

**THE REPUBLIC OF UGANDA**  
**IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA**  
**LABOUR DISPUTE MISCELLANEOUS APPLICATION 99/2019**  
**ARISING FROM LDR. No. 152 OF 2017**

**JIM NGANWA & OTHERS** ..... **CLAIMANT**

**VERSUS**

**GEMTEL LIMITED** ..... **RESPONDENT**

**BEFORE**

- 1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
- 2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

**PANELISTS**

- 1. MR. JACK RWOMUSHANA**
- 2. MS. ROSE GIDONGO**
- 3. MS. HARRIET MUGAMBWA NGANZI**

**RULING**

That Applicants through their lawyers Ayigihugu & Co Advocates Plot 7 Luwum Street Kampala filed this Application exparte' after they satisfied Court that service of court process was done by way of substituted service through Newspaper and on this Court's Notice Board was effected on the Respondent in vain.

This Application is brought by notice of motion under Section 82 and 98 of the Civil Procedure Act, and Order 46 rules 1 and 8 of the Civil Procedure Rules, for orders that:

- a) This Court reviews the Judgment and Decree in Labour Dispute Reference No. 152/2017 arising from KCCA/GEN/LC/133/2017 Jim Nganwa& Others vs GemTel Ltd.

b) Costs of the application be provided for.

The grounds of the application are set out in an affidavit deposed by Mr. Jim Nyanwa on his behalf and on behalf of his co-applicants; Steven Wagooli, Timothy Eyatu, Donald Wangi, Doreen Mbabazi and Nadia Kauthum Namubiru, and are summarized as follows:

1. That they filed LDR No. 133 of 2017 before the KCCA Labour Office, which referred the matter to the Industrial Court.
2. That it was their claim that the Respondent was liable to pay them their salary arrears, terminal benefits, payment in lieu of notice as a result of the loss occasioned by the termination of their employment.
3. That their claim was based on the fact that they had been employed by Gemtel Uganda Ltd (incorporated in Uganda) and working for its affiliate known as Gemtel Ltd in South Sudan, in which Gemtel (U) Ltd held 95% shares.
4. That in the claim they sought that, Gemtel Uganda Ltd (incorporated in Uganda) is liable to pay their salaries since at all material times it was paying their salaries.
5. That their claim in LDR 152/2017 was dismissed on the following findings of court:
  - a) Court found no evidence of any Principal/Agency relationship or anything to link Gemtel Ltd South Sudan with Gemtel(U)Ltd incorporated in Uganda.
  - b) Court found no evidence of any principal/agency relationship or anything to link Gemtel Ltd South Sudan t/a Gemtel green network with Gemtel Ltd incorporated in Uganda.
  - c) Court was unable to ascertain which of the companies was the holder of the bank Account which was intended to show that the Claimants received salaries from Gemtel Ltd.
  - d) There was no evidence to show that there was any connection between the 2 companies Gemtel Ltd South Sudan t/a Gemtel green network with Gemtel Ltd incorporated in Uganda.
  - e) That the accounts were not sufficient evidence to establish employment relationship between the applicants and Gemtel Ltd incorporated in Uganda.

That Mr. Jim Nganwa, who was the finance and Administrative Officer of the Respondent, was charged with the responsibility of keeping the documents, files and data of the Respondent, but he did not have most of the documents at the time of filing their claim before the labour officer because he lost the 2 laptops which contained the said documents when his properties including 2 laptops were robbed from his home. That the robbery was reported at Seeta Police Station vide ref. S/D/REF/04/07/01/2016, Police report attached as Annex. "A", but despite exercising due diligence to recover his properties, at the time of filing the claim he had not recovered them, therefore he did not produce most of the evidence at the trial.

That he recently recovered his property and discovered new and important evidence which he and his co applicants did not produce at the time of passing the judgement and decree and if brought to the attention of court, will change its mind because it addresses all the issues raised in the Judgement and decree as detailed in the Affidavit in support.

### **SUBMISSIONS**

It was submitted for the Applicants that the labour officer at KCCA handling KCCA/GEN/LC/133/2017 made a reference to this court which was registered as, Labour Court Reference No. 152/2017, seeking the payment of inter alia, salary arrears from the Respondent, whom they claimed was their employee because it posted them to work with Gemtel Gt Green Network South Sudan . However, Court dismissed their claim on the grounds that there was no evidence to show that there was a principal Agency relationship between the South Sudanese affiliate and the Respondent Company or that the Respondent had full control of its internal management even though it was purported to be the majority shareholder. The Applicants were aggrieved by the decision hence this application for a review of the award of the Court.

Counsel cited section 82 of the Civil Procedure Act and O46 r1 of the CPR as the basis for court to review its judgment as follows:

*Section 82 of the Civil Procedure Act cap 71 provides that any person aggrieved by a decree or order from which an appeal is allowed but no appeal has been preferred or by a decree or order in which no appeal is allowed may apply for review of judgment to the Court which passed the decree or order, and the Court may make such order on the decree or order as it thinks fit.*

*Order 46 rule 1 of the Civil procedure Rules provides that any person considering himself or herself aggrieved*

- a) By a decree or order for which an appeal is allowed but from which no appeal has been preferred or*
- b) By decree or order from which no appeal is hereby allowed and who from discovery of new and important matter or evidence which after the exercise of due diligence was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order against him or her, may apply for a review of judgment to the court which passed the decree or order for review.*

Counsel summed the grounds for review as:

- 1) Discovery of new and important matter of evidence
- 2) Error apparent on the face of the Record and
- 3) Sufficient reasons

