REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO 1314 OF 1999

JEREMIAH M KOBAAI …….. PLAINTIFF

VERSUS

TINA M KUKLENSHKI (director of Administration International Centre of Insect

Physiology & Ecology (ICIPE) …….. 1ST DEFENDANT

ECOLOGY (ICIPE) …… 2ND DEFENDANT

SECOND RULING

This court-file vanished from my chambers as soon as I reserved the application after arguments, to enable me consider the issues and determine them. There were no lockable places in my chambers in which the file could be locked up. So, whoever wanted to take the file, for whatever reason I do not know, took it away from unlocked desk drawers in my chambers. So, despite a number of inquiries and serious efforts to trace the file, the file could not be brought to me. Then, suddenly it has been found on my desk, with no indication as to who put it there, from where it had been brought, and why it was ultimately returned after more than one year of nonavailability. As a result, the ruling has been delayed for that period. Hopefully, lockers will be provided, to prevent a repetition of this occurrence in respect of other files or property. Although the act of the person who took the file from me was something not within my contemplation and I did not have a safer place to keep the file pending the writing of the ruling, I apologise for the delay.

The application in respect of which this Ruling is made, is an application for an order of review of an order I made on November 18, 1999 by which the suit was dismissed after it had been struck out on the ground that the suit had been brought against defendants who had been conferred by legislation with immunity from civil suits and the legal process.

The said application for review was filed more than one year after he said striking out and dismissal of

the suit.

In a nutshell, the applicant (plaintiff) told the court at the hearing of the application, that what necessitated the present application for review were certain developments of new matters which had arisen, and also, that the applicant feels that the clear position between the plaintiff and the defendants was not properly presented before the court.

Arguing those two grounds, it was said, in respect of the first one, that the “new issues” which arose, were that following the striking out and dismissal of the suit by the court, the plaintiff, who is the applicant, approached the Ministry of Foreign Affairs for mediation between the plaintiff and the defendants, but the defendants have not respondent to correspondence from the Ministry, thereby clearly indicating their unwillingness to settle the plaintiff’s claim.

It was said that since the Ministry’s attempts to mediate between the parties has failed, “the plaintiff has no other option than to turn to this Honourable court as the enforcer of all its citizens’ fundamental rights with an appeal that this court do review its orders made on 18.11.1989”.

At the hearing, counsel for the applicant/plaintiff also told the court that the plaintiff does not know how the Ministry will intervene and help, “since the Ministry’s intervention to arbitrate is not provided for in the contract of employment”.

Apparently concerning the other ground that the applicant feels that the clear position between the parties was not properly presented before the court at the hearing of the application by the defendants for striking out the suit, the applicant in the instant application said that the immunity of the defendants ought not to operate in a case between the defendants as employers and the plaintiff as an employee, because it would “set a precedent where hundreds of employees would be oppressed and have nowhere to seek redress”; and that “in arriving at the dismissal order made on 18th November, 1999 the court did not consider a miscarriage of justice”. It was said that the immunity cannot be a blanket immunity and every case, particularly involving employees or former employees whose rights have been infringed by the defendants. Finally, it is said in this application that pursuant to the said Ruling, the plaintiff (applicant), has suffered great loss, thus his decision to seek the review of the dismissed orders.

It was finally said for the applicant, that the advocate for the applicant now has a decision of the Court of Appeal, which he should have cited to the court when the application for striking out and dismissal of the suit was heard. It is the caOse of *Tononoka Steels Ltd v Eastern and Southern Africa Trade and Development Bank* , CA Civ Appeal 255 of 1998.

pposing the application, it was argued for the respondent defendants, that there was nothing to be reviewed, and that the applicant has elected to appeal and for that reason the option for review is not available to him. It is said that this is asking this court to sit on appeal against its own orders; no new matter unknown to the applicant has been shown; there has been inordinate delay in bringing the application; there is no merit; the plaintiff has argued the same things argued earlier.

It is now well-known in the legal profession, that while the remedy by way of review may be open to an aggrieved party (a) where an appeal is allowed, (b) where an appeal is not allowed, or (c) on a reference from a subordinate court, this remedy will only be open to him, in any of these three cases, namely (1) if there has been a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or (2) on account of some mistake or error apparent on the face of the record, or (3) for any other sufficient reason. That is the correct interpretation of rule 1(10 of order 44 of

the Civil procedure Rules.

