REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 42 OF 2017

NICHOLAS ISIKA PHILIP.....APPELLANT/APPLICANT

VERSUS

ITAL BUILD COMPANY LTD.....RESPONDENT

RULING

1. The Appellant herein filed an application dated 15/9/2020 brought pursuant to the provisions of section 3A of the Civil Procedure Act, Order 45 Rule 1(b) and Order 51 Rule 1 of the Civil Procedure Rules 2010, Article 165 of the Constitution of Kenya 2010 seeking principally an order that this court reviews its ruling rendered on 21/11/2019 and order the transfer of this Appeal to the Employment and Labour Relations Court. It also seeks that cost thereof be in the cause.

2. The application is premised on grounds set out on the body thereof and the supporting affidavit of the Appellant applicant herein sworn on even date. The Appellant/applicant's case is that he had lodged an appeal to this court and while waiting directions thereon, the respondent filed an application dated 15/12/2017 seeking to have the memorandum of appeal and the record of appeal struck off for failure to incorporate a certified copy of the order appealed from as well as an order dismissing the appeal for want of prosecution. It was further the applicant's case that this court vide its ruling dated 21/11/2019 dismissed his case on grounds that the court lacked jurisdiction since the dispute being a work injury related one ought to have been filed in the Employment and Labour Relations Court. It was also the applicant's case that following the decision of the Supreme Court of Kenya in **Petition number 4 of 2019 Law Society of Kenya Vs. Attorney General & Another [2019] eKLR** where it held that matters relating to work injury benefits that had been instituted under previous regimes should proceed and be determined by those courts as the litigants have legitimate expectation. Finally, it was the Applicant's case that the dismissal of the suit by this court was an error apparent on the record and which calls for a review of the same pursuant to the Supreme Court's decision aforesaid and upon review, the matter be transferred to the Employment and Labour Relations Court for determination.

3. The application was strenuously opposed by the respondent whose director Vittorio Veneziani swore a replying affidavit dated 25/11/2020 where he deponed *inter alia; that the Supreme Court delivered its judgement on the constitutionality of section 16 of the Work Injury Benefits Act on the 3/12/2019 when it held that the said provision was constitutional; that the application has been made with unreasonable delay; that the applicant has not shown that he will suffer any substantial loss unless the order is made.*

4. The application was canvassed by way of written submissions. The Applicant's submissions are dated 19/1/2021 while those of the respondent are dated 27/1/2021.

5. Learned counsel for the Applicant submitted that there has been discovery of new and important matter which after the exercise of due diligence was not within the knowledge of the applicant at the time the order was made namely that vide **Petition No. 4 of 2019** the Supreme Court on 3/12/2019 ruled that section 16 of the Work Injury Benefits Act was constitutional and that matters that had been instituted under previous regimes should proceed and be determined as such as the litigants had legitimate expectation. According to counsel, the said discovery necessitates a review of this court's ruling dated 21/11/2019 which had heavily relied on a decision of the high court in which an appeal thereof was pending at the Court of Appeal which was subsequently set aside by the Supreme Court. It was submitted that the dismissal of the appellant's case prejudiced him in that he is now forced to file a fresh appeal when timelines have already elapsed. It was submitted that this court has inherent jurisdiction under section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice. It was finally submitted that the applicant's appeal is so crucial to him that without a review or an order transferring it to the Employment and Labour Relations Court, the result will be a huge travesty of justice as he would have lost a chance of appealing. Counsel cited several cases namely **Khalif Sheik Adan V. Attorney General ELC No. 20 of 2018, Erick Omeny V. Cabinet Secretary, Ministry of Industrialization, Trade& Enterprise Development Florah Mutahi & Another [2020] eKLR, China Road & Bridge Corporation V. Kimayu Mboo [2020] eKLR.**

