REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 19 of 2010

JOHN GACHAU GITONGA ……………………….. CLAIMANT

VERSUS

MISS NDUTA MBILE ….…………..…….……………………..……………….RESPONDENT

RULING

The Respondent filed a Notice of motion on 4th October, 2012. The Notice of motion was brought under Section 1A, IB & 3A & 80 of the Civil Procedure Act, Cap.21, Laws of Kenya, Order 45 Rules 1 of the Civil Procedure Rules, 2010 and Section 16 of the Industrial Court Act No. 20 of 2011.

The application is seeking an order that the Honourable court be pleased to review, uplift and or set aside the orders made on 28th August, 2012 and all other consequential orders thereof. The application is supported by the affidavit of Miss Nduta Mbile, the Respondent, sworn on 3rd October 2012. The claimant did not file a replying affidavit but made submissions in opposition of the application.

On 28th August, 2012 the court heard this cause by taking the evidence of the claimant and the Respondent. On the same 28th August 2012, the court entered judgment for the claimant as prayed for in the statement of the claim dated 6th January 2011. A decree for Ksh.498, 228.35 was issued in favour of the claimant on 18th September, 2012.

On 25th September 2012, the Respondent filed a notice of motion seeking stay of execution pending an intended appeal against the judgment of 28th August, 2012. On the same date the Application was certified urgent and fixed for i*nter-partes* hearing on 1st October 2012 at 9.00 a.m. On 1st October, 2012, the claimant was not in court. Counsel for the respondent informed the court that a proclamation of attachment through Galaxy Auctioneers had issued against the Respondent in execution of the decree. Counsel also informed the court that the issue being raised was that the claim was fraudulent because there were letters from a labour officer who does not exist. Accordingly, Counsel submitted that there was an error on record and applied to file an application for review pending which a stay of execution, she prayed, should be granted. In the circumstances, the court ordered the Respondent to file and serve an application for review by 5th October 2012 and stay of execution was ordered till 5th October, 2012. The order, the court directed, be served upon the claimant and Galaxy Auctioneers.

On 5th October, 2012 the Respondent had filed the application for review dated 4th October, 2012 and both parties were present in court. The application proceeded to hearing on 9th October, 2012 as scheduled.

Rule 32 of the Industrial Court (Procedure) Rules, 2010 is liberal on the jurisdiction to review. The rule provides that;

"32. (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.

The grounds for review in the body of the notice of motion and the findings of the court on each of them is as follows:

(a) That it is clearly evident from the pleadings and evidence tendered that the claimant's claim is fraudulent as the same had been prepared by a non-existent labour consultant. In her submissions counsel for the Respondent stated that the labour consultant had offices at Mfangano Street. Hence the locality of the offices made it appear suspicious. Thus the consultant is a quark as he has no licence to work as such. In view of that submission by Counsel, the court finds that the consultant exits and there was no fraud on the part of the claimant. This ground for review therefore fails.

(b) The other ground for review is that the demand letters made reference to by the Claimant are from a quark Labour consultant who is not allowed to work as such by the labour offices. Counsel for the Respondent submitted that there was no statutory provision governing the practice of services of human resource management experts. Counsel also referred to the Consultant's business card which reads:

"A.O. JACOB KENYA LABOUR CONSULTANT
Labour laws advisers under Cap
229 & 226, 2007 and wages
regulations herein referred to
as labour agents (Registered
under Cap.499)
Jacob A.N. Kadadee
Chief Dispute Officer/Proprietor"

The card also bears physical and post address of the said consultant. Under Subsection 55 (1) of the Labour Institutions Act, 2007, the Director of Employment is required to keep a register of employment agencies which have been registered under the Act. Further, subsection 55 (2) provides that no person shall carry out business as an employment agency or charge or recover any payment in connection with the procurement of employment through an employment agency. Under Section 3 of the Act, ***"employment agency" means-***

(a) any person, company, institution, agency or other organisation which acts as an intermediary for the purpose of procuring employment for a worker, but does not include newspapers or other publications unless they are published wholly or mainly for the purpose of acting as intermediaries between the employer and the worker; or

(b) employment agencies not conducted with a view to profit, that is to say, the placing of services of any company, institution, agency or other organisation which, though not conducted with a view to

deriving any pecuniary or other material advantage, levies from either employer or worker for the above services an entrance fee, a periodical contribution or any other charge".

In the present case, the respondent has not provided any evidence to show that the consultant was registered as such by the Director of Employment. Further, the consultant in the instant case was not engaged as an employment agency within the statutory definitions so that the services rendered did not entail procuring employment for a worker. The consultant, as stated in the judgment, was engaged by the claimant to invite the Respondent to a conciliatory process which the Respondent failed to take advantage of. In the judgment, the court had therefore found that the Consultant's letter No. AOJ/JGG/2010 dated 29th June 2010 was clear evidence of an ongoing dispute between the parties and concluding in failed conciliatory process. The court therefore, in the judgment, had concluded that both statutory and other conciliatory mechanisms were available to employers and employees so that, the statutory process involving the labour officers was not the only path to pursue conciliation and amicable settlement. The court finds that the consultant did not require any to render such conciliatory and advisory services to the claimant or the Respondent and the ground for review shall therefore fail.