Accordingly, a review will lie even where an appeal was open, and also it will lie only in one of the three circumstances set out in the statute: *Tanitalia Ltd v Mawa Handels Anstalt* [1957] EA 215; and an applicant "will fail if he cannot strictly prove what he alleges if he brings the application on the second of those grounds" (ie that he has discovered some new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, the first of he grounds I have stated above): Kneller, J (as he then was), in *Shah v Dharamchi* [1981] 560, at p 567; the applicant must 'strictly prove that the allegation" on which he bases his application for review: see *Bachu v Wainaina* [1982] KLR 108 (CA). If no mistake or error in the judgment or order is apparent on the face of the record, an application for review on that ground should be dismissed. "The court to which the review application is made shall dismiss the application if satisfied that there is not sufficient of the aforesaid grounds for seeking review; except for mistake or error appearing on the face of the challenged record; and the applicant must strictly prove the grounds for review (excepting mistake or error on the record) failing which the application will not be granted": per Miller, JA (as ht then was), in *Kithoi v Kioko* , [1982] KLR 177, at p 181.

Going over the application and the affidavits on record, as well as the arguments before the court, nothing can be found to justify a review of the orders in question. The advocate for the applicant and the applicant himself, are simply repeating the same grounds which they presented to the court when opposing the claim to immunity. The court was told and it considered, on the defendants' application that this was a contract of employment situation. It was all clear from the pleadings and in the application. The court had them in mind when it arrived at its decision to strike out the suit. The *Tononoka* case was cited and commented upon. It did not influence the court in favour of the plaintiff when deciding on the issue of immunity.

Obviously the court was well aware that in striking out and dismissing the suit, the plaintiff would lose its claim against the defendants. The Ministry of Foreign Affairs' attempts to mediate would not have had a bearing on the decision of the court. Bad presentation at a hearing cannot in itself be a ground for review of a decree or an order, for everyday these courts are full of bad advocacy, bad case preparations, bad witness' testimony, bad affiants with their near perjurious affidavits, bad deponents who depone deceivingly or near that, and generally bad case presentations. But the law does not normally allow revision and correction or afterword up-dates by way of review. Litigation cannot be conducted by postscripts. It is once and for all.

Then, the aspects which are alleged to have been badly presented to the court have not been pinpointed. They have not been explained. They have not been shown to have affected the result of the decision. The reason (if any) for the bad presentation is not offered. Where the good presentation was, and why it was withheld so to await a second bite at the cherry, are not disclosed.

I see in this application a mere attempt to debate the same cause a second time at the same court hierarchy. It is a polite way of telling this court that it was wrong in its decision. But that, in our law, is something to be said at a different level in our court system. You do not tell the same court in substance by way of appeal to itself to correct what you perceive to be its wrong decision. On the matters which were argued and were decided (perhaps wrongly as the party sees it), the court is functus offici o.

There is also this unexplained and inordinate delay in returning to this court. The ruling was made on November 18, 1999. Nearly two years afterwards the applicant returns. And yet the advocate for the applicant simply dismissed the lapse of time without coming back, by denying delay. In his own words "There was no delay in this matter. The applicant has never rested in the pursuit of redress in this

matter." Surely if almost two years' passage without asking the court to review its own orders, in the absence of a good reason for the delay offered, is not inordinate delay in the circumstances, then the court is at a loss as to what can ever be inordinate delay. Having been given no reason for the time lapse, this delay was inexcusable. You do not excuse delay by simply adding that you have never rested in the pursuit of redress in the matter. Which redress and when was it, that was being pursued" Did it prevent you from simultaneously coming to the court during that period" Nothing is said in this direction to convince the court to overlook that aspect of the application.

Taking everything together, the court finds that none of the grounds on which a review can be made of a judgment or order, has been proved, and no mistake or error on the face of the record has been shown. Nor has the applicant shown a new and matter important or evidence which has come up and that he exercised due diligence to discover it but could not get it on the earlier hearing. Which diligence (if any) did he exercise" None is placed before the court in that regard. Whatever he has presented on this application was what was within his knowledge or could be produced by him at the time when the decree was passed or the order made. And no other sufficient reason has been given to the court for which a review can be made in this matter. A desire to better reagitate one's position which was earlier agitated will not alone do as a sufficient reason for reviewing a decree or order. It is not enough to allege, and even show, that a party was shut out and that it is only the court which can redress his claim. In this case the applicant was not shut out. The issue of immunity was argued fully and he was fully herd on that aspect. He cited authority, particularly the Tononoka case which he has raised once more. The same issue of employer-employee, was fully argued for him. In short, he was fully heard, but he lost. He had better look elsewhere on these same matters; because this court having discharged its duty in the matter which was brought to it to determine, its authority in this matter is exhausted and at an end.

This is not a proper case for review.

The application is dismissed with costs.

Orders accordingly.

This Ruling is signed and dated by me at Nairobi this 29th day of May, 2003.

R KULOBA

Judge

29.5.2003.