



Abubakar v Modern Coast Builders and Contractors Ltd (Miscellaneous Application 15 of 2022) [2023] KEELRC 1152 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1152 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION 15 OF 2022**

**AK NZEI, J
MAY 11, 2023**

BETWEEN

FIRDAUS ATHMAN ABUBAKAR APPLICANT

AND

MODERN COAST BUILDERS AND CONTRACTORS LTD RESPONDENT

RULING

1. The Application before me is the Respondent/Applicant's Notice of Motion dated November 22, 2022; whereby the following orders were sought:-
 - a. that execution of the judgment entered herein and the consequential decree, orders and proclamation, attachment and execution process be stayed, suspended and/or lifted pending hearing and determination of the application.
 - b. that the Court be pleased to review and/or vary its judgment entered on November 17, 2022 by setting aside the said judgment and referring the matter herein back to the Director of Occupational Safety and Health Services for fresh consideration.
 - c. in the alternative to prayer (b) above, the Honourable Court be pleased to set aside the judgment thereto and grant leave to the Applicant to file an appeal against the award of the Director of Occupational Safety and Health Services dated November 11, 2019.
 - d. that costs of the application be provided for.
2. The grounds upon which the application is based, and which are replicated in the supporting affidavit of Christine Mfutu, sworn on November 22, 2022 in support of the application, are as follows:-
 - a. that the Ruling delivered on November 17, 2022 bears some mistake or error apparent on the face of the record.



- b. that in rendering the Ruling, the learned Judge primarily stated that the Respondent had not filed any objection with the Director against the award of Ksh 9,349,344 payable to the Applicant pursuant to Section 51 of the [Work Injury Benefits Act](#), and that the Respondent's denial of liability ought to have been presented to the director during the enquiries stage and not before the Court.
 - c. that the Applicant hearing could not have participated at the enquiry stage as they were not privy to any proceedings before the Director of Occupational Safety and Health services and only came to know about them when the application for enforcement was filed.
 - d. that the Court failed to take cognizance of the fact that the law does not anticipate for a remedy to be applied by an Applicant when an award is presented for enforcement of which they were not aware at the time of raising an appeal to the Director of Occupational Safety and Health Services.
 - e. that the Court, in enforcing the award did not consider the evidence in the DOSH-1 form filed by the Applicant.
 - f. that the Court in enforcing the award relied on Section 51 of the WIBA that the Respondent/Applicant ought to have raised an objection with the Director of Occupational Safety and Health Services without taking (into account) that the said provision of the law does not prescribe a procedure for redress in cases where an objector was not aware or did not participate in the proceedings leading to the award.
3. The application is opposed by the Applicant/Respondent vide his replying affidavit filed herein on December 7, 2022.
 4. Both parties filed written submissions for and against the application pursuant to this Court's directions in that regard, which I have considered.
 5. The application is expressed to be brought under Section 80 of the [Civil Procedure Act](#), Order 45 Rule (1) & (2) and Order 51 of the [Civil Procedure Rules](#). It is to be noted that proceedings in this Court are regulated/guided by the Employment and Labour Relations Court (Procedure) Rules 2016, save where the provisions of the Civil Procedure Rules are expressly saved in this Court's said Rules or in the Employment and Labour Relations Court (Act (No 20 of 2011)). Where a lacuna and/or vacuum glaringly exists in situations where both this Court's Rules and Act are silent on a particular procedural issue, the Court, for that reason, reverts to the Civil Procedure Rules.
 6. This Court's power to review its own decrees and orders is provided for in Section 16 of the [Employment and Labour Relations Court Act](#) and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. Section 16 of the [Employment and Labour Relations Court Act](#) provides as follows:-

' the Court shall have power to review its judgments awards, orders or decrees in accordance with the Rules.'
 7. Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 on the other hand provides as follows:-

' 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.'
8. To a great extent, Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 is a replication of Order 45 Rule 1 of the Civil procedure Rules, on which the Respondent/Applicant's present application is primarily based.
9. Order 45(1) (1) of the Civil Procedure Rules provides as follows:-
- ' (1) Any person considering himself aggrieved:-
- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.'
10. The question that follows is what an error apparent on the face of the record is. The Court of Appeal stated as follows in the case of *Muyodi -vs- Industrial And Commercial Development Corporation & Another [2006] IEA 243:-*
- ' In *Nyamongo & Nyamongo -vs- Kago [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 real distinction between a mere erroneous decision and an error apparent on the face of 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 error apparent on the face of record would be made out. An error which has to be established by long drawn process of reasoning or on the points where there may conceivably be two opinions can hardly be said to 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 or wrong view, is certainly no ground for a review although it may be for an appeal.'
11. In the present case, the grounds set out in paragraph 2 of this Ruling do not, in my view, demonstrate the existence of an error that is apparent on the face of the record. Indeed, the said grounds are



reminiscent of a memorandum of appeal. The Respondent/Applicant appears to be attempting to refer to this Court's reasoning and decision contained in the Ruling delivered on November 17, 2022 as a 'an error apparent on the face of the record.' If the Respondent/Applicant was aggrieved by the said Ruling, it ought to have appealed to a higher Court.

12. This Court duly rendered itself on the Notice of Motion dated May 27, 2022 vide its Ruling delivered on November 17, 2022, and there is nothing for the Court to go back to regarding the said application. This Court cannot sit on appeal over its own decision. The prayer for review is not capable of being granted, and is declined.
13. Likewise, the prayer for setting aside of this Court's Ruling/Orders dated November 17, 2022 and grant of leave to the Respondent/Applicant to file an appeal against the Director's award dated November 11, 2019 cannot be granted by this Court. No reason and/or valid reason has been given as to why this Court's said order should be set aside. Further, the *Work Injury Benefits Act* does not donate jurisdiction to this Court to grant the leave sought by the Respondent/Applicant. The prayer is declined.
14. In sum, I find no merit in the application, and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH MAY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Applicant

..... for Respondent

