Lumadede v Attorney General (Civil Appeal 78 of 2019)
[2024] KECA 315 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 315 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 78 OF 2019

FA OCHIENG, PM GACHOKA & WK KORIR, JJA

MARCH 22, 2024

BETWEEN

ROBERT MWISANI LUMADEDE ..... APPELLANT

AND

HON. ATTORNEY GENERAL ..... RESPONDENT

(Being an appeal against the Ruling and Order of the Employment and Labour Relations Court of Kenya at Nakuru (Monica Mbaru, J.) dated 7th February, 2019 in Misc. Appl. No. 164 of 2018)

JUDGMENT

1. The appeal before us arises from the ruling of the Environment and Land Court (M. Mbaru J) delivered on 7th February 2019.

2. The ruling in question was in relation to an application dated 11th December 2018, through which the appellant herein had sought the review of a ruling dated 22nd November 2018.

3. In order to get a better appreciation of the matter, it is imperative that a brief historical background be laid out herein.

4. On 23rd October 2012, the appellant lodged an Originating Summons dated 22nd October 2012. The said originating summons was lodged at the Chief Magistrate's Court, Nakuru; and the single relief that was sought was in the following terms;

> "1. This Honourable Court may be pleased to extend the limitation period hereof to enable the applicant to file a suit claiming damages for loss of earning for the new grade promoted to resulting from an early retirement."

5. By his supporting affidavit, the applicant informed the court that the matters began way back, in the year 2006 when the Ministry of Housing wrote a memo stating that there would be a re- deployment of a number of officers to different Government offices.

6. The appellant said that he was deployed to the Ministry of Water Development. However, as he was deployed to a junior position, he raised a complaint. However, instead of sorting out the complaint, the Ministry proceeded to retire him.

7. As a result of the said retirement, the appellant asserted that he suffered great loss and damage.

8. Being aware of the need to provide the court with an explanation for having failed to file a suit in a timely manner, the appellant deponed thus, in his supporting affidavit;

> "7. That the failure to file the claim within the prescribed time was due to the respondent's inability to respond to my complaint and also was not in a position to raise court fees."

9. Annexed to the originating summons was a copy of the appellant's "Intended Plaint". At paragraph 4 of the said draft plaint, the appellant stated that;

10. As a consequence, the appellant's claim for damages was pegged upon the contention that the Ministry had failed, neglected, and/or refused to have him reinstated and thereafter promote him to the new grade.

11. Having given due consideration to the summons, (which had been transferred to the Employment and Labour Relations Court, at Nakuru), the learned Judge, noted that the matter was premised on Employment and Labour Relations. Such relations are contractual.

12. In the circumstances, the court held that the provisions of Sections 27 and 28 of the *Limitation of Actions Act* did not apply to this case. It was the court's understanding that;

> "In this case, this is a matter based on a contract of employment and thus it is not covered for matters subject to extension of time; and even if it were, the explanation that the respondent failed to respond to the applicant in good time is not a disability sufficient to explain the inaction.
>
> For the reasons above, the court is denied the power and authority to extend the time for the applicant to file his claim arising from his employment contract, out of time. The application is dismissed. No order as to costs."

13. Following the rejection of the originating summons, the appellant filed an application for a review of the ruling.

14. On 7th February 2019 the Employment and Labour Relations Court dismissed the application for review.

15. Being dissatisfied with the decision dated 7th February 2019, the appellant filed an appeal before this Court. In his memorandum of appeal, the appellant raised the following six grounds of appeal; -

> "1. The learned Judge erred in law and fact by arriving at a decision that the applicant may have addressed the matter under Nakuru CMS 140 of 2012 and High Court 80 of 2014 for him to make an application as herein and seek for time extension to file an employment claim which is over 6 years old under the

provisions of the *Employment Act* Cap 226 and *Employment Act*, 2007 cannot be cured by any innovation, device or craft.

2. The learned Judge erred in law and fact in finding no good cause to warrant any review of the ruling delivered on 22nd November 2018.

3. The learned Judge erred by failing to consider the evidence adduced on behalf of the appellant.

4. The learned Judge erred in fact by failing to consider the evidence adduced on behalf of the appellant.

5. The learned Judge failed to appreciate the submissions of the appellant by finding in favour of the respondent herein.

