



Munyua v Industrial Promotion Services (K) Limited & another (Cause 1358 of 2018) [2024] KEELRC 551 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 551 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1358 OF 2018
SC RUTTO, J
MARCH 8, 2024**

BETWEEN

CAROLYN MUNYUA CLAIMANT

AND

INDUSTRIAL PROMOTION SERVICES (K) LIMITED 1ST RESPONDENT

HELLEN AKELLO 2ND RESPONDENT

RULING

1. By way of a Judgment delivered on 6th October 2023, this Court found in favour of the Claimant in the following manner:
 - a. A declaration that the Claimant’s termination from employment was unfair.
 - b. The Claimant is awarded one (1) month’s salary in lieu of notice being the sum of Kshs 900,000.00.
 - c. The Claimant is awarded compensatory damages in the sum of Kshs 1,800,000.00 being equivalent to three (3) months of her gross salary.
 - d. The Claimant is further awarded salary for 10 days worked in August, 2018 being Kshs 300,000.00.
 - e. The total award is Kshs 3,000,000.00.
 - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
 - g. The Claimant shall also have the costs of the suit.



2. It is worth pointing out that on 27th November 2023, the Court corrected the sum appearing at paragraph (c) above, from Kshs 1,800,000.00 to Kshs 2,700,000.00. Effectively, the total award at paragraph (e) was corrected to Kshs 3,900,000.00.
3. As a consequence to the Judgment, the Applicants filed the instant Application seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to review the judgment dated 06/10/2023.
 - d. That this Honourable Court be pleased to make any such further and or other orders as it may deem just, fair, reasonable and appropriate in the circumstances in order for the ends of justice to be met.
4. The Application is premised on the grounds appearing on its face and on the Affidavit of Ben Simiyu, counsel on record for the Applicants. Mr. Simiyu deposes that the Court held that at the time of writing the judgment dated 6th October 2023, the Respondents' submissions were missing from the Court's physical record and were not traceable on the online portal.
5. He avers that in the disclosed circumstances, the 1st and 2nd Respondents/Applicants' written submissions and list/bundle of judicial authorities were not considered by the Honourable Court in arriving at its judgment.
6. Mr. Simiyu further states that the 1st and 2nd Respondents/Applicants filed their written submissions as well as a list/bundle of judicial authorities after assessment and payment of Court fees on 13th September 2023.
7. He further avers that after effecting the online filing, the 1st and 2nd Respondents/Applicants Advocates on record served the Claimant's/Respondent's Advocates on record with the written submissions as well as list/bundle of judicial authorities on 14th September 2023, the same were also hand delivered to the Court registry.
8. Mr. Simiyu contends that the fact of the missing written submissions as well as list/bundle of judicial authorities from the judiciary online portal cannot be attributed to the 1st and 2nd Respondents/Applicants' fault because they were received, assessed by the judiciary, an invoice generated and the same paid.
9. After close of the parties' respective cases on 27th March 2023, the Claimant/Respondent was given twenty one (21) days within which to file written submissions, they filed the same on 25th July 2023, after a period of four (4) months.
10. The Court record shows that when the matter came up for mention on 24th April 2023, the 1st and 2nd Respondents/Applicants were directed to file and serve their written submissions within fourteen (14) days from the date of service.
11. Unfortunately and/or regrettably, the 1st and 2nd Respondent/Applicants Advocates erroneously heard from the virtual Court session that their written submissions were to be filed and served by 14th September 2023 and not within fourteen (14) days as per the Court's directive. Consequently, they filed their submissions on 13th September 2023, honestly believing that they were still within time.



12. The erroneous date was occasioned by the 1st and 2nd Respondents/Applicants Advocate's poor hearing and/or internet connectivity challenges on the virtual Court platform on 24th July 2023.
13. The 1st and 2nd Respondents/Applicants Advocates' failure to file written submissions as well as a list/bundle of judicial authorities within fourteen (14) days was also occasioned by their Advocate's honest mistaken belief that filing submissions as well as list/bundle of judicial authorities on or before 14th September 2023 was within a period of only thirty (30) days as compared to the four (4) months which the Claimant/Respondent has taken to file submissions.
14. Failure to file submissions as well as list/bundle of judicial authorities within fourteen (14) days was an honest mistake on the part of the 1st and 2nd Respondents/Applicants Advocates for which the parties as innocent litigants should not suffer and or be punished.
15. The Claimant countered the Application through Grounds of Opposition, dated 24th November 2023, through her Counsel. The Claimant contends that:-
 - a. That the Application is gravely incompetent for being ambiguous, uncertain nebulous and lacking in clarity of orders being sought.
 - b. That no new evidentiary material has been placed before the Honourable Court for consideration.
 - c. That the Applicant has not pointed out any error apparent on the face of the record for the Court's attention.
 - d. That should the Court find that there is any such error on the face of the record, it is such that does not go to the root of the dispute and therefore not capable of affecting the terms of this Honourable Courts award.
 - e. That the only error which was evident on the face of the Court's judgment, has since been brought to the Court's attention by the Claimant vide a letter dated 3rd November 2023.
16. On 27th November 2023, the Court gave the parties liberty to file written submissions if they so wished. The Applicants took up this option and filed written submissions in support of the Application.
17. The Applicants posited that sufficient reason has been demonstrated to warrant the Court to review its Judgement. On this score, reliance was placed on the provisions of Rule 33(1) (d) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and the case of Francis Origo & another v James Kumali Mungala (2005) eKLR.
18. The Applicants stated in further submission that they filed their submissions on 13th September 2023 honestly believing that they were still within time. To buttress the necessity of submissions, the Applicants sought to rely on the case of Mau Resort v Narok County Government (2021) eKLR.
19. The Court was further urged to consider the Applicants' submissions although irregularly filed out of time.
20. It was the Applicants' further argument that their submissions highlighted a number of pertinent issues that were not brought to the Court's attention. In this regard, the issue of whether the 2nd Respondent was a necessary party to the proceedings, was highlighted.



