Osiri v Onda Mechanical (EA) Limited & 2 others (Appeal E184 of 2022) [2024] KEELRC 1802 (KLR) (5 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1802 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E184 OF 2022

NJ ABUODHA, J

JULY 5, 2024

BETWEEN

GEOFFREY NYAKERIGA OSIRI ..... APPELLANT

AND

ONDA MECHANICAL (EA) LIMITED ..... 1ST RESPONDENT

FIRST ASSURANCE COMPANY LIMITED ..... 2ND RESPONDENT

DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICES ..... 3RD RESPONDENT

RULING

1. The 1st and 2nd Respondents filed application dated 11th December, 2023 under Section 16 of the *Employment and Labour Relations Court Act*, Rule 33 of the *Employment and Labour (Procedure) Rules, 2016*, Articles 27 (1), 50 and 159 (2) (d) of the *Constitution* seeking for orders of the court to review, vary and/ or set aside its Judgment dated 24th November 2023 as well as consider the 1st and 2nd Respondent's submissions dated 15th September 2023.

2. The Applicants also sought orders that pending the hearing and determination of the application, there be a stay of execution of the judgment and decree of court and all further consequential orders which prayer has since been spent.

3. The application was supported by the Affidavits of Crispin N. Ngugi and Doreen Jepsergon Cherutich the advocate for the 1st and 2nd Respondents and the process server herein.

4. The Applicants averred that there was an error on the face of the record and/ or sufficient reason justifying a review of the said judgment. That the indication in the said judgment that the Applicants had not filed their submissions when indeed the same was filed on the e-filling platform and a physical copy delivered to the court registry was erroneous.

5. The Applicants averred that the court did not consider the said submissions though the same were duly filed.

6. The Applicants averred that they raised fundamental issues in their submissions touching inter lia on the competence of the appeal which was filed out of time to which the court's decision would have been different if the submissions were considered.

7. The Applicants averred that the Judgment rendered has caused and continues to cause them unwarranted prejudice in the circumstances where they were not given a chance to be heard as their submissions were not given due consideration.

8. The Applicants averred that the Judgment unfairly burdens and unjustly prejudices them and the Appellant stands to unjustly benefit at their expense.

9. The Applicants averred that their rights to equal benefit of the law and fair hearing guaranteed under Article 27(1) and 50 of the *Constitution* have been severely circumscribed, prejudiced and curtailed.

10. The Appellant did not file their response to the Applicants' application but filed his submissions dated 5th April, 2024. The Appellant opposed the Applicants Application and submitted that the delay in filing the Appeal late in 3 days was caused by the Directors delay to furnish him with its decisions and objections by the Applicants as ordered by the Court. That the said delay had been adequately explained.

11. The Application was dispensed of by written submissions.

Determination

12. I have considered the pleadings and submissions filed by the parties herein and not as follows:

13. Section 16 of the *Employment and Labour Relations Court Act* gives the Court power to review its judgements, awards, orders or decrees in accordance with the Rules. Further, Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provides for review as follows:-

    (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

        (b) on account of some mistake or error apparent on the face of the record;

        (d) for any other sufficient reason.

14. When it comes to the grounds for review the Applicant relied on mistake or error on face of record and/or sufficient reason justifying review of the said Judgment. The Applicant has raised issue with the court indicating in the Judgment that they did not file submissions on the appeal whereas according to the applicant, they filed their submissions on Judiciary e-filing portal and provided a physical copy to the court assistant to place in the court file.

15. The Court of Appeal had the following to say in an application for review in the case of *National Bank of Kenya Ltd vs Ndungu Njau*.

> "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 a 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.

16. In *Muyodi -v- Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, the Court of Appeal described an error apparent on the face of the record in the following terms:

> "....in *Nyamogo & Nyamogo -v- Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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 no 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 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal..."

17. Thus, an error apparent on the face of record must be one that is obvious to the eye, and it must be one which when looked at does not yield two results.

18. From the above proposition, the question in the present application is whether the observation by the Court that the applicant may not have filed submissions as at the time the Court was preparing its judgment hence not considering the same in its final decision, goes to the root of the decision the court finally arrived at.

19. In answering that question, the court has considered the purpose of submissions in any proceedings. The Court of Appeal decision in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, their Lordships had this to say:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

20. From the above observations, it is clear that submissions have a part to play in any proceedings before the Court but they do not and cannot take the place of pleadings and evidence by the parties. They are a party's parting shot in any issue before the Court and constitute his voice on the opinion he holds on the issue. This does not mean that the opinion is final or a command to the court to ensure that it follows them or considers them.

21. It is good practice and indeed useful for the Court to consider submissions filed in a matter. They may shape or influence or even make it easier for the judge to understand or perceive the evidence for or against a case before such a judge. But submissions as observed by the Court of Appeal in *Daniel Toroitich's case* cited above, do not themselves constitute evidence and cannot determine a case one way or the other.

22. Is the error of omission to consider submission therefore fatal to the decision of the Court to warrant a review? My answer is "No". Except if they raise a fundamental principle of law which the Court, in its analysis, ought to ordinarily and obviously have considered in arriving at a decision but omitted to do so.

23. The applicant herein has contended that their submissions that were not before the Court at the time of preparation of the judgment, questioned the competence of the appeal which was filed out of time hence the court's decision would have been different if the submissions were considered. An allegation that an appeal has been filed out of time without leave, is a matter that goes to the competence of the Appeal itself and the jurisdiction of the Court to entertain the appeal. It should therefore be dealt with as a preliminary matter. The impugned judgment is a merit judgment. There is nothing on record to show the applicant at any stage questioned the competence of the appeal for being brought out of time.

24. Further I have looked at the submissions and I am of the view that even if they would have been on record at the time of writing the judgment, the Court would not have arrived at a different decision since they only echoed what was in the pleadings and the evidence on the record.

25. In the upshot, the Application lacks merit is hereby dismissed with costs.

26. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY JULY, 2024 DELIVERED VIRTUALLY THIS 5TH DAY OF JULY, 2024

ABUODHA NELSON JORUM

JUDGE