6. In all the circumstances of the case, the findings of the learned Judge are insupportable in law or based on the evidence adduced."

16. On 2nd November 2023 when the virtual hearing took place, the appellant represented himself, whilst the respondent did not show up.

17. The appeal was canvassed by way of written submissions, which none of the parties highlighted.

18. Notwithstanding the absence of the response, the onus was still upon the appellant to demonstrate that his appeal was merited.

19. As far as the appellant was concerned, he did not take action out of time, as the time spent when he was awaiting a response from the Ministry cannot be taken into account.

20. The appellant referred to matters of fact which had not been taken into account by the trial court.

21. He also submitted that it was in the best interests of justice, and for a good working relationship, that the appellant should consult the Ministry of Justice and Constitutional Affairs, as well as the office of the Attorney General, before instituting litigation. It is in the process of the said consultation that the perceived element of delay arose.

22. The appellant told this Court that he instituted the litigation after he realized that the respondent was not being genuine. He had come to the realization that the Ministry was frustrating him.

23. The originating summons was described by him as being the last option, through which the appellant could have his rights protected.

24. In the circumstances, the appellant invoked the provisions of Article 159 of *the Constitution* of the Republic of Kenya and invited this Court to disregard procedural technicalities.

25. We have given due consideration to the grounds of appeal as well as the submissions on record. We have also given careful consideration to the record of the proceedings before the court from whose decision this appeal arose.

26. The sole issue that falls for determination is whether or not the learned Judge erred when she declined the application for review of her earlier ruling. The answer lies in determining the scope of the remedy of review.

27. Pursuant to the provisions of Section 16 of the *Employment and Labour Relations Court Act*, 2011 the said court is clothed with the power to review its judgments, awards, orders, or decrees. It is expressly stipulated that the court shall when exercising its power to review, do so in accordance with the Rules.

28. The applicable rules in this instance are the Employment and Labour Relations Court (Procedure) Rules, 2016. The said rules were already in place by the time when the appellant sought review of the court's ruling.

29. Pursuant to Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules;

    a. if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

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

    c. if the judgment or ruling requires clarification; or

    d. for any other sufficient reasons."

30. In accordance with that rule, the appellant should have demonstrated to this Court that although his application fell within any one or more of the areas spelled out in rule 33(1), the trial court had declined the application for review.

31. In the case of Pancrast Swan v Kenya Breweries Ltd [2014] eKLR, the court stated as follows:

> " The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power.
>
> The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of the Civil procedure. Thus, re-assessing evidence and pointing out defects in the order of the Court is not proper."

32. We have re-evaluated all the proceedings before the Employment and Labour Relations Court, but we did not find any trace of the new and important matter or evidence that the appellant had come across after the learned Judge had first rejected the application for extension of time. In the case of Tokesi Mambili & Others v Simion Litsanga [2004] eKLR, the court held thus:

> " In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason."

33. Secondly, the appellant has not demonstrated to this Court that there was either an error or mistake apparent on the face of the record. In the case of Nyamogo & Nyamogo v Kogo [2001] EA 174 the court held that:

> " An error apparent on the face of the record cannot be defined precisely and 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 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 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 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. 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 also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

34. Thirdly, the appellant has not demonstrated that the original decision, which he sought to have reviewed, required clarification.

35. Finally, the appellant has failed to demonstrate to us that he had placed any other sufficient reason before the Employment and Labour Relations Court, that could warrant a review of the ruling dated 22nd November 2018. In the case of The Official Receiver and Liquidator v Freight Forwarders Kenya Limited [2000] eKLR the court stated that:

> " ...these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice 'be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the

36. Be that as it may, this appeal arises from a decision of the trial court made by the learned Judge in the exercise of judicial discretion. It is trite that the circumstances in which this court can interfere with the exercise of discretion by a lower court are circumscribed. This court may only interfere with the exercise of such discretion when, in the words of the predecessor of this court in Mbogo and Another v Shah [1968] EA 93, it is satisfied that the decision of the lower court was wrong:

> " ...because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

37. Consequently, we find no reason to interfere with the learned Judge's exercise of discretion in dismissing the application for review.

38. In the result, we find that the appellant has not persuaded us that the decision to reject the application for review was erroneous.

39. The appeal lacks merit and is hereby dismissed.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF MARCH, 2024.

F. OCHIENG

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR