



REPUBLIC OF KENYA



KENYA LAW
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**Mwala v Agakhan University (Cause 1437 of 2018)
[2023] KEELRC 1440 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1440 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1437 OF 2018**

SC RUTTO, J

MAY 31, 2023

BETWEEN

FLORAH VIHENDA MWALA APPLICANT

AND

THE AGAKHAN UNIVERSITY RESPONDENT

RULING

1. This Ruling relates to the claimant's Application dated March 31, 2023. A brief background of the facts giving rise to the instant Application is as follows. On November 8, 2022, during the hearing of the claimant's case, the respondent's Advocate, Mr. Amoko, raised an objection with regards to admissibility of the averments contained at paragraphs 51-64 of the claimant's witness statement. Mr. Amoko based his objection on the fact that the said averments were in reference to the discussions which were undertaken on a "without prejudice basis".
2. Mr. Muturi, Counsel for the claimant vehemently opposed the objection and argued that there was no indication that the negotiations were on a "without prejudice basis." Upon considering submissions by both Counsels on the issue, the court rendered a Ruling thereby sustaining the objection by the respondent's Advocate and consequently, expunging from the record, the averments contained at paragraphs 51-64 of the claimant's Statement.
3. Subsequently, the matter proceeded for hearing and trial closed on March 16, 2023. Thereafter, parties took directions for filing of final submissions and in that regard, the matter was to be mentioned on May 2, 2023 for purposes of confirming compliance and taking a Judgment date. In the intervening period, the claimant lodged the instant Application, seeking the following main order: -

That this honourable court be pleased to review its ruling and orders made on February 22, 2023 expunging various paragraphs from the claimant's witness statement.



4. The Application is supported by the Affidavit of Mr. Nelson Harun Muturi, Counsel for the Applicant. Briefly he avers that: -
- a. There was an error or mistake apparent on the face of the record in the manner the court contextualized the citations from Halsbury's Law of England as relied upon by Lady Justice Njoki Mwangi in HCCA NO. 38 OF 2015 *Kakamega Mumias Sugar Co. Limited v Beatrice Akinyi Omondi.*
 - b. The court could not possibly determine whether negotiations were on a without prejudice basis without first admitting such evidence and any rebuttal thereof and then deciding if such negotiations were on without prejudice basis. That this could only be determined by way of a judgement.
 - c. The court only considered the citation from *Halsbury's Law of England* to the extent where there exists a binding agreement and found that there was no a binding agreement. This was an error on the face of the record since whether there was an agreement leave alone a binding one or not could only be established on the basis of evidence adduced which was not the case herein.
 - d. The court did not consider the second limb of the citation from *Halsbury's Law of England* which is that without prejudice communications are admissible for the purpose of deciding whether a binding agreement was reached or not.
 - e. The court did not consider the third limb of the citation from Halsbury's Law of England which is that without prejudice communications are admissible to show that negotiations have taken place.
 - f. The claimant sought to show that negotiations took place and an agreement was reached that the claimant be paid the remainder of her contract period in lieu of reinstatement.
 - g. The claimant sought to show that the point of departure between the claimant and the respondent was in the quantum when the respondent tabulated a sum of Kshs.6 million while the claimant tabulated a sum of Kshs.18,536,632.45/=. The court could only establish this on the evidence but no by blocking the evidence which was an error apparent on the face of the record.
 - h. The claimant contends that the blocking of her evidence to show what happened from the time she was suspended to the time she was constructively terminated 20 months later effectively denied her an opportunity to tell the court her story of what happened in between.
 - i. The respondent never communicated to the claimant before and during negotiations that the negotiations were on a without prejudice basis nor did the respondent ever mark the correspondences between the claimant and the respondent as made on without prejudice basis. How was the claimant supposed to know that she was engaged in not binding negotiations if prior notice of the terms of engagement was not served upon her? This is the meaning to be assigned to the word "express condition" in section 23(1) of the *Evidence Act.*



