Karithi v Karumo Technical Training Institute (Employment and Labour Relations Cause E020 of 2021) [2024] KEELRC 13523 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13523 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

EMPLOYMENT AND LABOUR RELATIONS CAUSE E020 OF 2021

ON MAKAU, J

DECEMBER 20, 2024

BETWEEN

MITHIKA GEORGE KARITHI ..... APPLICANT

AND

KARUMO TECHNICAL TRAINING INSTITUTE ..... RESPONDENT

RULING

Background

1. On 9th February 2024, I rendered judgment whereby I dismissed the claimant's suit with no order as to costs. The claimant was aggrieved and brought a notice of motion dated 28th June 2024 seeking the following orders: -

    a. That the application be certified urgent and be heard ex-parte and service thereof be dispensed with in the first instance.

    b. That this Honourable Court be pleased to review its judgment delivered on 9th February, 2024 on account of some mistake or error apparent on the face of the record or for any other sufficient reason and set aside the finding that the claimant is not entitled to terminal dues as tabulated at paragraph 8 of his claim and the costs of this suit be paid by the respondent and substitute it with an order directing the respondent to pay to the Claimant/Applicant his terminal dues and arrears for April, 2020 to January 2021.

    c. That the Honourable court be pleased to order the respondent to pay the applicant the salary arrears of Kenya Shillings Two Hundred and Thirty Seven Thousand and five Hundred and other terminal benefits.

    d. That cost of the application be provided for.

e. That this Honourable court be pleased to grant any other order that it deems fit to meet ends of justice.

2. The motion is supported by the claimant's supporting affidavit sworn on even date and it is opposed by the respondent vide a Replying Affidavit sworn on 9th August, 2024 by the respondent's Principal Ms Flora Njura Kanyua.

3. The applicant's case is that there is an error apparent on the face of the record because the court failed to consider that the respondent did not provide evidence to ascertain the period when he was in employment and when his employment was terminated. That the respondent issued him with a certificate of service indicating the period of his employment as 2nd January 2018 to 31st January 2020 yet he worked up to 2021. That a cursory look at the judgment reveals an error on the face of the record as to when he was employed and when he was dismissed by the respondent.

4. A further ground cited for review is that the court erred in fact by not ordering the respondent to pay the claimant terminal dues and arrears of Kshs.237,500.00 yet the respondent admitted that he was working for it from May to January, 2021.

5. Finally, the claimant averred that the application was made without undue delay and that it is in the interest of justice that the application be allowed.

6. On the other hand, the respondent averred that by the impugned judgment the court found that the claimant was not laid off but his contract lapsed on 31st January 2020 and he declined an offer of a new contract. In view of the foregoing matters the application for review lacks merits and it is otherwise an abuse of court process.

7. It is further respondent's case that there is no error apparent on the face of the record and grounds raised by the applicant are not viable for review. Consequently, it urged that the motion should be dismissed with costs for dragging the respondent back to the corridors of justice.

Submissions

8. The claimant did not file written submission and instead relied on his supporting Affidavit. The respondent submitted that there is no error apparent on the face of the record to warrant review and contended that the claimant is just disagreeing with the court's judgment on merits. That the claimant has argued that the court did not consider his evidence which is not a viable ground for review. Further that the claimant has attempted to adduce new evidence as the basis for review which is not possible. Consequently, it maintained that the motion should be dismissed for being a non-starter and devoid of merits.

Determination

9. The applicable law 33 of the ELRC Procedure Rules which provides that;

> " 33.
>
> (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-
>
> 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."

10. The first factor to consider is time of filing the application for review. In this case the judgment was passed on 9th February 2024 and the application for review was filed on 2nd July 2024. The time taken to file the application was four months and three weeks. The said delay has not been explained. The applicant merely averred that the application was brought without undue delay. Consequently, I must hold that the said delay was unreasonable in the circumstance of the case.

11. The second factor to consider is whether there was a mistake or error apparent on the face of the record in the impugned judgment. An error apparent on the face of the record was defined by the Court of Appeal in National Bank of Kenya v Ndung'u Njau (1997) eKLR thus;

> " The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be 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 the law. Misconstruing a statute or other provision of the law cannot be a ground for review."

12. Also, in Nyamogo and Nyamogo v Kogo (2001) E.A 174 the Court of Appeal 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."

13. In the instant case, the claimant alleges that the error apparent on the face on the judgment is ascertainable on casual look. However, he has gone to great detail of explaining that the court did not consider certain evidence and therefore arrived at an erroneous decision. He went further to adduce new evidence in the form of certificate of service to prove the alleged error on the face of the record.

14. Guided by the above binding precedents, I find that the grounds cited by the applicant are not suitable for review but an appeal. Clearly, the applicant is disagreeing with the reasoning of the court and the application of the evidence to the law on redundancy and payment of terminal benefits. The application is otherwise questioning the merits of the judgment. Such challenge lies in the province of appeal to a higher court and not review before the trial court. Consequently, I find no merits in the motion which was also brought after in ordinate delay, and dismiss it entirely. I award costs to the respondent because it was dragged back to court corridors through a frivolous motion.

DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER, 2024.

ONESMUS N MAKAU

JUDGE

ORDER

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE