REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 4/2013

(formerly Nrb 1100/2012)

(Before Hon. Justice Hellen Wasilwa on 20th September, 2013)

GRACE ACHIENG OGOT …..... CLAIMANT

-VERSUS-

SUKARI CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LTD …..... RESPONDENT

R U L I N G

The application before court is the one dated 27.6.2013 and filed on the same day. The application is filed through a notice of motion brought through a certificate of urgency brought under Article 159(2)(c) and (d) of the Constitution of Kenya 2010, order 46 of the Civil Procedure Rules 2010, Cap 21 and Sections 15(1) (A) and (4), 16, 20(A) of the Industrial Court Act 2011 (Act No. 20 of 2011 and Rules 25 and 32(1) of the Industrial Court (Procedure) Rules, 2010 and all other enabling provisions of the Law. The applicants seek orders:-

(a) That this court be pleased to set aside the proceedings of 13th May 2013 and re-open the case to allow the respondent to recall the plaintiff and respondents witnesses to testify afresh.

(b) That this court be pleased to review its own orders made on 12th May 2013 and allow the applicants request to furnish further and better particulars.

(c) The honourable court do direct and/or allow the parties to settle the dispute out of court and report the out- come within a reasonable time to be fixed by the honourable court.

The application is based on the grounds that:-

1. The claimant/respondent has testified and closed her case.
2. The respondent/applicant has offered one witness only and is yet to call three more others to testify.
3. The evidence of the remaining witnesses are to be lead on and cross examined upon, is documentary and failure to put the documents in court will occasion miscarriage of justice.
4. The court will be deprived of material upon which it will base it's balanced judgment and or it's **ratio decindendi.**
5. The objective of the trial is to do justice to parties before court and unless the application is allowed, there is real danger that there will me miscarriage of justice.

6. The claimant has testified and her employment relationship is governed by Human Resource Policy Manual which she has not access to and the Collective Bargaining Agreement (CBA).
7. The claimant/respondent has asserted that she did not have a copy of the Human Resource Policy Manual and she did see it for the first time on record and claimed that it was an unsigned copy and therefore not binding to her case as it was unofficial.
8. The claimant/respondent has a signed copy which has same contents as the one on record and which is computer generated and they wish to make it as part of the court record by providing a similar copy which is signed.
9. The claimant/respondent admits existence of the Forensic Audit report which touched on all aspects of the respondents units which made several recommendation.

10 Public interest involved is so high that unless the respondent/applicant's application is allowed, grave injustice shall be occasioned to all parties including the claimant/respondent because she is still a member of the respondent/applicant.

11 The claimant/respondent was in administration at the contract and so collective bargaining agreement employment and labour relations law will lack factual proof to resolve parties dispute unless Human Resource Policy Manual is made part of the proceedings

12 The respondent/applicant has annexed further list of documents to be brought to the notice of the parties and the court to avoid miscarriage of justice.

13 The claimant/respondent has no reason to fear unless she is hiding adverse information against herself.

14 The orders sought if granted will serve the ends of justice.

The application is supported by the affidavit of one Isaac Sumba Sheunda the chairman of the respondent/applicant herein. He avers that he is aware of what transpired in court on 13th May 2013.

The respondent/claimant on the other hand opposed this application.They filed their grounds of apposition on 2.7.2013 and they aver that the application lacks merit and is an afterthought.They further aver that all the documents sought to be produced by the respondent have substantially and fundamentally been amended and/or doctored and/or altered and/or forged for purposes of answering to the issues raised by the claimant in her evidence already presented in court.They argue that there is no reason that would warrant a review of this court's orders as there is no apparent mistake on the face of the record and neither is there any discovery of new facts. They submit that re–opening the case will greatly prejudice the claimant's case and interests.The respondents also contend that this application is ***re judicata*** having been made orally in court on 13/5/2013 and being rejected. They submitted that the application cannot be granted by court given that rule 32 of the Industrial Court (Procedure) Rules only allows review if there is discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant and could not be produced by him at the time when the decree was made. Given that all the documents (intended to be produced were not only in the custody of the respondent/applicant but were also authorized by the respondent/applicant, the claimant/respondent contend that there is no discovery of a new matter.

