



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 69/2013

(formerly Nrb No. 1942/2012)

(Before Hon. Justice Hellen Wasilwa on 9th October, 2013)

PETER O. OGIRO CLAIMANT

-VERSUS-

DOMNICAN FRIARS VICARIATE OF E. AFRICA RESPONDENT

RULING

The application before court is the one dated 16.7.2013. It was filed by the claimant applicant herein seeking orders for review of this court's judgment delivered on 25.6.2013. The application was filed under Rule 32 of the Industrial Court (Procedure) Rules 2010 which provides that:-

“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 a 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, judgment or ruling requires clarification or,

(e) for any other sufficient reason”.

The applicant seeks a review of this court's judgment on the ground of discovery of a new and important matter and evidence which after the exercise of due diligence was not within the knowledge of the claimant or could not be produced by the claimant at the time when the matter proceeded. The

applicants also contend that there is a mistake or error apparent on the face of the record, the judgment is in breach of written law, the judgment requires clarification and that there are sufficient reasons to review the said award.

According to the applicant, this court based its judgment on the erroneous view that the claimant's services were based on a contract dated 30.4.2012 and failed to take into account, the previous contract of the claimant where he had been performing similar duties and had been on probation for 3 months in the said contract dated 6.6.2011 to 31.4.2012. The applicant's contention is that having been on probation for 3 months in the 1st contract, it could not be the practice of the employer that during a fresh contract there could be another period of probation as the claimant was not a new employee having served on a year's contract before. The claimant applicant further contends that the claimant was not on probationary employment at the time of termination hence his termination was unfair and unjustified and therefore the procedures for termination under S. 41 and 43 of the Employment Act 2007 apply.

The issue for determination by this court is whether there is any new and important issue that was not within the knowledge of the claimant at the time or if there is an error apparent on the face of the record. A look at the submission of the claimant does not reveal any new or important matter. The contract relied upon by the claimant is the same one this court has had to consider. There is also no error on the record because there is none that the claimant has pointed. The submission by the applicant is that the 2nd contract that the claimant was serving did not entail the claimant serving 3 months probation having served a previous contract. A look at the 2nd contract however does not point to that aspect. The contract marked No. 21 states that the contract period begins May 01, 2012 and ends April 30, 2013.

Paragraph 3 of this contract entitled probationary period and notice of termination states as follows:-

“You will be required to serve a probationary period of three (3) months with effect from the date you report to duty during which time, your employment may be terminated by either party by seven days (7 days) notice in writing or pay in lieu thereof”.

The claimant did sign this contract on 2/5/2012 attesting that he had read and understood the above contract agreement and binding himself to abide by its terms and conditions.

The contention now that he was not on probation at the time of dismissal on 2.7.2012 cannot be true. This was still within the 3 months probationary period as per the contract letter. The provisions of Section 41 and 43 of the Employment Act 2007 did not therefore apply.

There is therefore no ground that would warrant a review of this court's judgment and I therefore dismiss this application accordingly.

HELLEN WASILWA

JUDGE

9/10/2013

Appearances:-

Claimant present in person

N/A for respondent

CC. Sammy Wamache.