6. On behalf of the respondent, learned counsel raised two issues for determination namely; whether the court should review its ruling and

whether the applicant's appeal has high chances of success. On the first issue, it was submitted that the applicant has not satisfied the conditions imposed by section 80 of the Civil Procedure Act and order 45 Rule 1(b) of the Civil Procedure Rules as there is unreasonable delay in filing the application since the ruling was delivered on 21/11/2019 while the application was filed on 16/9/2020. It was also pointed out that the Supreme Court Ruling now relied upon was delivered on 3/12/2019 long after the impugned ruling and that the delay offends the tenets of equity and should not be excused. As regards the second issue, it was submitted that the applicant's appeal has no prospects of success whatsoever as the copy of the order issued by the trial court had not been filed as part of the record of appeal. The respondent sought for the dismissal of the application with costs.

7. I have given due consideration to the application, the rival affidavits as well as submissions by counsels for the parties herein. It is not in dispute that the applicant had lodged his appeal herein in time but delayed to prosecute it prompting the respondent to file an application seeking for its dismissal on grounds that the same was defective and for want of prosecution. This court upon perusing the same established that it lacked jurisdiction to handle the matter in view of the fact that the subject matter is a work injury dispute which ought to have been lodged at the Employment and Labour Relations Court. This court dismissed the suit for want of jurisdiction vide its ruling dated 21/11/2019. It is also not in dispute that the Supreme Court in Petition No.4 of 2019 delivered a ruling dated 3/12/2019 where it upheld the constitutionality of section 16 of the Work Injury Benefits Act and upheld the Court of Appeal decision that ''…. *claimants in those pending cases have legitimate expectations that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked.''*

That being the position, I find the issues necessary for determination are firstly, whether the applicant has furnished sufficient reasons to warrant and order for review of the ruling dated 21/11/2019 and secondly, what orders can the court make?

8. As regards the first issue, the remedy for review is found in section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

> ***"Any person who considers himself aggrieved-***
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> ***a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
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> ***b) by a decree or order from which no appeal is allowed by this Act, may apply for review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.''***
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> *Order 45, Rule 1 of the Civil Procedure Rules provides* for the application for review of decree or order. It sates:
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> ***''1.(1) Any person considering himself aggrieved-***
>
> ***a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or which could not be produced by him at the time when the decree was passed or the 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 or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.***
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> ***(2) A party who is not appealing from a decree or order may apply for review of judgement notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when, being respondent, he can present to the appellate court the case on which he applies for review''***

The Applicant's gravamen is that there is a new and important matter that has been discovered and which had not come to the knowledge and attention of the applicant at the time of the ruling dated 21/11/2019 namely that the Supreme Court's decision dated 3/12/2019 which upheld the Court of Appeal's decision that section 16 of the Work Injury Benefits Act is constitutional and which directed matters instituted under previous regimes to proceed and be determined as such. The applicant contends that his appeal that had been pending ought to have been determined as such and hence the need for review of the ruling and thereafter the matter be referred to the ELRC for determination.

9. On the issue of the applicant stumbling on new evidence, it is noted that the ruling was delivered on 21/11/2019 whereas the Supreme Court decision was delivered on 3/12/2019 ten days afterwards. Since the Supreme Court had not made a decision as at 21/11/2019 then that cannot be said to have been a new matter not within the knowledge of the applicant at the time. It could have been near impossible for the Applicant to have purported to know the mind of the apex court as the said court had not yet made a decision and hence there could not have been anything to be produced by the applicant at the time of this court's ruling. It is clear that there was no new matter in existence at the time of the delivery of the ruling by this court to entitle the applicant to seek for review since the event creating the new matter took place after the ruling had been delivered. There were thus no new matters that could not be obtained by the applicant even with due diligence being used on or before the delivery of the ruling on 21/11/2019. I find the Applicant has not demonstrated the existence of new evidence which he could not get even after exercising due diligence.

