



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1090 OF 2010

SYMON ONYANGO OKUMU..... CLAIMANT

VERSUS

SHARAD DAHYABHAI AND 5 OTHERS..... RESPONDENTS

RULING

By an application dated 6th February 2013 and filed in court on 7th February 2013 the Respondents apply for review of the Judgment delivered on 22nd January 2013 on the following grounds among others grounds.

- i. At all times material to this suit, the Applicants were employers and the Respondent an employee within the context of the Labour Relations and the Employment Act.
- ii. The Respondent brought this action against the applicant vide a Memorandum of Claim dated 10th September 2010 wherein the applicants responded vide a statement of response dated 26th October 2010.
- iii. The respondent did not effect service to any of the applicants as required by order 5 rule 7 and no affidavit of service was filed in court.
- iv. The hearing took place without the knowledge of the first applicant herein as he was out of the country at all material times during the hearing of the case and he was in custody of crucial material documents relevant to the case.
- v. The claimant reported to the first applicant thus his evidence is material to a just determination of the case.
- vi. The honourable court proceeded to hear the matter and duly delivered its judgment on the award on the 22nd day of January 2013.
- vii. The Applicant has upon perusing the judgment of the court discovered that there are errors apparent on the face of the record.
- viii. The applicants have also discovered that the previous advocate on record did not advance certain documents in support of the applicants' case to the court without their knowledge, which documents could have led the court to reaching a different conclusion.
- ix. The said documents are important in ascertaining the proper position of the parties and settling the dispute herein justly.
- x. The Applicants have also discovered certain documents which were not in their position at the trial of this case that could have a great bearing in determination of the issues involved herein.
- xi. It is in the interest of justice and fair play that the judgment herein be reviewed and the applicant be allowed to advance the documents in support of their case for better evaluation of the case herein.
- xii. This court has the jurisdiction to hear and determine the matters herein between the parties.

They pray for the following orders.

- a. The honourable court be pleased to allow the firm of Mithega & Kariuki advocates to come on record in place of the firm of M/S Aming'a Opiyo, Masese & Co. Advocates.
- b. The application for review herein be allowed and the same heard on merit.
- c. The costs herein be provided for.

The application is filed together with a Verifying Affidavit of SHARAD DAHYABHAI PATEL and an affidavit of facts the same SHARAD DAHYABHAI PATEL both sworn on 6th February 2013. In the affidavit of facts the Deponent deposes that he is the 1st Applicant and duly authorized by all the other applicants to swear the affidavit, that he is 75 years old and the founding investor of Film Corporation of Kenya for over 50 years, that the Claimant in the main suit (who is the Respondent in the application) and who is hereafter referred to as the Claimant, was an employee of the Film Corporation of Kenya from 1999 to 2004 and again from 2006 to 2010, that he was never aware of the suit filed by the Claimant until judgment was delivered, that there are errors apparent on the face of the record that require correction, that he has discovered new evidence which the previous advocates did not advance and that the new evidence would have led the court to reach a different conclusion, that there were miscalculations under item 9 at page 6 of the judgment as judgment was way above the prayer by the Claimant, that the Claimant was not a member of the collective bargaining agreement and is also not entitled to service gratuity as he worked for only 4 years, that the said collective bargaining agreement was not dated or registered and is the subject of cause No. 371 of 2009 which is pending for determination, that the court awarded notice way over the net salary of the Claimant of Kshs.29,104, that the Claimant was not entitled to leave allowance as he took leave during the period he was in employment, that the Claimant engaged in fraudulent activities against the company, that the Claimant did not come to court with clean hands and that it is in the interest of justice that the judgment be reviewed.

The Claimant filed a Replying Affidavit sworn on 8th April 2013 and filed in court on the same day. He deposes in the Replying Affidavit that he worked for the Respondent from 1994 to 2010 when he was dismissed, that Pearl & Dean was a sole agent of Film Corporation of Kenya operating within the same office and did not hire or pay salary to any of the employees of Kenya Film Corporation, that the Respondents were fully represented by the firm of Aming'a Opiyo and Masese Advocates who had full instructions. A copy of the letter instructing the said advocates to handle the Respondents case is annexed as Exhibit "S001". The Claimant further deposes that judgment was delivered after hearing both parties by viva voce evidence, that the dismissal letter states the Claimant was covered by collective bargaining agreement, that the Respondents application lacks merit and should be dismissed.

The parties appeared before me on 16th May 2013 for the purpose of taking a hearing date for the application when they agreed to proceed by way of written submissions. A further mention was fixed for 13th June 2013 to confirm filing and exchange of the written submissions and to take a date for the ruling.

