Omoke & 106 others v Danree Multihandling Services Ltd & another (Cause 544 of 2017) [2023] KEELRC 1214 (KLR) (19 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1214 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

CAUSE 544 OF 2017

ON MAKAU, J

MAY 19, 2023

BETWEEN

JAMES OMOKE & 106 OTHERS .... APPLICANT

AND

DANREE MULTIHANDLING SERVICES LTD .... 1ST RESPONDENT

A-ONE PLASTICS LIMITED .... 2ND RESPONDENT

RULING

1. This ruling relates to the claimants' Notice of Motion dated 18th October, 2021 seeking the following orders:-

    a. Leave be granted the firm of Sospeter & Company Advocates, Devkesh House, 1st Floor Room M 18 Ruiru to come on record for the claimants/applicants in place of the firm of Njuguna & Kirera Advocates to take urgent steps herein.

    b. The Honorable court be pleased to review, vary and or set aside the orders of court made on the 24th May 2019 and the claim herein be reinstated for hearing and determination on the merits.

    c. That upon prayer (b) above being granted, the claimants' claim be transferred to the Employment and Labour Relations Court at Ruiru (Senior Principal Magistrate's Court) for hearing and disposal thereof.

    d. The costs of and incidental to this application be provided for.

2. The application is supported by the affidavit sworn on even date by one Jason Odindo Ojowi. In brief the applicants case is that the impugned ruling of 24th May, 2019 should be reviewed and/or set aside on grounds that it blames the applicants for a mistake of their counsel; it gives prominence and undue

regard to procedural technicalities contrary to Article 159(2)(d) of *the Constitution* and thereby denied them substantive justice; the tone of the judge in the ruling reveals annoyance with the conduct by counsel and therefore they were victims of the bad blood between the judge and their counsel; the ruling is contradictory since it appreciates that they were present in court on 18th February, 2019 yet the suit was dismissed; and finally the ruling denies them access to justice.

3. The claimants prayed for a chance to present their case on merits and urged the court to reinstate the suit and transfer it to Ruiru Senior Principal Magistrates court where all the parties reside and also because the claimants' salary was less than Kshs.80,000.00 per month.

4. The 2nd Respondent opposed the application vide a Replying Affidavit sworn by its Finance Manager Mr.Stephen Mutua on 26th November 2021. In brief he averred that it is not true as alleged by the claimants that they were not aware of the proceedings and order dismissing their suit on 18th February, 2019 and 24th May, 2019. Further that three of the claimants were in court on 18th February 2019 and failed to respond and address the court when the matter was called in the absence of their counsel; that Article 159 (2)(d) is not panacea for parties attempting to escape from procedural requirements; that the ruling of the court is not based on the Advocates conduct but the facts presented by the claimants' Advocate's Affidavit stating that one Bonventure was present in court; and that the claimants were afforded several opportunities to make their presence known to the court but they failed to respond and therefore they cannot allege that they were denied justice.

5. The affiant further deposed that the claimants were not denied access to justice because they had opportunity to appeal against the dismissal but they did not since they had no interest in the suit and that is why it took them 3 years to file the instant application.

6. The affiant further deposed that the application is res judicata by dint of Section 7 of the *Civil Procedure Act* since the issues raised in the application are directly and substantially in issue in the application dated 19th February 2019; they were litigated by the same parties and the matter was heard and determined by a competent court in the ruling dated 24th May, 2019. Further the present application offends Rule 33(6) of the *ELRC Procedure Rules* since it seeks review of a ruling given in respect of an earlier application for review dated 24th May, 2019.

7. The affiant further avers that the application has been made after an inordinate delay of 3 years from the date of the impugned decision which delay is inexcusable. Further the application is an afterthought, frivolous, an abuse of the court process and a ploy to vex the 2nd respondent.

Submissions

8. It was submitted for the claimants that the preliminary objection mounted against the instant application was dismissed vide a ruling dated 16th September, 2022 which was to the effect that the application is not res judicata. Therefore the court was urged to exercise its discretion to review its orders as donated by section 16 of the ELRC Act and Rule 33 of the ELRC Rules.

9. It was submitted that there is an error apparent on the record in the impugned ruling in so far as it states that the suit was dismissed for non-attendance which contradicts a finding that the claimants were in court but failed to make their presence known. However, it was submitted that the claimants never attended hearing and therefore pursuant to Rule 22 (2) of the *ELRC Rules*, the suit ought not to have been dismissed.

10. It was further submitted that, the court in the impugned ruling elevated procedural technicalities above substantive justice. Reliance was placed on the case of *Lynette Wambui Gitau v Kenya Methodist University (KEMU)* [2021] KE HC 322 (KLR) to urge the court to allow the application as prayed.

11. The respondent on the other hand reiterated that the present application is res-judicata and ought to be rejected as it affects section 7 of the *Civil Procedure Act*. Reliance was placed on the *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, *Accredo AG & 3 others v Steffano Uccelli & another* [2019] eKLR and *Qayrat Foods Limited v Saiya Ahmed Mohamed & 6 others* [2020] eKLR.

12. Further it submitted that the application offends Rule 33 (6) of the *ELRC Rules* which bars review of an order made for a review of a decree or order. The said rule was said to be the equivalent of Order 45 Rule of the *Civil Procedure Rules* which bars entertainment of an application to review and order made on an application for review of a decree or order passed or made. For emphasis the case of *Bethwel Omondi Okal v Managing Director KPLC* (2019) eKLR was cited.

13. Without prejudice to the foregoing, it was submitted that the claimants have not met the legal threshold for review set out under Rule 33 of the *ELRC Rules*. First it was submitted that the delay of 2 years 5 months was not explained and it is therefore inordinate and inexcusable. Reliance was placed on the case of *Unilever Tea (K) Ltd v Richard Ombati Kiboma* [2021] eKLR.

14. Further, it was submitted that there is no error apparent on the face of the record in the impugned ruling as alleged. Consequently, it was urged that the correct procedure to challenge the ruling is by an appeal and not review.

15. Finally the court was urged to dismiss the application highlighted above and not to transfer it.

Determination

16. I have carefully considered the application, Affidavits and submissions. The application seeks for review, varying or setting aside of the impugned ruling and reinstate the suit. The 2nd respondent opposed the same on ground that it is res judicata, it offends Rule 33(6) of the ELRC Rules which bars review of an order made to review decree or order; and that it does not meet the legal threshold for review to issue.

17. Consequently, the issues for determination are;

    a. Whether the application is res judicata.

    b. Whether the application offends Rule 33(6) of the *ELRC Rules*.

    c. Whether the application meets the legal threshold for review of the impugned ruling.

Res judicata

18. The preset application seeks review, variation, and/or setting aside and reinstatement of the suit of the ruling by Nzioki Makau J rendered on 24th May 2019. The said ruling was in respect of the claimants notice of motion dated 19th February 2019 seeking for setting aside order made on 18th February 2019 by which the suit was dismissed. It further sought for reinstatement of the suit for hearing on merits.

19. Marete J considered a preliminary objection raised against the instant motion on ground of res judicata and in his ruling delivered on 16th September 2022 found that the two applications were different and overruled the objection. No appeal was preferred and therefore, even though I do not agree with the reasons by my brother Judge, my hands are tied. I will not say more on that issue.

Offence to Rule 33(6) of ELRC Rules

20. The ruling by Nzioki Makau J of 24th May, 2019 was essentially an application for review. Rule 33(6) of the *ELRC Rules* provides that;

> " No order made to review an order made on an application for review of decree or order passed or made shall be entertained."

21. The above rule is in consonance with Rule 6 of Order 45 of the *Civil Procedure Rules* which was discussed in the case of *Bethwel Omondi Okal*, *supra*, thus:

> " ...under Rule 6 of order 45 of the *Civil Procedure Rules* there is a clear bar of subsequent application for review once a decision has been made on an application for review. Simply put, a court while exercising its jurisdiction for review cannot be asked to review a review order because the law does not allow it."

22. I find the above decision to be a good law and resonating very well with the facts and the circumstances in the present case. The claimants indeed filed a Notice of Appeal against the impugned decision and applied for typed proceedings in order to pursue an appeal. However they lost interest in the appeal and after close to 2 and half years, they sought a second review. With much sympathy, I tell them that the door has been locked and sealed by Rule 33(6) of the *ERLC Rules*.

Legal threshold

23. Rule 33(1) of the *ELRC Rules* 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 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."

24. The claimants, as stated above filed a Notice of Appeal to challenge the Ruling dated 24th May 2019 and as such they lost the right to seek review. Secondly, the claimants delayed to make the application for over 2 years. The claimants' purports that they were not aware of the ruling until their new counsel perused the court file and discovered that the suit had long been dismissed and an application for reinstatement of the suit was also dismissed on 24th May 2019. However, they acknowledge the fact that they had appointed one Bonventure Arema as their representative in court.

25. They have not stated when they instructed the new advocate and why they never went to see their former advocate for update on the progress of their case for more than 2 years from the date it was filed in court. The reason is simply that they had no interest in the matter. Consequently, I find and hold

that the delay of over 2 years is unreasonable and has not been explained to the satisfaction of the court. The court should not exercise discretion in favour of an indolent party.

26. In addition the alleged error apparent on the face of the record has not been demonstrated to the required standard. I gather support from the case of *Nyamogo & Nyamogo v Kogo* [2001] EA 174 where 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."

27. In conclusion I find the notice of motion dated October 18, 2021 fatally incompetent pursuant to Rule 33(6) of the *ELRC Rules*. It is also without merits and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF MAY, 2023.

ONESMUS N. MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties 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