



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
INDUSTRIAL COURTS
Cause 285 of 2010

HELLEN WAIKUNU.....CLAIMANT

Vs.

DOTSAVVY LIMITED.....RESPONDENT

RULING

The Application dated 15th June 2012 by the Respondent/Applicant seeks to set aside the Award of 15th December 2011. It is expressed to be brought under the provisions of Section 3(1) of the Industrial Court Act and Rule 32(1)(c) as well as Rule 32(1)(6) of the Industrial Court (Procedure) Rules 2010. The Application is grounded on reasons on the face of the Motion and it is supported by the affidavit of Robert K. Koech.

The Application was urged by Mr. Khasiani while Mr. Oluoch was present for the Claimant/Respondent.

Mr. Khasiani submitted that the Award of the court was without basis in law as findings made were on the footing that the Claim was uncontested. He referred this Court to page 3 of the Award. His submission was that the Applicant was *ipso facto* entitled to the orders sought. He submitted further that it is the Labour Officer who has power to recommend that the employer does pay the employee an equivalent of a months wages as compensation for unjustified termination. In his view the finding that the Court had 'discretion' as stated in page 3 paragraph 3 of the Award was incorrect. His next challenge was that the Members of the Industrial Court were appointed as such under Section 17 of Part III of the Labour Institutions Act No. 12 of 2007. He submitted that Section 31 of the Industrial Court Act No. 20 of 2011 repealed the whole part III of the Labour Relations Act. Further, Section 5 of the Industrial Court Act 2011 sets out the composition of the Industrial Court which does not include members. Therefore as a result of this position in law, Respondent/Applicants submitted that it was an error for the Judge to seek approval from the Members as has been set out at page 4 of the Award.

There is an affidavit annexed to the Application sworn by Kenneth Kipkirui Lang'at the previous advocate on record. He admits that the failure to attend court was due to failure on part of his staff to diarise the case.

The Application was opposed by the Claimant/Respondent who filed a Replying Affidavit sworn on 3rd July 2012 and filed in Court on 11th July 2012. Mr. Oluoch submitted that the application by the Respondent/Applicant was devoid of merit and was an afterthought. He further contended that the hearing date was taken in court in presence of counsel. He referred the Court to the sequence of events which all demonstrated the lack of seriousness of the Applicant. It took a few months to move the Court. He submitted that it was after a delay of 7 months from Judgment and a period of 5 months from receipt of instructions that this case has come to Court. He submitted that no reason has been advanced for delay. The taking of dates in court in presence of counsel and even the service of a Hearing Notice should be considered. He thus prayed for the Application to be dismissed.

The Applicant in brief reply stated that the advocate present in Court was not Mr. Lang'at but someone who held his brief. The delay it was submitted has not prejudiced the Claimant since she has not moved to execute. Counsel submitted that no prejudice will be suffered and thus urged the Court to allow the Application as prayed.

The Court has heard the parties extensively and has considered the rival submissions. The Notice of Motion application together with supporting affidavits and the Replying Affidavit of the Claimant have been extensively referred to. There appear to be some grounds which are not contested. The hearing of the case took place before the Hon. Kosgei in who December 2011 issued an award in favour of the Claimant. This Award is what precipitated the Application before Court.

This Court has been called upon to re-open the case and proceed to hear the Claim afresh. This is because the Respondent was not in Court on the date set for hearing of the case. Is this a fit case to reopen? Has sufficient basis been laid to revisit the matter and hear parties again? In exercising its authority a Court must be guided by the law. The Court is enjoined by Section 3(1) of the Industrial Court Act 2011 to –

.....enable the just, expeditious and proportionate resolution of disputes governed by this Act.

Section 4 established the Court. The Section 4 provides as follows:-

Section 4.(1) In pursuance of Article 162(2)(a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.

(2) The Court shall be a superior court of record with the status of the High Court.

(3) The Court shall have and exercise jurisdiction throughout Kenya.

As seen above, the Court is established pursuant to Article 162 of the Constitution of Kenya 2010.

Article 162(2) and 162(3) provide as follows:-

162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Section 4 (*supra*) confirms that this Court is a Superior Court of record with status of the High Court.

The predecessor of this Court was established pursuant to the Labour Institutions Act Part III and in particular Sections 11 to 27 which were repealed by the Industrial Court Act No. 20 of 2011.

What the new law did was commence a march toward the establishment of this Court pursuant to Article 162(2). The proceedings before the predecessor of the Court were to continue in terms of Section 33. Section 33 of the Industrial Court Act 2011 provides as follows:-

Section 33. All proceedings pending before the Industrial Court shall continue to be heard and shall be determined by that court until the Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar of the Judiciary.

This Court has now come into operation pursuant to the Swearing in of 11 Judges of the Industrial Court on 13th July 2012. The President appointed the 12 Judges of the Court vide a Special Issue of the Kenya Gazette being Gazette Notice No.9797 published as Vol. CXIV—No. 65 of 19th July, 2012.

The case before me was heard by a Judge who had continued to sit in terms of section 33. Was the decision made with assessors proper? The short answer to this is a resounding yes!

Would this Court be minded to re-open the case on the basis of the facts before it? I think the horse has already bolted from the shed. The Respondent had opportunity to be heard, that opportunity was lost when the Respondent failed to attend Court on the scheduled hearing date. The Court is mindful that litigation must come to an end.

There is room for review as per the rules in the final result the application is dismissed with costs.

Dated and Delivered at Nairobi this 30th day of July 2012.

Nzioki Wa Makau
JUDGE