(c) The other ground for review is that the Respondent visited the labour offices at Nyayo House to enquire about the complaint the claimant had lodged against her only to be advised that there was no such claim. Thus the claimant's claim was ungrounded and the same ought to have been dismissed. The evidence and the law on this point is clear. The claimant testified that he went to the "Labour Officer" in 2010 and he took time before coming to court because he was negotiating and he wished to exhaust with the "Labour Officer". The court has no doubt that whatever the claimant called "Labour Officer" was in fact the labour consultant.

Thus, there is no doubt that the claimant never went to the Labour Office as established under the Labour Institutions Act, 2007. He only went to the Labour Consultant.

The only issue of law is whether he was required to go to the labour office within the meaning of the Act before filing his claim in court. The law is clear because Section 87 (1) of the Employment Act, 2007 provides as follows:

"87. (1) Subject to the provisions of this Act whenever—

(a) an employer or employee neglects or refuses to fulfill a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute".

The claimant's claim being primarily about dismissal, the court finds that the claimant was entitled to lodge a complaint to a labour officer or to file a suit in the Industrial Court. He proceeded correctly in filing the suit without first, lodging the complaint with a labour officer. The ground for review will therefore fail.

(d) The other ground for review is that the award given in favour of the claimant as against the Respondent was clearly made in error without giving full consideration to the evidence of the Respondent and the same is very prejudicial to the Respondent and the court ought to review and set aside the same. To support this ground the Respondent in her affidavit has stated as follows:

"7. That in my evidence I indicated that the alleged legal officer has his offices at Mfangano Street which office looks suspicious as it is a matter of judicial notice and fact and also of my own knowledge that all Labour Offices in this country are located at Nyayo House 16th Floor.

8. That I also indicated in my evidence that I had employed the claimant for a period not exceeding one and a half months and that I had cleared al his debts before we parted ways.

9. That the Respondent in his evidence indicated that he worked for me for four years which statement was a lie as I had only engaged him in the month of January and part of February 2008 after post election violence and only when need arose.

10. ……

11. That it is clear from my testimony that I had paid the claimant all his dues during the period of time that he worked for me hence my prayer that this court do review its decision of 28th August, 2012.

12. That I am advised by my advocate I verily believe to be true that there is an error apparently on the face of the record in that the court did not consider and give due weight to all the issues enumerated above and all the others raised during the hearing and the only way to cure the same is by reviewing the same. Copies of the judgment and the decree thereof are annexed hereto as the Bundle of Exhibits marked "MNM2".

13. That suffice to say, the court did not make any deliberations on the issues and evidence of the Respondent in order to reach a conclusion thereof before issuing the award save to say that I was inconsistent without substantiating such an allegation.

14. That it is noteworthy that the court gave undue consideration to an alleged conciliatory process by the parties which could not have been the case as there are no labour offices at the alleged house and further the claimant did not avail in court any report by the conciliator and or minutes of the conciliation meeting.

15. That in the premises, the claimant's claim is not tenable both in law and fact and it is only fair and just that the award herein be reviewed, set aside and dismissed".

The court has revisited the material on the court record and in particular the proceedings of the hearing. What were the inconsistencies in the evidence of the Respondent that the court had referred to in its judgment? The court points out the following:

(i) In cross examination by the claimant, the Respondent had stated that the claimant worked for her at night and for the Respondent's mother during the day. During the examination in chief, she had testified that she paid the claimant "300/= per day".

(ii) The respondent testified that the claimant had taken him to some offices in River Road and she decided to check her case at Nyayo House. This was an inconsistent behavior in the opinion of the court. It was a clear avoidance of the issues in dispute. Why would the Respdoent have checked for her case at Nyayo House when in fact the invitation was at an office in Mfangano Street as per the letter from the consultant. In paragraph 7 of the supporting affidavit the Respondent now admits that it was at Mfangano Street as per the letter Ref. AOJ/JGG/2010. Such is further inconsistency on her part. She had testified she had been taken to River Road.

(iii) In cross-examination she stated that in paragraph 4 of the Reply she had pleaded that the claimant absconded but in fact, she stated, he had been sick. In re-examination, the Respondent had then stated that the claimant was sacked due to absenteeism. In evidence in chief the Respondent had suggested that the claimant was a casual worker because she paid him 300/= per day. In the opinion of the court, these were clear contradictions that were calculated to avoid the issues in dispute. In the circumstances, the court concluded that, thus,

***"In the instant case the Respondent did not take advantage of the conciliation process and* the claimant has proved his case on a balance of probabilities".**

As submitted by the claimant, the court agrees that it was the duty of the Respondent to keep a record of all employment relationship between the parties and as provided for in Section 74 of the Employment Act, 2007. Where an employer fails to keep the record like in the instant case, a balance of probabilities would tilt in favour of the employee. A contract of service for a period of four years like in the instant case would impose the duty to keep records on the Respondent.

Subsection 10 (7) of the Act provides that if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection 10 (1), the burden of proving or disproving an alleged term of employment stipulated in contract shall be on the employer. The court finds that under that Subsection 10(7), the burden of the employer includes prove of existence of the contract of employment which in the instant case, the Respondent failed to prove that the contract did not exist as alleged by the claimant. Instead, the Respondent dwelt on the issues of the validity of the consultant which was not the crucial issue in this case. The Respondent failed to discharge the burden as imposed by the Act. It is notable that even for the admitted period the claimant served, the Respondent did not produce any records.

Accordingly the application for review fails. It is dismissed with costs.

Signed, dated and delivered this 9th day of October, 2012.

BYRAM ONGAYA
JUDGE