When the parties appeared before me on 13th June 2013 Mr. Karuga holding brief for Mr. Otieno Arum confirmed filing of the submissions of the Applicant which were filed on 12th June 2013 and by then had not been served on the Claimants advocates. Mr. Murambu for the Claimant informed the court that he did not wish to file submissions and would rely on the replying affidavit, the submissions on record and the judgment. He also informed the court that he was not objecting to Mr. Arum being on record for the Respondents/Applicants although he had expressed doubt over Mr. Arum being properly on record. The court reserved the ruling for 17th September 2013.

I have considered the application and the affidavits filed with the application together with the attached documents. I have also considered the Replying Affidavit and the attached exhibit and the Applicants written submissions.

Section 16 of the Industrial Court Act allows this court to review its judgments, awards, orders or decrees in accordance with the Rules. Rule 32 of the Industrial Court (Procedure) Rules 2010 allows a person aggrieved by a decree or an order of the court to apply for review in the following circumstances;

- a. *If there is discovery of a new and important matter or evidence which after the exercise of 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.*

The applicant herein has raised several grounds in support of his application for review. I will look at each one of them separately.

The first is that the claimant did not effect service of the Memorandum of Claim against any of the Applicants as no affidavit of service was filed in court.

From the court record, there is a Memorandum of Appearance filed in court by Aminaa Opiyo Masese & Co. Advocates for all the Respondents. This is adequate proof of service as the said advocates would not have entered appearance if there was no service. The claimant has also in the replying affidavit annexed a copy of a letter of instructions addressed to the said firm of advocates instructing them to ***“serve legally the summary dismissal to the above named employee with immediate effect, and that your respected firm shall follow through the above matter to judicial conclusion.”***

The letter is signed by Hasmita Patel, the 6th Respondent and is written on behalf of Kenya Film Corporation. It has not been alleged that she had no capacity to give the instructions to the said advocates. She was one of the witnesses for the Respondent and did not allege lack of service.

The Applicants were also not sued in their personal capacity but in their capacity as proprietors of Kenya Film Corporation which was the employer of the Respondent.

For these reasons I find no merit on this ground and dismiss it.

The second ground is that the hearing took place without the knowledge of the 1st Respondent. As in the 1st ground, I find that the 1st Respondent was ably represented by an advocate and dismiss the same.

The third ground is that there are errors apparent on the face of the record. In both the affidavit of facts and the submissions it is not stated what this error on the face of the record is. There is a mention at paragraph 11 of the affidavit of an error in item 9 at page 6 of the judgment. There is also a mention at paragraph 19 that the court awarded notice based on salary above the net salary earned by the Claimant. I have confirmed from the Judgment that there is no error on both as the court used the gross salary of the claimant in both instances and that this is the correct legal position as provided in Section 36 and 49(1) (a) of the Employment Act.

I therefore find that there is no error on the face of the record and dismiss the same.

The fourth ground for review is that there are certain documents that the advocate for the Applicants did not present in support of the applicants case, without their knowledge. This is not a ground for review of a Judgment as provided by the law which I have set out above. I therefore dismiss the same.

The 5th ground for review is that there is discovery of new documents which were not in the possession of the Applicants. The Applicants have not stated what these documents are and why they were not in their possession or where they were found and when. The law relating to discovery of new evidence is clear and specific. They must be documents 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 the decree was passed or the order made.

The applicants have not shown that there are any new documents that were not within their knowledge at

the time of the hearing, or which they could not obtain with due diligence.

I find that this ground too has not been proved and dismiss it.

The last ground is that it is in the interest of justice and fair play that judgment herein be reviewed and the applicant be allowed to advance the documents in support of their case.

In the submissions the applicants counsel has advanced several grounds including the ground that proceedings were not typed prior to court preparing the award and that directions were not taken. A perusal of the record shows that the case was initially fixed for hearing of oral submissions on 26th July 2012. Mr. Tolo appeared for the Respondent on that date and informed the court that he had discussed the case with Mr. Mulango for claimant and agreed to file written submissions. The case was then mentioned severally on 5th September, 5th October, 9th October, 7th November 2012 when the court set the date of Judgment for 22nd January 2013. At all the mention dates, directions were taken by the parties. The issue of typing proceedings before judgment was prepared was not raised by any of the parties. The applicants have also not explained how the typing of proceedings or the failure to do so affected the outcome of the case.

For the foregoing reasons I find no merit in the Respondents' application for review and dismiss the application with costs to the Claimant.

Read in open Court this 17th day of September 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

NO APPEARANCE for Claimants

NO APPEARANCE for Respondent