On issue of setting the matter out of court, the claimant/respondents submit that the proposal is not made in good faith.

Having heard submission of both parties, the issues to determine are:-

1. Whether the applicants can be allowed to reopen the respondent's case, the respondent having given evidence and closed their case.
2. Whether new evidence can be introduced at this stage.
3. Whether the order for review can be granted.
4. Whether this court can compel parties to explore an out of court settlement.

On the 1st and 2nd issues, the claimants filed their claim on 27.6.2012. The respondents were served with the summons and memorandum of claim and they duly filed their defence on 11.10.2012.

After disposal of some preliminary issues including an order to transfer this case for hearing in Kisumu, hearing was scheduled for 28/3/2013. Hearing didn't take off at this time as the applicants brought in an application to amend their defence which the court allowed. Hearing proceeded on 3.6.2013 when the claimant/respondent gave her evidence in the presence of the respondents and closed their case. On this day the applicant called one witness and the respondents made an oral application to have claimants case re-opened again so that they could cross examine her afresh on some new evidence which they are seeking to introduce. I made a finding that the application could not be allowed at that stage as it would be prejudicial to the claimant. I cited rule 17(1) of the Industrial Court (Procedure) Rule 2010 which states that:-

"Where a party intends to rely on a document that has not been identified in a verifying affidavit filed as part of the pleadings or where no verifying affidavit is filed, a party shall make sufficient copies of each document for the court and serve the other party with a copy before the case is set down for hearing."

The operative words "Before the case is set down for hearing"

In this case, the case case has not only been set down for hearing but the hearing has commenced and the claimant/respondent has already given her evidence and closed her case. The applicants urge this court to allow them re-open the claimants case and cross examine her on new evidence. The rely on Article 159(d) of the Constitution deals with procedural technicalities. I do not find the issue of re-opening the claimant's case a procedural technicality as it goes to the core of the substantive issues which will be coupled with introduction of new evidence. The Supreme Court had to deal with this, issue in the case of **Raila Odinga & 2 Others VS Independent Electoral & Boundaries Commission & 3 Others (2013)** eKLR and dismissed an application to introduce fresh affidavits which the court found was prejudicial to the respondent's case. I am bound by that finding of the Supreme Court and I decline to allow the re-opening of the claimant's case and introduction of fresh evidence as it is prejudicial to the claimant's case. In any case, such evidence would only be possible if the claimant had not closed her case.

On the 3rd issue, the rules on review are well set out in the law and in case law. In the **C. A – Civil Appeal 230 of 2004 (C. A at Eldoret) the learned JJA, Omolo, Bosire, Visram** stated that:-

"whether or not a decision or order should be reviewed is a matter within a judge's own discretion. An applicant to succeed he must place material before court to show any or a combination of the three factors --- - there exist new and important matter or evidence which after exercise of due diligence were not within his knowledge or could not be produced at the time the decree or order was made. Secondly, and in the alternative that there is a mistake or error apparent on the face of the record.Thirdly, and in the alternative, for any other sufficient recover."

The applicants have not demonstrated this fact. On last issue of settlement of matter out court, I believe Alternative Dispute Resolution should be encouraged. S. 15(1) of the Industrial Court Act "quote" Indeed encourages Alternative Dispute Resolution but this is not a compellable issue. The parties must be willing to submit to that process. The applicants are desirous of this attempt which I would encourage.

The upshot is that the orders sought for re-opening of claimant's case and introduction of new evidence is declined. Prayers for review are also declined. I will however urge the parties to explore a settlement and will be willing to stay these proceedings as they make that attempt.

HELLEN WASILWA

JUDGE

20/09/2013

Appearances:-

Claimant/Respondent present

Gichaba h/b Kadima for applicant

CC. Sammy Wamache.

COURT - Leave to appeal is granted. Certified copy of the ruling to be supplied as prayed. Hearing on 8/11/2013. In the meantime an out of court settlement be explored.

HELLEN WASILWA

JUDGE

20.9.2013