Analysis and Determination

21. The Court has considered the Application, the Grounds of Opposition, as well as the Applicant's submissions and has identified the main issue for determination as being whether the Applicants have satisfied the requirements for the grant of an order for Review.
22. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016, is very explicit that the Court can only review its orders if the following grounds exist: -
 - a. if there is 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 reason.
23. As is discernible from the record, the gist of the Application by the Applicants is review of the Court's Judgment delivered on 6th October 2023, through which the Court found in favour of the Claimant. The basis of the Application is that the Court failed to consider the Applicants' submissions in arriving at its determination.
24. Indeed, at paragraph 41 of the Judgment, the Court noted that at the time of writing the Judgment, the Respondents/Applicants' submissions were missing from the court's physical record and were not traceable on the online portal. The Court further noted that as per the directions issued on 24th July 2023, the submissions were to be filed by 11th August 2023.
25. It thus follows that the Applicants' submissions were not available for consideration by the Court at the time it made the determination. Be that as it may, does that suffice as a ground for review under Rule 33(1) of this Court's Rules?
26. A clear reading of Rule 33 (1) of this Court's Rules reveals that the grounds for review are restricted. As such, the jurisdiction of the Court and scope of review is limited.
27. As was held by the Court of Appeal in the case of National Bank of Kenya Ltd vs Ndungu Njau [1997] eKLR:

“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.”
28. In this case, the Applicants have submitted that they have demonstrated sufficient reason to warrant review of the court's Judgement. Thus, what amounts to sufficient reason?
29. In the case of Zablon Mokuva v Solomon M. Choti & 3 others [2016] eKLR, the Court reckoned that it is practically impossible to itemize what would be 'sufficient reason' for purposes of review under the courts' 'residual jurisdiction' or inherent powers. The court further opined that given that a review



application is not an appeal and neither must it be allowed to be an appeal in disguise where the merit is revisited, 'sufficient reason' ought to include, the statutory grounds for review as outlined in the Civil Procedure Rules.

30. And further, in the case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR, the Court cited with approval the decision in Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608, where the Supreme Court of India determined that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule.
31. The Court adopted this proposition and culled out the following principles inter alia:
 - i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds..."
32. I subscribe to the position taken by the Courts in the above referenced authorities, that 'sufficient reason' is a reason sufficiently analogous to those specified in the rule and ought to include the statutory grounds for review. As such, what amounts to 'sufficient reason' must be considered in light of clauses (a), (b) and (c) of Rule 33(1).
33. Thus guided, and applying the above proposition to the case herein, it is the finding of the Court that the Applicants' submissions cannot be new evidence. In terms of Rule 33(1) (a), new and important matter or evidence is that which could not have been discovered had the Applicants exercised due diligence. A catena of judicial precedents have determined that submissions do not constitute evidence and cannot take the place of evidence.
34. Further, the Applicants have not demonstrated that there is some mistake or error apparent on the face of the record or that the Judgment requires clarification.
35. If I may add, the argument by the Applicants that they had raised a pertinent issue in their submissions as to whether the 2nd Respondent was a necessary party to the suit, is in view, immaterial. I say so since it is clear from the Judgment that there are no adverse orders made against the 2nd Respondent or an order specifically directed at her.
36. All in all, I am not convinced that failure to consider the Applicants' submissions amounts to 'sufficient reason' within the meaning of Rule 33(1) and that the same is analogous to the other reasons stipulated in clauses (a), (b) and (c) of the said Rule.
37. To this end, the Court finds that the Applicants have failed to satisfy the requirements for grant of the orders of Review under Rule 33 (1) of this Court's Rules.
38. Accordingly, the Applicants' Application dated 8th November 2023 is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

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STELLA RUTTO

JUDGE

In the presence of:



Mr. Otieno for the Claimant/Respondent

Mr. Juma Instructed by Mr. Simiyu for the Applicants/Respondents

Millicent Kibet Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

