Fredrick Ngatia t/a Ngatia & Associates Advocates v Jumba (Cause E146 of 2021) [2023] KEELRC 654 (KLR) (15 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 654 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E146 OF 2021

JK GAKERI, J

MARCH 15, 2023

BETWEEN

FREDRICK NGATIA T/A NGATIA & ASSOCIATES ADVOCATES ..... APPELLANT

AND

GEOFFREY AMUGUNE JUMBA ..... RESPONDENT

RULING

1. Before the court of determination is a Notice of Motion Application by the Appellant/Applicant filed under Certificate of Urgency dated 24th November, 2022 seeking orders that:-

    1. Spent.
    2. Spent.
    3. The Honourable Court be pleased to review its judgement dated and delivered on 31st October, 2022 specifically on the finding that the respondent was entitled to house allowance in the sum of Kshs.101,250/= and substitute it with a finding that the award was not merited and is set aside.
    4. The costs of this Application be provided for.

2. The Application is expressed under Rule 33(1) (b), 33(2), 33(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions of the law and is based on grounds set out on its face and supported by the Affidavit sworn by Fredrick Ngatia dated 24th November, 2022 who deposes that the respondent had already demanded a total sum of Kshs.480,875/= within 5 days failing which he would procced to execute.

3. The Appellant/Applicant states that the amount claimed by the respondent was erroneous as the court did not enhance the award of the trial court but had set aside some of the awards and thus the amount due before the application for review is Kshs.185,850/= as follows:-

   One month's salary in lieu of notice.....Kshs. 45,000/=

   Compensation for unfair dismissal.....Kshs. 45,000/=

   House Allowance .....Kshs.101,250/=

   Unremitted NSSF.....Kshs. 3,600/=

   Accrued Salary.....Kshs. 30,000/=

   Less Kshs. 39,000/=

   Amount due Kshs.185,850/=

4. The affiant further states that he will be prejudiced if the respondent executed the erroneous and exaggerated sum of Kshs.480,875/= and had not reviewed to decree of the trial court for confirmation that it conforms with the judgement.

5. That he was apprehensive of the respondent's ability to reimburse the amount in the event the review herein was successful, which could occasion irreparable loss.

6. The affiant expresses willingness to deposit the sum of Kshs.185,850/= to court as security pending the hearing and determination of the Application.

7. The affiant further states that the court upheld the award of Kshs.101,250/= for housing allowance among other awards in error as the issue of house allowance was never in issue and the respondent was employed on a consolidated salary and the award was therefore an error apparent on the face of the record and warrants a review of the judgement on that aspect only.

8. That the respondent did not demand house allowance at any point in the course of his employment and the parties had not discussed and agreed on a separate sum as house allowance and its award was tantamount to rewriting of the contract between the parties.

9. The affiant concludes that it was in the interest of justice and fairness that the order sought do issue.

Respondent's Case

10. In his Replying of Affidavit sworn on 13th December 2022, the respondent deposes that:-

    1. The applicant's apprehension was unfounded as he was yet to obtain a decree issued by the court a fact within the counsel's knowledge.

    2. The alleged prejudice likely to be suffered was fictitious and feigned since a decree is signed and sealed by the Deputy Registrar after ascertaining that it was aligned to the terms of the judgement of the court.

    3. The request for stay of execution was calculated to deny the respondent from enjoyment of the fruits of his judgement.

    4. The applicant's computation of the dues omitted interest awarded from date of filing until payment in full and costs before the trial and appellate court.

5. The court should direct the applicant to pay the respondent the uncontested sum as a condition precedent to considering the review on merit.

11. As regards the alleged error on the face of the record, the affiant relies on the Court of Appeal decision in *JKN V HWN* [2015] eKLR on what amounts to an error on the face of the record, and states that the court could not sit on appeal of it's own judgement and there was no error on the face of the record as the respondent had prayed for housing allowance before the trial court and the court allowed it on merit based on the evidence before it and it was appealed against and withheld.

12. The respondent further deposes that the appellant's grounds for review were arguments made before the trial court and the proper forum was the Court of Appeal.

13. The respondent prayed for dismissal of the application with costs.

Respondent's Submissions

14. The respondent submitted that the applicant applied for review of the judgement dated October 31, 2022 on the ground that the finding that the claimant was entitled to house allowance was an error on the face of the record.

15. The respondent faults the applicant's argument on the premise that the issue of house allowance was litigated before the trial court and the trial court allowed it on merit and was similarly raised for review after judgement of the court.