10. The Applicant has also claimed that there is a mistake or error apparent on the face of the record. He has maintained that his appeal should not have been dismissed but be sustained or in the alternative have it transferred to the Employment and Labour Relations Court for determination. The applicant has sought reliance on the **Supreme Court decision in Petition No.4 of 2019** which upheld the constitutionality of section 16 of the Work Injury Benefits Act and that any pending matters in courts were to be determined under the then prevailing regimes since the litigants have legitimate expectations. Learned counsel for the applicant has pointed out that this court had relied on a decision by Ogola J in **Juma Nyamawi & 5 Others V Attorney General; Mombasa Law Society (Interested party) [2019] eKLR** which was later overturned by the Supreme Court. The applicant now seeks to convince the court that the Supreme Court's decision dated

3/12/2019 is clear indication that there is an error apparent on the face of the record meriting an order for review. However, I am not persuaded by the said argument because this court had the time agreed with the findings of a concurrent court and by that time the Supreme Court had not ruled on the matter. The Applicant has now approached the court armed with the said decision by the apex court seeking for a review of the ruling. From the submissions of the applicant's counsel, it is clear that the applicant is blaming the court for dismissing his suit which ought to have been determined under the previous regime of laws or transfer it to the court with jurisdiction. That being the position, the ruling herein according to the applicant was an erroneous conclusion of law and it follows therefore that the same cannot form a basis for review as by doing so will amount to sitting on appeal from its own order. That scenario is not tenable and the only recourse for the applicant is to lodge an appeal. In the case of **Origo & Another V. Mungala [2005] 2KLR** the court held as follows:

> ***"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end.''***

Similarly, in the case of **Nyamogo & Nyamogo V Kogo [2001] EA 170** where the court held as follows:

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points of law where they may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.''***

Based on the above authority, I am satisfied that the Applicant herein has not established that indeed there is an error apparent on the record. If the Supreme Court later came up with a different decision favourable to the applicant, the suggestion that this court should go back to its decision and change it so as to suit the decision of the apex court is misplaced. It is noted that the decision by the apex court was made long after this court's ruling was made and hence there is no error apparent on the record as claimed by the applicant. If the applicant is of the view that this court made an erroneous decision, then his recourse lies in appeal but not a review. This court will not accept the invitation by the Applicant to revisit the ruling dated 21/11/2019 and to make a different verdict based on the decision of the Supreme Court that was decided much later. The court's decision made on 21/11/2019 was based on the circumstances of the matters as appertaining then before the Supreme Court came up with the latest decision and it would be untenable for this court to substitute its earlier ruling with one capturing the new developments. The ruling made on 21/11/2019 was based on the fact that at the time section 16 of Work Injury Benefits Act (WIBA) had been declared unconstitutional and that the reversal of the High Court's decision by the Supreme Court came much later. This court found that it had no jurisdiction to determine the matter and if the applicant felt that it was an erroneous decision for failing to refer it to the ELRC, then the same is not a ground for review but an appeal. In that regard, the court is now functus officio and the only recourse for the applicant is to pursue an appeal.

11. The other ground for review relates to whether the application has been made without undue delay. The impugned ruling was delivered on 21/11/2019 whereas the review application was made on 15/9/2020 which is almost ten months. The Applicant has not tendered any explanation whatsoever as to why he filed the application so late in the day yet he is aware of the requirement under Order 45 of the Civil Procedure Rules. Such a conduct disentitles the applicant the discretionary remedy sought. In the case of **Stephen Gathua Kimani V Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** quoting with approval the case of **John Agina V Abdulswamad Shariff Alwi CA No. 83 of 1992** where the Court of Appeal held that an unexplained delay of two years in making an application for review under Order 44 Rule 1(now Order 45 Rule 1) is not the type of sufficient reason that will earn sympathy from any court. As the Applicant has not offered any explanation for the delay of about one year to file the review application, I find that he has not satisfied the conditions for a grant of a review order.

12. In light of the foregoing observations, it is my finding that the Applicant's application dated 15/9/2020 lacks merit. The same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 31ST DAY OF MAY, 2021.

D. K. KEMEI

JUDGE