He argued that the Applicants' reason for review was discovery of new and important matter of evidence. He also relied on O46r 3(2) which he quoted as follows:

*"Under O.46 r3 (2)Grant of application*

*Where court is of the opinion that the application for review should be granted it shall grant it except that no such application shall be granted on the ground of discovery of new matter of evidence which the applicant alleges was not within his or her*

*knowledge or could not be adduced by him or her when the decree or order was passed or made without strict proof of the allegation.”*

He also cited **Emma Obukullo Vs Walter Arnold LDMisc. Application No.73**, in which this court’s holding was to the effect that where the basis for review was discovery of new and important evidence, the evidence must not be within reach of the applicant. In this case the applicant had not adduced any new evidence to show that the evidence was not in his possession at the time he testified or that if it was brought to the attention of court, it would be able to make court change its mind. He also cited **Nakivubo Chemist (u) Ltd 1979 HCB and Miscellaneous Application No 497 of 2014 Kalokala Vs Nduga David** in which Hon. Stephen Musota stated that:

*“That the discovery of new and important evidence which after due diligence was not within the applicant’s knowledge or could not be produced by him or her at the time when the decree was passed on the Order was made.”*

It was his submission that the discovery of new and important matter of evidence which was not within the applicants knowledge or could not be produced because of a misfortune of the robbery in which Mr. Nganwa’s lost 2 laptops which contained all the Company documents, data and files was therefore ground for review. He went ahead to list the new evidence, as stated in Mr. Nganwa’s affidavit in support and how it would change courts mind and prayed court grants the application

## **DECISION OF COURT**

We have carefully considered Counsel’s submissions, the Notice of Motion and the Affidavit in support of the Application and find as follows:

Section 82 of the Civil Procedure Act cap 71 provides that, *“... any person aggrieved by a decree or order from which an appeal is allowed but no appeal has been preferred or by a decree or order in which no appeal is allowed may apply for review of judgment to the Court which passed the decree or order, and the Court may make such order on the decree or order as it thinks fit.*

Order 46 rule 1(b) of the Civil procedure Rules also provides that any person considering himself or herself aggrieved

a) ...

b) *By decree or order from which no appeal is hereby allowed and who from discovery of new and important matter or evidence which after the exercise of due diligence (emphasis ours) was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order against him or her, may apply for a review of judgment to the court which passed the decree or order for review.*

It is trite law that for a court to be moved to review its own decree or order the Applicant must prove that:

a) *He or she had discovered new and important matter of evidence which in spite of the exercise of due diligence was not within his knowledge at the time the judgment or decree was entered.*

b) *There is an error on the face of the record, the error must be manifest and clear and no court would remit such an error to remain on the record such as a wrong application of the law or failure to apply the appropriate law (see **FX Mubuke vs UEB HCMA No. 98/2005**.*

c) *That there is sufficient cause to warrant the review of the decree similar to discovery of new evidence or an error apparent on the record.*

From the perusal of the application, it appears that the Applicants rely on reason (a) that despite exercising due diligence, they were not able to produce the evidence required before judgment was passed in LDR 152/2017, due to a misfortune of the theft of 2 laptops which contained the said evidence.

Mr. Nganwa in paragraph 8 of his affidavit in support of the Application, deposed that, as the chief Administrative officer of the Respondent he was charged with keeping some of the Respondent's documents, files and data, some of which were on the 2 laptops which were stolen. That he reported a case of theft at Seeta Police Station, vide ref. S/D REF/04/07/01/2016 and attached a copy of the report as annexure "A". The police report shows that he lost 2 laptops among other items which contained evidence relating to the Respondent and its affiliates in South Sudan. He was therefore unable to produce the evidence required at the trial, despite exercising due diligence to recover the stolen property. He states under paragraph 15 of the Affidavit that, he recently recovered his property and discovered new and important evidence which he and his co applicants did not produce at the time of passing the judgement because it was not within his reach due to the misfortune of the theft of the laptops. He further stated under paragraph 11 of his supplementary affidavit filed in court on 17/06/2017, that *"I received a call from someone who told me that he had one of my laptops and under paragraph 12. That I met the person in kampala and he handed over the laptop with some documents."*

Mr. Ngangwa attached a police report Marked "A", showing that 2 laptops were among the items stolen from him in a robbery which he reported to the Police vide reported to Seeta Police vide REF/04/07/01/2016. Therefore the fact that the laptops purported to contain the evidence which was required but was not availed at the time of filing the claim because they were stolen and their theft was reported to police and the fact that there is nothing on the record to connect or link the recovered laptops to the laptops reported as stolen, suggests that there was no reason why these laptops and the evidence contained in them could not have been availed before judgment was passed.

We are not convinced that an unidentified person could have called Mr. Nganwa and handed him a laptop which was reported to Police and the Media as stolen without police intervention. Nothing on the record indicates that the laptop was recovered by Police, or that it was actually one of the laptops that was reported as stolen. In the circumstances the laptop

and evidence recovered from it is doubtful thus rendering the misfortune of the robbery as insufficient cause for review of the judgment.

There is also no evidence to show the due diligence that the Applicants claim to have exercised. Save for the police report marked as "A", there is no evidence at all to show that the Applicants or their lawyers took steps to try and recover the laptops as stated in the Affidavit in support. We are not convinced that any due diligence was exercised by the Applicants.

Consequently, this application lacks merit, and is dismissed with no order as to costs.

1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE

2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1. MR. JACK RWOMUSHANA

2. MS. ROSE GIDONGO

3. MS. HARRIET MUBAMBWA NGANZI

DATE 30/07/2020

  
  
