Andjorin v Boeing International Corporation (Cause E994 of 2021)
[2023] KEELRC 1130 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1130 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E994 OF 2021

JK GAKERI, J

MAY 10, 2023

BETWEEN

CHAMSOU ANDJORIN ..... CLAIMANT

AND

BOEING INTERNATIONAL CORPORATION ..... RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion dated 13th October, 2022 by the Applicant seeking orders that:-

    1. The Honourable Court be pleased to set aside the ruling by Justice Dr. Jacob Gakeri delivered on 23rd June, 2022 staying the proceedings in the matter and referring the dispute to arbitration as dictated by clause 15.2 of the Mutual Termination and Separation Agreement (MTSA).

    2. Pending the hearing and determination of the application, the Honourable Court be pleased to grant stay orders against the Ruling delivered by Hon. Justice Dr. Jacob Gakeri on 23rd June, 2022 in E994 of 2021.

    3. The Honourable Court be pleased to make such further orders as necessary for the ends of justice.

    4. The costs of this application be provided for.

2. The application is expressed under section 159 of the *Constitution of Kenya*, 2010, sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 Rule, 1, 2, 3 and order 51 rule 1 of the *Civil Procedure Rules* and other enabling provisions of law.

3. The application is based on the grounds set forth on its face and the Supporting Affidavit by the claimant/applicant who depones that the MTSA is at the core of the dispute herein and reliance on it is making a decision on its validity and enforceability.

4. That in the absence of the MTSA, the employer employee relationship was governed by a contract dated February 28, 2017 which gave the court jurisdiction over disputes relating to the contract.

5. That the MTSA is unenforceable as it was executed under the threat of unemployment in the airline Industry and threat to personal income, a situation exacerbated by the COVID-19 Pandemic.

6. That the court did not consider all the emails on record prior to execution of the agreement.

7. That the MTSA was couched on a 'take or leave it" terms and either way being forced out was inevitable and had no option but execute the agreement as the converse was vulnerability of my family.

8. The affiant further states that court misapprehended the fact that the affiant had the option to choose whether or not to accept the terms of the MTSA. That no payment would have been made if he declined to sign the agreement.

9. That by holding that the waiver of claims is a standard clause in a contract, the court was misled.

10. That by so holding the claimant is estopped from pursuing any claim against the Respondent and there was no dispute to refer to arbitration.

11. That the claim involved statutory dues which cannot be waived by any contract or agreement.

12. That the court erroneously pronounced itself conclusively on a substantive dispute before it and effective determined the whole suit at the interlocutory stage of the proceedings without hearing the cause in full.

13. That declining the prayers being sought has the effect of driving the affiant from the seat of justice as the legality of the MTSA was called into question at the interlocutory stage and it is only just and equitable that the court places reliance on the contract dated February 28, 2016 as the basis of the employment relationship.

14. That the applicant has moved the court without unnecessary delay and it is in the interest of justice that the orders sought be granted.

Replying Affidavit

15. The affiant, Natalia Kuleshova depones that that Affidavit was in opposition of the applicant's application for review of the court's ruling delivered on June 23, 2022.

16. That the applicant and the Respondent entered into a Mutual Termination Separation Agreement (the MTSA) on or about November 5, 2020 and the Respondent honoured its obligations and the Claimant's employment ended on December 31, 2022.

17. That although the application was made as a review, it is in fact an appeal in disguise and does not meet the threshold of a review as provided by law and the court was indeed functus officio as the matter has already been referred to arbitration.

18. That the application is an abuse of the court process.

19. That since the claim before the court is on unfair termination, the relevant agreement at the time of termination was the MTSA and the employment agreement had nothing to do with the case.

20. That the applicant was accorded ample time to consider the terms of the MTSA and implored the Respondent to meet its part of the bargain.

21. The affiant wonders how the Claimant could allege that the MTSA was unenforceable on the one hand and rely on it to push for payment and settlement of the same dues.

22. That the applicant was at liberty to refer the matter to arbitration as per the agreement.

23. That the court must satisfy itself that the arbitration agreement is enforceable in the first place.

24. According to the affiant, there is no discernible mistake or error apparent on the face of the record in the Ruling of the court.

25. That the applicant has simply taken issue with the court's interpretation of facts and analysis of the law.

Claimant/Applicant's submissions

26. According to the applicant's counsel, the only issue for determination is whether the court should review its orders granted on 23rd June, 2022.