16. Reliance was made on the decision in *National Bank of Kenya V Ndungu Njau* [1997] eKLR to urge that a review was unsustainable where the issue relates to a different position on the matter or an erroneous conclusion of law which is a ground for an appeal not a review of judgement.

17. The decision was in *Unilever Tea (K) Ltd V Richard Ombati Kibuma* [2021]eKLR was also relied upon to urge that a decision on merits of the judgement cannot be an error on the face of the record.

18. The respondent urged the court to make a similar finding in the instant application and sought for its dismissal.

Determination

19. The singular issue for determination is whether the Application herein is merited.

20. The pith and substance of the Appellant/Applicants application is that the judgement delivered on October 31, 2022 has an error on the face of the record in that the court upheld the award of house allowance Kshs.101,250/= yet the claimant's salary was consolidated and the parties had neither discussed nor agreed that the claimant would be paid a separate amount as house allowance.

21. Regulation 33 of the *Employment and Labour Relations Court (Procedure) Rules,* 2016 provide for review of judgement, decree or order of this court.

22. Rule 33 provides that:-

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 judgement or ruling:-

a. . . .

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

23. In *National Bank of Kenya Ltd V Ndungu Njau* [1997]eKLR, the court of Appeal held that:-

> "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."

24. The principles governing review of judgements or orders of courts are well settled.

25. On the definition of the phrase error on the face of the record, in *Muyodi V Industrial Commercial Development Corporation & another* [2006] EA 243, the Court of Appeal held:-

> "In Nyamongo and Nyamongo Vs 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 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 was 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 review 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. This laid down principle of law is indeed applicable on the matter before us."

26. Similar sentiment were expressed by the court in *Maurice Otieno Owiny V Mombasa Container Terminal Ltd & another* [2017] eKLR where the court stated that:-

> "an error apparent on the face of the record is one which speaks for itself and does not require legal or factual arguments to prove it."

27. The critical issue before the court is whether the appellant/applicant's notice of motion application meets the threshold for review of the judgment dated October 31, 2022.

28. According to the applicant, the fact that the respondent did not demand house allowance during the course of his employment meant that he could not introduce it after termination of employment as it was never discussed nor agreed upon between the parties and thus the award was an error apparent on the face of the record.

29. The trial court expressed itself as follows:-

> "As regards house allowance, the claimant is entitled to it. The respondent claimed in their evidence that Kshs.45,000/= was consolidated salary. It is however my view that it was the respondent's responsibility to issue the claimant with an employment contract detailing his salary. In the absence of the employment contract. I hold that Kshs.45,000/= was not inclusive of house allowance hence the claimant is entitled to house allowance for the period he worked for the respondents."

30. It is common ground that apart from the Applicant's witness oral evidence before trial Court that the respondent's salary was consolidated, it availed neither a written contract as required by section (9) (1) (a) of the *Employment Act* nor a pay statement as ordained by Section 20 of the Act and thus had nothing to show to buttress its oral evidence.

31. Both sections 9(1) and 20(1) of the *Employment Act* are couched in mandatory terms and the Applicant was in breach as the respondent was its employee from April 2018 to September 2019.

32. Nothing would have been easier for the applicant than the attachment of a copy of the Employment Contract to show that the respondent's salary was consolidated or at least the pay statement to demonstrate that part of the Kshs.45,000/= was designated as house allowance.

33. It requires no belabouring that housing allowance is now a statutory right for all employees as provided by section 31 of the *Employment Act*. The fact that it was not demanded in the course of employment does not deprive the employee the right to raise it after termination unless there was credible evidence to the contrary.

34. In the instant case, the respondent failed to substantiate the allegation that the claimant's salary was consolidated.

35. The foregoing analysis is intended to demonstrate that what the applicant refers to as an error on the face of the record is an evidential issue that neither speaks for itself nor it is apparent in the judgment. The applicant appears to be contesting the merits of the judgement which is invariably a ground for appeal as opposed to a review as held in *National Bank of Kenya Ltd v Ndungu Njau* (Supra).

36. In other words, it requires factual arguments. Relatedly and guided by the sentiments of the Court of Appeal in *Nyamongo & Nyamongo Vs Kogo* [2001] EA 170, that there is no error on the face of the record where there may conceivably be two opinions, the court is satisfied and holds that the applicant's Notice of Motion Application dated 24th November 2022 does not meet the threshold for review of the judgement delivered on 31st October, 2022 and is accordingly dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF MARCH 2023

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE