REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 234 OF 2019

SERGII GERGEL.....CLAIMANT

-VERSUS-

ARFA AFRA LTD T/A IMAX AFRICA LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 8th January, 2020)

RULING

The claimant filed the statement of claim on 08.04.2019 through Maranga Nyangute & Company Advocates. The claimant prayed for judgment against the respondent for:

a) A declaration that the claimant's services were wrongfully, un-procedurally, unlawfully, and unfairly terminated in the circumstances and the claimant is entitled to compensation of his terminal dues as detailed in the sum of Kshs. 3, 577, 680.00 being:

i. Salary for 4 months for the year 2016 (120,000 x 4) Kshs.480, 000.00.

ii. Salary for 12 months for 2017 Kshs.120, 000 x 12) Kshs. 1, 440, 000.00.

iii. Salary for 11 months in 2018 (120,000 x 11) Kshs.1,320, 000.00.

iv. 1 month salary in lieu of notice Kshs.120, 000.00.

v. NSSF Kshs.10, 080.00.

vi. NHIF Kshs.47, 600.00.

vii. House Allowance Kshs.40, 000.00 per month for 4 months Kshs.160, 000.00.

b) Damages for unfair, wrongful, and un-procedural termination.

c) Cost of the suit and interest at Court rates from the time of filing the claim till full and final payment.

d) Any other relief that the Honourable Court may be pleased to grant.

The Court delivered the judgment on 08.11.2019 for the claimant against the respondent for:

a) Payment of **Kshs.120, 000.00** in lieu of notice by 15.12.2019 failing interest to be payable thereon at Court rates from the date of the judgment until full payment.

b) Each party to bear own costs of the suit.

The claimant was dissatisfied with the judgment and has filed an application for review on 12.11.2019 through Maranga Nyangute & Company Advocates. The application is under Order 45 rule 1 of the Civil Procedure Rules, sections 1A, 3A and 80 of the Civil Procedure Act, section 16 of the Employment and Labour Relations Court Act, 2011, rule 32 of the Industrial Relations Court Rules, 2010 and all enabling provisions of the law.

The claimant prayed for orders:

a) That due to the urgency hereof, the application be certified urgent, service of the same be dispensed with and the application be heard ex-parte in the first instance.

b) That the Honourable Court be pleased to hear the suit again, review, vacate, vary and or set aside the judgment issued on 08.11.2019 by the Honourable Court again.

c) That the costs of the application be provided for.

The application was based on the annexed supporting affidavit of the claimant and upon the following grounds:

a) That there exists an error apparent on the face of the record.

b) That fresh evidence has just been brought to the notice of applicant.

c) That there are sufficient grounds upon which the Honourable Court should be pleased to review its judgment delivered on 08.11.2019.

d) That it is only fair, just and in the interest of justice that the application herein be allowed.

e) That the application has been filed without delay.

f) That no prejudice shall be occasioned to the respondent if the application is allowed.

The applicant states as follows in his supporting affidavit:

1) While the Court found that the parties were in a contract of service, the Court declined to find that the termination of the contract of service was unfair, un-procedural, unlawful and illegal and therefore the Court failed to award damages for the same contrary to the evidence on record, the respondent's witness testimony, the rules of natural justice, the express provisions of the Employment Act, 2007 and the Constitution of Kenya, 2010. The Court relied on the contractual term that the employment lapsed when the resolution was passed removing the claimant and the Court failed to consider that the law on termination of employment and removal of a director were distinct. The Court also failed to consider the addendum to the applicant's contract of employment which increased his salary by Kshs.40, 000.00 for working for the two affiliate respondents. Further the judgment was not clear whether a director was an employee or a representative of shareholders. Further the claimant states at paragraph 6 of the affidavit, *inter alia*, thus, "**It is extremely tough for me to understand how my employment with the respondent could have commenced and run under an employment contract but come to an end through a board resolution since I enjoyed all the benefits of an employee as envisaged in the contract in question.**" The Court further failed to consider that the claimant was a holder of Class D of Kenya Work Permit granted to a foreigner (holding skills and qualifications not available in Kenya) who is offered specific employment by a specific employer. Further the Court had failed to consider that the respondent had alleged in the response that the termination was on account of gross misconduct in which event, the claimant was entitled to be heard and to respond prior to the decision for the termination of his employment was taken. The Court found that the respondent's exhibits disclosed that the claimant did not have a clean record of service yet no warning letters had been exhibited.

2) There is new evidence which was forwarded to the claimant's advocates by the respondent's former CEO but for unexplained reasons the Advocate failed to file them in Court - so that the mistake that occasioned the Honourable Court's failure to make out actual ascertainable sums owed to the claimant by the respondent was by the claimant's advocate and not by the claimant. That the documents show that the respondent owes the claimant a sum of Kshs.3, 544, 941.00 in unpaid salary arrears, unremitted NHIF, NSSF, housing allowance, untaken air tickets, and untaken and unpaid leave. The advocate filed the case with speed and hence the conflicting accounts in the claimant's evidence (as found by the Court in the Judgment) on the amount the claimant prayed for as owing.

3) The applicant further relied on the supporting affidavit of his Counsel Collins Mutabazi Advocate filed on 13.11.2019. The advocate confirms that the respondent's former Chief Executive Officer (CEO) send to him an email on 16.05.2019 forwarding the exhibits now subject of the alleged fresh evidence in the present application. He further states, "**9.THAT however, having been sent the records of the applicant's unpaid wages with no explanation as to how to make out a plausible explanation from the figures in the documents, I under an error of judgment chose not to file the same or amend the applicant's statement of claim as the figures in the same were never explained to me as to how they were arrived at. I mistakenly informed the applicant that "it was too late to change the figures in his claim.**" He informed the applicant as much on 20.05.2019. The Advocate states that at the time he believed that the oral testimony by the applicant and his witness (CW2) would be sufficient. The Advocate proceeds to make explanations and clarifications (which were not told to the Court in pleadings or evidence at the hearing or final submissions) in an attempt to show that the judgment as arrived at would otherwise have been different.

The respondent opposed the application by filing on 22.11.2019 the grounds of opposition through MMS Advocates LLP and the annexed replying affidavit of Kenneth Bett, the respondent's Operations Manager. The grounds of opposition are as follows:

1) The application is fatally defective as the applicant purports to adduce additional evidence which was in his possession and knowledge during the pendency of the suit.

2) The applicant has not established any mistake or error apparent on the face of the record as envisaged in Order 45 of the Civil Procedure Rules.

3) The judgment delivered on 08.11.2019 was delivered in reliance of the evidence adduced by both the applicant and the respondent during the hearing of the suit.

4) The application is therefore bad in law, brought in bad faith, unmerited, an abuse of court process, and prejudicial to the respondent.

The parties filed their respective submissions. The Court makes findings on the application as follows:

1) The affidavits in support of the application are clear that the alleged fresh evidence was in possession and knowledge of the applicant and the applicant's advocate as at 20.05.2019. The hearing of the main suit was on 08.10.2019. The Court finds that the applicant, with due diligence, should have made the evidence available at the hearing but failed to do so. The applicant's advocate by his affidavit has confirmed that a deliberate decision was made for the applicant and with the knowledge of the applicant that the documents would not be filed and exhibited in the suit or amendments made for particulars of the claim to come out in the statement of claim. Rule 33 of the Employment and Labour Relations Court Rules, 2016 provides that a review may be allowed if there exist new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by the applicant at the time the order or judgment was made. The Court finds that the applicant has failed to satisfy the set standard and criteria.

2) The Court has considered the applicant's dissatisfaction with Court's findings and the reasons for the findings in the Judgment. The Court finds that an applicant's dissatisfaction with the finding and reasoning in the judgment does not constitute an error of law or fact apparent on the face of the record as would justify a review. The Court follows the holding by Mativo J in **Bethwel Omondi Okal –Versus- Managing Director KPLC & Co. [2017]eKLR**, upholding **National Bank of Kenya Ltd –Versus- Ndungu Njau (1996)KLR 469 (CAK) at Page 381** thus "**14. Also of useful guidance is the following excerpt from the judgment in the above cited case of National Bank of Kenya Ltd –Versus- Ndungu Njau [8] where the Court stated: "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for**

review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review." The Court finds that the alleged dissatisfaction with the findings and reasoning in the judgment may constitute grounds of appeal and certainly not review towards urging the trial court to change its findings and reasoning in that regard. It was therefore misconceived for it to be submitted for the applicant that the Court should change its finding that the contract of employment was not terminated per the clause on cessation of the applicant's directorship and the Court should instead find that the claimant was unfairly, un-procedurally, and unlawfully terminated and was therefore entitled to compensation. Further the Judgment was clear that the parties were in a contract of employment under which the claimant was designated a director and the contract of employment would lapse if the claimant ceased to be a director – "**director**" being clear to the parties to mean a designation given to the claimant as an employee and then also to mean a duly registered director of the company, the employer.

3) In any event, in urging that the review be allowed, the applicant did not urge any material changes to the Judgment consequential to the review and the prayer was essentially that consequential to allowing the review, the purported new evidence is allowed, the judgment is set aside and the case heard afresh. The court finds that to the extent that the applicant seeks rehearing of the case upon evidence that was in his possession as at the hearing, the application was clearly an abuse of Court process. The Court holds that the review process is not for the purpose of reopening cases that have been concluded and judgment rendered and upon the ground of the applicant solely seeking to change the character of his case to achieve a different outcome in the already determined case. In the opinion of the Court, doing so would open litigation to endless process in which litigants would wait for a judgment or ruling and thereafter, decipher the weaknesses in their cases as found in the judgment or ruling, and seek to cure the weaknesses through reopening the cases in disguised review applications. The Court will not allow litigants to invoke such unfair schemes that are inconsistent with the established tenets of due process. The Court finds that the applicant had knowledge (as at the hearing) of the evidence upon which a reopening of the case for rehearing is being prayed for and clearly, the case falls outside Rule 33(5) of the Employment and Labour Relations Court Rules, 2016 which provides, **"(5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.**" The Court follows the opinion in its ruling in **Yaron Gurevich –Versus-Carnation Plants Limited [2019]eKLR**, and which applies to the present application, thus, "**3). Further the documents to be admitted run into over 477 pages. In the opinion of the Court such amounts to massive evidence that may change the character of the suit completely and will require the claimant to go back and even reopen pleadings. There are no prayers for reopening pleadings and the Court will not allow the parties to prosecute their cases by instalment with the consequence that the purposes of the rules of pleading and pre-trial case management are defeated. The discovery by instalment in a case whose hearing is already underway and is hotly contested like in the instant one will lead to absurd outcomes in which the parties shift and re-shift the character of their respective cases and the scope of the dispute. Under Rule 14(10) of the Court's rules of procedure documents to be relied on at the hearing are to be served upon the other party in 14 days or shorter time the court may order, before the scheduled hearing date. If pleadings have closed, then leave of Court is needed to file supplementary documents. In the instant case leave is being sought after the claimant had closed his case and some of the respondent's witnesses had already testified. As submitted for the claimant, it will be prejudicial. Needless to state, allowing such massive evidence that may substantially change the character of the parties' respective cases is inconsistent with section 3 of the Employment and Labour Relations Court Act, 2011 that requires the Court to facilitate the just, expeditious and proportionate resolution of disputes governed by the Act**."

4) On whether there is any other sufficient reason to justify the review, the Court follows the decision by the Supreme Court of India as cited for the respondent, **Ajit Kumar Rath –Versus- State of Orisa and Others on 02.11.1999** thus, **"….A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified there in**." Rule 33 of the Employment and Labour Relations Court Rules, 2016 identifies grounds for review to include discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the person or could not be produced by that person at the time when the decree was passed or the order made; on account of some mistake or error apparent on the face of the record; if the judgment or ruling requires clarification; or for any other sufficient reason. The Court finds that the applicant in the instant case has not established a reason sufficiently analogous to those specified in the rule. It was submitted that it was sufficient reason that mistakes by learned Counsel for the claimant not to file the documents was such sufficient reason. The Court has already found that the evidence was available to and in the knowledge of the learned Counsel and the applicant but they made a deliberate decision not to file the documents on their understanding and decision that the oral evidence would be sufficient. It was further submitted that the purported new evidence would cure the findings in the Judgment that the claimant's evidence had been inconsistent and contradictory to justify award of the alleged salary arrears or other claims. The Court has already found that the review process is not meant for a litigant to decipher weaknesses in his case and seek to change the character of his case or evidence to cure the weaknesses as found in the Judgment.

Accordingly, the submissions as made for the applicant fall short of establishing any other sufficient reason to justify the review as prayed for.

In conclusion the application for review filed for the claimant on 12.11.2019 is hereby dismissed with costs.

Signed, dated and delivered in court at Nairobi this Wednesday, 8th January, 2020.

BYRAM ONGAYA

JUDGE