree of the court. That Grace Njihia, is only being used by the respondents to frustrate the claimants and to give them time to dispose their movable properties with a view to defeating the cause of justice.

The claimants further state that the respondents application does not meet the threshold for review as contemplated under Rule 32 of the Industrial Court (Procedure) Rules as there are no errors that are shown on the judgement, there is no discovery of new evidence or need for clarification. That the application is challenging the court reasoning where an appeal should lie and not a review as provided for under section 16 of the Industrial Court Act

The preliminary objections filed noted that:

1. *The application offends the provisions of section 17 of the Industrial Court Act and Rule 32 of the industrial Court (Procedure) Rules and regulations, as the Court has no jurisdiction to hear this matter.*
2. *The application seeks to have the honourable court to sit on appeal over its own judgment*
3. *The application constitutes an abuse of the court process.*

On the preliminary objections, I note that under section 17 of the Industrial Court Act, parties have a right to lodge an appeal where they are dissatisfied by a judgement or ruling of this Court and also under section 16 of the Act, the Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules and this is set out under Rule 32 of the Industrial Court (Procedure) Rules which requires;

(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.

(2) A person seeking review of a decree or decision of the court shall apply to the court by notice of motion supported by affidavit and the Court shall proceed to hear the persons in accordance with section 16 of the Act.

(3) The Court shall, upon hearing an application for review, deliver a ruling allowing the application or dismissing the application.

(4) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.

(5) An order made for a review of a decree or order shall not be subject to further review.

On this basis, the application as filed meets the basic criteria as outlined under the Industrial Court Act and the Rules thereto.

However this application is supported by the annexed affidavit of Grace Njihia, the accountant of the respondent. Affidavits are statements that confirm facts as stated by a party or by a witness to the facts. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order cannot be made authorizing the evidence of such witness to be given by affidavit.

The respondent submitted their case by the call of Grace Njihia, who on her sworn evidence stated that she was conversant with matters before this court, she gave evidence and the claimants had a chance to cross-examine her. This is the same witness who has sworn the affidavit as to the facts before this court. She is the accountant of the respondents and was a witness in this court.

The basis of the claim herein was a case of business closure and staff lay off due to redundancy on the fact that they could not be deployed anywhere else since the respondent had closed its business for good. Grace Njihia was the accountant at this closed entity, the respondent. The respondent may still exist as it had directors or other officers. Grace Njihia as the accountant or former officer of the respondent as stated in her evidence in court under oath is not a director of the respondent. This is as clearly set out under the Companies Act, Cap 486. The director of a company essentially and ordinarily derives powers, authority and mandate from the company where an employee therein is an agent of the directors as this is a person who assists in a particular function required by these directors. The fact that this assisting officer undertaking a particular role cannot be an owner.

An affidavit sworn on behalf of a company shall be made by an officer thereof as under Order 3, rule 2 of the Civil procedure Rules. A former employee in a business that is closed and has under oath confirmed this fact cannot be deemed to be such an officer. Such an officer may have been granted authority to swear an affidavit but not competent to swear an affidavit on behalf of the company and may only swear an affidavit in a matter which affects or concerns their status and not on behalf of the company as defined by section 2, Cap 486. This was clearly outlined by Warsame, J. in ***Dominion Farm Limited versus African Nature Stream and another, HCCC No. 21 of 2006.***

rules of procedure are not made in vain and should not be ignored by parties who are represented by counsel, though the Court note these may be omissions of inadvertent and unintentional defects in use of

procedure which may give substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage such situations for the ends of justice. These are procedures which are not intended to cause prejudice on the opposite party and the court should allow for the sake of substantive justice, this is why the Industrial Court of Kenya exists, not tied to strict application of procedural technicalities in its work and where justice demands allow parties to remedy any defects that are necessary.

I will therefore address the substantive issue before me, that of review of the court judgement and orders made therein.

The exercise of review entails a judicial examination, that is to say, a reconsideration, a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. One procures such examination and correction, alteration or reversal of a former position for any of the reasons of discovery of new and important matter or evidence, on account of some mistake or error apparent on the face of the record or on any other sufficient reason. The court of review therefore only has a limited jurisdiction circumscribed by the definitive limits fixed by the law as set out under Order 44, rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the above grounds is shown; one cannot elaborately go into evidence against and then reverse or order as that would be acting without jurisdiction, and to be seating in appeal. The object is not to enable a judge rewrite a second judgment or ruling because the first one is wrong but rather to address a new and important matter, address a mistake on the record or where established, any other sufficient reason.

The court must therefore establish whether there is an evident omission that needs correction to meet the ends of justice and to prevent miscarriage of justice and thus must correct grave and palpable errors. This was the finding in *Nduhiu Gitahi versus Waruguongo [1988] KLR 621*.

In a case of redundancy, all employees, whether casual, on contract, piece work or seasonal are entitled to notice or pay in lieu of such notice. In the case of the 3rd, 4th and 10th claimants, they had ongoing contracts with the respondent and the court found that they were entitled to termination notice as per their contract and equally notice was due arising from the redundancy. In the judgement, paragraph 42 must be read together with paragraph 49 and noting the amendment that the Court allowed to the respondent on what was stated as admitted claim that comprised notice pay, the notice pay to the 3 claimants is herein payable.

Noting the above correction, the award relating to the 3rd, 4th and 10th claimants will be amended to only retain one month notice pay as due for any employee under a contract. Off-duty allowance will also be corrected, the 3 claimants were on full time contracts and the monthly pay covered their off duty pay unlike the other claimants who were treated as casuals. This amendment had indeed been allowed by this Court .

A counter-claim is a fresh suit where a claimant or respondent in this case should be given a chance to reply. It is an independent action by the respondent as against the claimant. It is a cross-claim and the principles of pleadings which govern a counter-claim are substantially the same as those, which would apply to a statement of claim in a cross-action brought by the respondent against the claimant. Where a claim must comply with the Rules of the Industrial Court or in the case where Order VII, rule 1(2) of the Civil Procedure Rules, then by parity of reasoning a counter-claim must equally comply with the mandatory provisions of Order VII and the relevant rules therein.

This did not stand out as one such case. This was therefore not considered as relevant and in this review, this will not be gone into.

I will therefore make the following reviews;

- a. Zairus Zimuli

- i. Notice pay required under his contract at Kshs. 11,800.00;
- ii. Redundancy notice under section 40 of the Employment Act at Kshs. 11,800.00; and
- iii. Severance pay amounting to Kshs.35, 400.00.

b. Dan Chongo

- i. Notice pay under his contract at Kshs.10,656.00;
- ii. Redundancy notice as under section 40 of the Employment Act at Kshs.10,656.00; and
- iii. Severance pay at Kshs.15, 984.00.

c. Nickson Kavogo

- i. Notice pay under his contract at kshs.11,990.00;
- ii. Redundancy notice as under section 40 employment Act at Kshs.11,990.00; and
- iii. Severance pay at Kshs. 47,960.00.

These are the only reviews found warranted and reasonable to do.

I will therefore grant the above corrections to the extent outlined. Having exercised the court discretion with regard to the respondent/applicant supporting affidavit, costs will be awarded to the claimants.

Delivered in open court this 31st day of July 2013.

M. Mbaru

Judge

In the presence of

Jacob Kipkirui: Court Assistant

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