

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE MISC.APPLN. 165OF 2019
ARISING FROM LDA NO. 05/2017.

SURE TELECOM . **.....APPLICANT**

VERSUS

BRIAN AZEMCHAP **..... RESPONDENT**

BEFORE:

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

PANELISTS

- 1. MS. ROSE GIDONGO**
- 2.MR. RWOMUSHANA JACK**
- 3. MR ANTHONY WANYAMA**

RULING

This application is made under section 40(2) of the Labour Disputes (Arbitration and Settlement) Act 2006, section 82 of the Civil procedure Act, cap 71 of the laws of Uganda, section 33 of the Judicature Act cap 13 (as amended by order 43 and 52(1) and (3) of the Civil procedure Rules SI 71-1 seeking review of the award of this court made onon the following grounds:

- a) That the honourable Court entered an award in the matter of Brian Azemchap vs sure telecom LDA No.005 of 2017.
- b) That there are errors apparent on the face of the record
- c) That the said errors resulted in miscarriage of justice.

- d) That the applicant will suffer significant loss if the application is granted
- e) That in the interest of justice and equity this application should be granted

The affidavit in support of the application is to the effect that

- a) The panel having held that the court had no power to determine the question of fact without respondent in this application went ahead to determine the question of fact and mixed law and fact
- b) The panel went ahead to determine the questions of fact based on evidence when there was no record of appeal.
- c) That the court determined the appeal based on general ground of appeal to the detriment of the respondent
- d) That the amount awarded to the Respondent was not based on any objective calculation justified by the respondent

REPRESENTATION

The Applicant was represented by Mr. Mugalula Patrick of M/SKatende, Ssempebwa & Co. Advocates and the Respondent by Mr. Mwanje of Kaddu& Partners Advocates.

SUBMISSIONS

Whether this honourable court should Review its award on LDA No. 5/2017?

Both parties were given timelines within which to file their submissions but both did not meet the timelines. Counsel for the Respondent made his submissions on 19/11/2019 and the Applicants on the 6/12/2019, prompting the Respondents to file supplementary submissions on 19/02/2020.

The Applicant's Case

It was the submission of the Applicant that this court should review its award in LDA No. 005/2017, because there are various errors apparent on the record in the award. Counsel cited **Edison Kanyabwera vs Pastori Tumwebaze (CA, No. 6 of 2004) [2005]** , **Mugisha vs Equity Bank Industrial Court Misc appl. No.70/2017**, for the

description of error apparent on the record to mean an evident error which does not require any extraneous matter to show its correctness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error may be one of fact, but it is not limited to matters of fact and includes error of law.

It was Counsels submission that the matter before this court for review had the following errors:

1. That this court having held in the same award that it had no jurisdiction to determine questions of fact in this case, went ahead to determine questions of fact making findings of fact whereas no leave had been sought or granted for such findings to be made.

Court unilaterally framing an issue of fact, that it had already rejected as being untenable since no leave was sought to raise questions of fact. Counsel cited **Lubanga vs Ddumba CA No.10 of 2011[2016]**, which differentiated the question of law and fact as follows:

“ A question of law is about the correct legal test is, as contrasted with a question of fact, which is concerned with what actually took place between the parties to the dispute. When the issue is whether the facts satisfy the legal test, then a question of mixed law and fact arises.

Where a second appeal in a civil cause, the grounds of appeal are not of law but of findings of fact or mixed law and fact and then such grounds are wrong in law and are either abandoned by the appellant or are struck out by court : see; Mitwalo Magyengo v Medad(supra) see also the Kenyan case of MaianaVs Mugiria [1983]KLR78.

He contended that the Court at page 11, framed an issue for trial on Appeal as; *whether the Appellant was given a fair hearing before he was terminated?* yet it was an issue of both mixed law and fact, which offends the rules under which an appeal was brought. He further contended that apart from being in contravention of section 94(2) of the Employment Act 2006, it was inconsistent with the rest of the award which struck out

grounds 1,2, and 3, which were of mixed law and fact. Therefore, the unilateral framing of this issue by Court, was an error apparent on the face of record, since the issue was a question of fact, because it required court to make a finding as to what happened between the parties.

Therefore, by entertaining this ground as framed, yet it struck out grounds of mixed law and fact, made the Courts award inconsistent with itself and the law and also offended the rules governing the framing of grounds of appeal in this Court. He cited **Bureau Veritas vs Davlin Kamugisah LD Misc. Application No. 54 and 64 of 2017** for the same legal proposition.

He insisted that the jurisdiction of the Industrial Court when dealing with appeals from the labour officer(s) is clearly set out under Section 94 of the Employment Act, 2006, which this court cited, and it is restricted to matters of law forming part of the decision of the labour officer.

The court was also faulted for making findings of fact whereas no record of Appeal was filed in this matter upon which Court based those findings. Counsel insisted that no record of Appeal was prepared and submitted to the parties therefore there was no basis upon which court could make findings, therefore the Appeal should have been restricted on matters purely of law since the court had neither seen any witness or reviewed any documents in order to make a finding of fact, therefore it erred to make this finding especially given that no leave was sought by the Respondent to appeal on questions of fact. He further relied on **Edison Kanyabwera(supra)**.

Counsel also contended that the Court went ahead to determine a general ground of Appeal to the detriment of the Applicant and without the Applicant being heard on the same since the ground was imprecise and too general. He argued that this ground goes to the tenets of a fair hearing and to admit such a ground gave the Respondent opportunity to go on a fishing expedition. He argued that a ground of Appeal had to be clear and concise showing the error of the court which is being challenged so that the

Respondent to the Appeal and indeed the Court can clearly understand the issue being raised by the Appellant. He contended that accepting such a ground was not only setting a bad precedent but also caused a grave injustice to the respondent.

It was also his submission that the Court awarded general damages in the absence of any judicial exercise of discretion or judicious explanation of the basis of the same manifestly excessive sum. He contended that the award of USD450,000 was excessive especially given that the Respondent was paid Ugx. 150,000,000/- on his dismissal. In his opinion the discretion of court was not properly and judiciously exercised in making this award which was an errors apparent on the face of the record.

In conclusion he prayed that the Court should review its award and set aside its award in LDA No.005/2017 and set it for retrial in light of the demonstration by the Applicant of the errors on the face of the record.

In reply Mr. Mwanje Steven for the Respondent, submitted that the Application was brought under section 40(2) of the Labour Disputes (Arbitration and Settlement) Act, section 82 of the Civil Procedure Act, Orders 43 and 52 of the Civil Procedure Act, seeking for an order to correct errors of law of the award issued by this court. It was his submission that the Applicant was in essence appealing against the said decision as provided under O43 of the CPA and seeking review under Section 82 of the CPA.

He stated that the Respondent filed an affidavit in opposition to this application. He raised a Preliminary point of law to the effect that the Application was an attempt by the Applicant to argue an Appeal in the guise of an application for review. He argued that the application was brought under the provisions of Order 43 of the Civil procedure Rules which provides for the right of a party to appeal against a decision that he/she feels aggrieved about. He cited section 94(3) of the Employment Act, which provides that the Industrial Court has power to confirm, modify, or overturn any decision from which an Appeal is taken and the decision of the Industrial Court in such case shall be final. Therefore, the Applicant had no right of Appeal.

In the supplementary submissions Counsel argued that according to Section 82 of the Civil Procedure Act and Order 46 rule 1(1b), the party seeking review must be aggrieved and the grounds upon which a review can be granted were well defined in **FX Mubuuke v UEB Misc. Appln No.98/2005** as follows:

- i. *That there is a mistake manifest or error apparent on the face of the record.*
- ii. *That there is discovery of new and important evidence which after exercise of 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 or the order made.*
- iii. *That any other sufficient reason exists.*

It was his submission that although the Applicant relied on grounds that there were errors apparent on the face of the record, the grounds of the application are not as apparent and would require this Court to carry out an investigation, to establish the facts, which was contrary to the holdings in **Batuk K. v Surat Borough Municipality & Ors (1953) Bom 133, Fx Mubuuke(supra)**. He also cited **Lalwak Alex v Opio Mark miscel. Appln No.0058 of 2016**, which distinguished an error apparent on the record with a mere erroneous decision as follows:

".. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record ... that mere error or wrong view is certainly no ground for review although it may be for an appeal."

According to him the Court went on to state that it would not be sufficient to ground of review that another judge could have taken a different view on the matter, or that court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review but could be a ground for appeal. He insisted that the grounds as raised in the Applicant's affidavit and the subsequent submissions did not qualify as grounds of review as stated

in **Lalwak**(supra) but qualify as grounds for appeal because they are not self - evident and require elaborate argument as evidenced by the submissions of Counsel for the Applicant, therefore they should be dismissed with costs to the Respondent.

DECISION OF COURT

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 to the Court which passed the decree or order for a review of the judgement.

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 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 /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 judgement may apply to the court which passed the decree or order for review.

It is the law that for a court to be moved to review its 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 Mubuuke 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.*

After carefully perusing the application, the affidavits in support and in opposition and both Counsels submissions, we find that whereas the Applicant seeks Court to review its decision in LDA No. 005/2017, on the ground that there are errors apparent on the record, which is if not addressed will occasion gross miscarriage of justice to it, the grounds as framed and the submissions on the Affidavit in support of the application showed that the error as stated by Counsel was not so apparent because it required elaborate argumentation by Counsel to establish the errors. It would therefore, require Court to also carry out an investigation to establish the errors and in doing so Court may overturn its decision which is contrary to the purpose for review.

It is settled matter that a review of a judgement or award is strictly meant to correct self-evident errors or omissions on the part of the Court, because once it issues a decree or order, it is rendered functus officio. A review is therefore an exception, intended to correct apparent errors and not to change the decision of the court. As stated in **Lalwak Alex vs Opio Mark miscn Appln. No 0058/2016**, “... *if the court reached a wrong conclusion of law, in circumstances of that nature, it could be a good ground of appeal but not for review otherwise court would be sitting in appeal on its own judgement which is not permissible in law...*”

The grounds as framed by the Applicant are asking court to reverse its decision on the basis that, it incorrectly applied the law and particularly misconstrued Section 94 of the Employment Act. The Applicant also questions the Court’s discretion to award the quantum of damages it awarded to the Respondent, which it considers, to be excessive and therefore it improperly exercised its discretion.

The Application therefore seeks Court to reverse its decision and not to correct the errors or omissions apparent on the face record, which is not acceptable in law, the errors as stated do not meet the criteria for review, and as stated in **Lalwak**(supra)could stand as grounds for appeal. Having rendered its decision, this Court is functus officio and the only remedy for the Applicants would be to appeal, although we are cognisant of the fact that the Industrial Court is the last Court of appeal in cases where an appeal arises out of the Labour officer's decision.

This notwithstanding, the grounds as framed in this application do not meet the criteria for review, the application, is accordingly dismissed with no orders as to costs.

Delivered and signed by:

1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE

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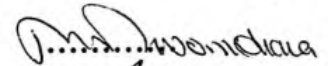
2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

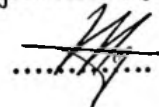
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DATE.13/03/2020