27. Reliance was made on the provisions of order 45 rule (1) of the *Civil Procedure Rules, 2010* on review.

28. That the court believed that the MTSA was valid and had been executed without undue influence or coercion and made a determination of the entire case by holding the MTSA valid.

29. That the Claimant is likely to be prejudiced if the matter is referred to arbitration on account of the Ruling.

30. Counsel submitted that paragraph 72 of the ruling that waiver clauses were standard whenever final and full payment or settlement agreements are entered into was an error apparent on the face of the record.

31. That the court inadvertently made a determination of the whole case by holding the MTSA valid.

32. Reliance was made on the decision in *Alpha Fine Foods Ltd v Horeca Kenya Ltd & 4 others* (2021) eKLR on the scope of review as well as the sentiments of the court in *Valeo (K) Ltd V Barclays Bank of Kenya Ltd* (2008) eKLR for a definition of error on the face of the record.

33. Counsel submitted that the holding that a waiver clauses was a standard practice in agreements failed to consider the resultant effect of the said waiver.

34. The decision in *Coastal Bottlers Ltd v Kimathi Mithika* (2018) eKLR was relied upon to demonstrate the effect of a waiver clause.

35. According to counsel, the orders made on June 23, 2022 had the effect of driving the applicant from the seat of justice as with the waiver in the MTSA.

36. That the reference to the waiver clause was an error on the face of the record.

37. Counsel urged that the applicant signed the MTSA while under economic duress as held in Medscheme Holding Pty Ltd & another V Bhamjee (2005) and urged the court to consider the surrounding circumstances when the applicant executed the MTSA.

38. That the applicant's email of 5th November, 2020 was sent out at 6.34 pm out of frustration and desperation in the middle of a pandemic and a foreigner of advanced age.

39. That the circumstances in which the applicant signed the MTSA amounted to duress.

40. Counsel relied on paragraph 99 of the ruling to urge that the facts of the case suggested otherwise by providing an analysis of the email communication between the parties.

41. Finally, counsel urged that endorsing arbitration pursuant to a clause contained in a disputed document was a kin to being dragged into a process which should ordinarily be voluntary.

42. Section 12 of the *Employment and Labour Relations Court*, 2011 was relied upon to urge the jurisdiction of the court to hear and determine disputes arising out of employment and parties should fall to the employment agreement which had no arbitration clause.

Respondent's submissions

43. According to the Respondent's counsel, the singular issue for determination was whether the applicant had satisfied the test for review of the ruling delivered on 23rd June, 2022.

44. Counsel submitted that review jurisdiction must be exercised within the provisions of section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules, 2010* and a court may review its decision on account of some mistake or error apparent on the face of the record.

45. Reliance was made on the decision in *Nyamongo & Nyamongo v Kogo* (2001) E.A 173 for the proposition that an erroneous decision was not an error apparent on the face of the record.

46. According to counsel, mistake or error on the face of the record signified an error evident from the record that did not require detailed examination of the error.

47. That what the applicant was alleging as an error required a re-examination of the evidence and arguments.

48. Counsel relied on the decision in *Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* (2019) eKLR where the court held that an order for review was unavailable if there was no glaring omission or an evident mistake.

49. Counsel further submitted that the application for review herein was an appeal against the ruling delivered on June 23, 2022.

50. Counsel further submitted that by the applicant's allegation that he was coerced to sign the MTSA and that the court should not have relied on the MTSA in determining the issues, the applicant was essentially urging that the court arrived at an erroneous conclusion by holding that the applicant was not coerced.

51. Counsel urged that the review was an appeal as the applicant appeared to be inviting the court to reconsider its position as was held by the Court of Appeal in *National Bank of Kenya Ltd v Ndungu Njau* (1997) eKLR that an erroneous conclusion of law or evidence is a ground of appeal.

52. Finally, counsel urged that there was no discernible mistake or error apparent on the face of the record in the Ruling.

Determination

53. The singular issue for determination is whether the applicant has made a case review of the Ruling delivered on June 23, 2022.

54. In order to determine whether indeed the ruling has an error apparent on the face of the record, it is elemental to delineate the contours of the concept of error on the face of the record.

55. Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provides;

> 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. 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 order made;
>
> b. On account of some mistake or error apparent on the face of the record;
>
> c. If the judgement requires clarification; or
>
> d. For any other sufficient reason.

56. The foregoing provision confer upon the court jurisdiction to review its judgements and rulings on application by the aggrieved person.

57. The pith and substance of the applicant's case is that the Ruling dated June 23, 2022 has a mistake or error apparent on the face of the record in the context of rule 33(1)(b) of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.

58. A detailed elucidation of the concept of error apparent on the face of the record was made in *Muyodi v Industrial and Commercial Development Corporation & another* (2006) 1 EA 243, where the Court of Appeal stated as follows;

> "In *Nyamongo & Nyamongo v Kogo* (2001) EA 174, this court said that an error 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 options, 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. This laid down principle of law is indeed applicable in the matter before us".

59. Similarly, in *Edison Kanyabwera v Pastori Tumwebaze* (2005) UGSC 1, the Supreme Court of Uganda explained the concept of error apparent on the face of record as follows;

> "It is stated that in order that an error may be a ground for review, it must be one apparent on the face of the record, i.e an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on record. The error may be one of fact, but it is not limited to matters of fact and includes error of law."

60. Finally, 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. 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 statue or other provision of law cannot be a ground for review."

61. The court is bound by and is in agreement with the foregoing expositions of the law on review of judgements and rulings.

62. Applying the foregoing provisions and propositions of law to the instant suit, it is clear to the court the applicant's Notice of Motion appear to exceed the beacons prescribed by law regarding review of judgements and rulings.

63. First, in his Supporting Affidavit, the applicant avers that since the Mutual Termination and Settlement Agreement was disputed, by the Applicant, reliance on it was in effect making a decision on its validity and enforceability and according to the applicant the MTSA was unenforceable as it was entered into under coercion and the court did not consider the emails the applicant sent to the Respondent.

64. Simply put, the applicant is questioning the court's finding as opposed to locating the mistake or error on the face of the record as espoused in the decisions cited above.

65. The applicant states that since he was faced with a take it or leave it situation, and needed money for his family, he was coerced to sign the MTSA and the same is therefore unenforceable yet the court held otherwise, thus questioning the merits of the finding of the court.

66. By so doing, the applicant places the issue on a platform where there could reasonably be two opinions as the court stated in Nyamongo & Nyamongo V Kogo (Supra), which rules out the issue as 'error' apparent on the face of the record. Relatedly, the error is question is neither self-evident nor glaring and requires a detailed analysis and reasoning.

67. The second ground for review is that at paragraph 72 of the ruling, the court held that waiver of claims was a standard clause in contracts, thus there was no dispute to be referred to arbitration as the applicant is estopped from pursuing any claim against the Respondent and was claiming statutory dues.

68. That this was an erroneous pronouncement as it determined the entire suit conclusively at the interlocutory stage.

69. The impugned paragraph states as follows;

> " The Claimant assails the MTSA on the premise that it contained a clause on waiver of claims which is standard practice whenever final and full payments or settlement agreements are entered into."

70. Simply put, the paragraph merely confirms that such clauses are typical in certain agreements. The paragraph makes no reference the waiver clause in the MTSA or its import which the court is enjoined to do before determining its effect on the agreement as explained by the Court of Appeal in *Costal Bottlers Ltd v Kimathi Mithika* (*supra*).

71. Significantly, and as submitted by the Respondent's counsel, section 6(1) of the *Arbitration Act*, 1995 enjoins the court to determine whether the agreement to be referred to arbitration is enforceable.

72. According to the applicant, the foregoing paragraph is unequivocal that the waiver of claims clause in the MTSA is enforceable and thus the applicant had no case before the arbitrator or any court of law for that matter.

73. In his submissions, counsel for the applicant relied on Court of Appeal decisions to demonstrate the effect of discharge vouchers or settlement agreements, an issue the court had not been invited by the parties to address and neither made a finding on it.

74. The court is alive to the Court of Appeal decisions in *Krystalline Salt Ltd v Kwekwe Mwakele & 67 others* (2017) eKLR, *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR, *Trinity Prime Investment Ltd v Lion of Kenya Insurance Company Ltd* (2015) eKLR and *Damodar Jihabhai & Co. Ltd & another v Eustace Sisal Estates Ltd* (1967) E.A 153 among others on the nature of settlement agreements or discharge vouchers.

75. Similarly, the applicant's submission that the orders made on 23rd June, 2022 drove the applicant from the seat of justice is unsustainable as arbitral awards are challengeable in court by the aggrieved party.

76. Relatedly, the applicant had a statutorily guaranteed right to appeal the ruling at the Court of Appeal for determination at that level.

77. For the foregoing reasons, it is the finding of the court that the applicant's Notice of Motion dated 13th October, 2022 does not meet the threshold for review of the ruling delivered on 23rd June, 2022.

78. Accordingly, the Notice of Motion dated 13th October, 2022 is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF MAY 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