- j. The court subsequently admitted into evidence the respondent's witness statement which addresses the meetings and the respondent states that the meetings were on without prejudice basis. This is a mistake that the court can correct by reviewing its ruling and orders and in place thereof holding that the respondent by its subsequent conduct of relying on a witness statement that addresses the meetings was deemed to have acquiesced to the blocked evidence.
5. The respondent opposed the Application through its Grounds of Opposition dated April 18, 2023. The said Grounds are as follows: -
- a. There is no admissible evidence before this honourable court as the affidavit in support of the Review Application is inadmissible since it is argumentative rather than factual and has been sworn by the claimant's Advocates.
 - b. The claimant has failed to establish, any of the grounds warranting review of the court's ruling and orders issued on February 2, 2023.
 - c. The Review Application is an appeal disguised as an application for review.
 - d. There is a distinction between referring to negotiations which is what the respondent's witness, Ms. Vickie Adiedo, did in her witness statement, which is permissible, and referring to the contents or substance of the negotiations, which is privileged and thus impermissible.
 - e. The instant Application is incompetent since it is not accompanied by the ruling/orders of the Court sought to be reviewed as required by Rule 33 (2) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016.
 - f. The Review Application has not been brought within reasonable time as the said ruling and orders were issued on February 2, 2023.
6. Following the court's directions issued on April 27, 2023, the Application was canvassed by way of written submissions which I have considered. I must point out that the Applicant's submissions were neither on the court's physical record nor traceable on the online portal.

Analysis and determination

7. The court has considered the Application, the respondent's Grounds of Opposition as well as the submissions on record and find the singular issue for determination at this juncture as being whether the Applicant has satisfied the requirements for grant of an order for review.
8. As stated herein, the crux of the Application is review of the Court's Ruling delivered on February 2, 2023, expunging the averments contained at paragraphs 51-64 of the claimant's witness statement.
9. Rule 33 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.
10. In support of the Application, Counsel for the applicant enumerated 19 grounds expressing his dissatisfaction with the Ruling of the court. I have considered the said grounds and note that they mainly relate to the manner in which the court interpreted and applied the citation from the *Halsbury's Laws of England* as relied upon by Hon. Lady Justice Njoki Mwangi in Kakamega HCCA No 38 of 2015 *Mumias Sugar Co. Ltd v Betarice Akinyi Omondi*. In this regard, Counsel has averred that the court did not consider the second and the third limb of the citation from Halsbury's Laws of England. In addition, Counsel in his grounds makes extensive legal arguments with regards to the said citation from the Halsbury's Laws of England as well as section 23 (1) of the *Evidence Act*.
11. Respectfully, the court finds that the grounds in support of the Application are issues of law and do not constitute a mistake or an error of fact apparent on the face of the record as would justify a review. On this score, I will follow the determination by the court in *National Bank of Kenya Ltd v Ndungu Njau* (1997) eKLR, where it was 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. 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.
- In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it”. (My Emphasis).
12. Further, as was rightly held by the Court of Appeal in the case of *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR, the issues envisaged under Order 45 of the *Civil Procedure Rules* (and in this case Rule 33 of this *Court's Rules*), relate to issues of fact and not law.
- “The court was deemed to know the law and ought to have been aware of the Treaty. Its lack of awareness of the Statute or case-law, however obscure, was not a mistake or error apparent on the face of the record nor was it a new and important matter or evidence which was discovered. The three limbs of rule 1 in Order 44 (now Order 45) relate to issues of fact. The issues raised by the appellant related to law. Where the court is not well served, an error of law in a decision predicated on correct facts cannot be blamed on a litigant or his counsel. But it can be challenged on appeal.”
13. Flowing from the above authorities which I wholly apply and reiterate, it is this court's finding that the grounds constituting the Applicant's dissatisfaction with the findings in the Ruling may be grounds of appeal but certainly not review.



14. In light of the foregoing and having considered the specific reasons given by the applicant for seeking an order of review, it is my considered view that she has not satisfied the requirements for grant of the orders of review under Rule 33 of this Court's Rules.

15. Consequently, the Application is dismissed with no orders as costs.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of May, 2023.

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STELLA RUTTO

JUDGE

Appearance:

No appearance for the Applicant/ claimant

Mr. Owino for the respondent

Court Assistant Abdimalik Hussein

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

3

