



REPUBLIC OF KENYA



**Ongeso v PN Mashru Ltd (Cause 173 of 2015)
[2023] KEELRC 2389 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2389 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 173 OF 2015
AK NZEI, J
SEPTEMBER 28, 2023**

BETWEEN

VITALIS JUMA ONGESO CLAIMANT

AND

PN MASHRU LTD RESPONDENT

RULING

1. The application before me for determination is the Claimant's Notice of Motion dated 14/12/2022. The Claimant/Applicant seeks the following orders:-
 - a) that the Court be pleased to vary, review and/or set aside its Ruling dated 24/3/2022, and in particular the order dismissing the Claimant/Applicant's suit.
 - b) that the Court do reinstate the Claimant's suit pending hearing and determination of Civil Appeal No. 64 of 2022.
 - c) that the costs be in the cause.
2. The application, expressed to be brought under Sections 1A.1B,3,3A,63(e) and 80 of the *Civil Procedure Act*, Order 45 Rules 1,2,5 6 and Order 51 Rules 1&3 of the *Civil Procedure Rules* and the inherent jurisdiction of the Court, is premised on the supporting affidavit of Richard Mbuya Advocate sworn on 14/12/2022. It is deponed in the said affidavit:-
 - a) that the suit herein was dismissed on 24/3/2022 on ground of the Claimant failing to file an affidavit in response to a notice to show cause why the suit could not be dismissed for want of prosecution, dated 17/11/2021, within 7 days as directed by the Court on 1/12/2021.
 - b) that the replying affidavit was prepared on 6/12/2021, and was submitted to the Court's Registry on 8/12/2021 for assessment, and was paid for on the same date.



- c) that the Court's Registry erroneously stamped the said affidavit as having been received on 9/12/2021, yet the same had been submitted for assessment on 8/12/2021, and had been paid for on the same day.
 - d) that the Claimant's suit was dismissed on 24/3/2021 for non-compliance with the Court's orders issued on 1/12/2021.
 - e) that the Court did not factor in the date when the replying affidavit was submitted to the Court's Registry for assessment and subsequent payment of the requisite fees as evidenced by the Court receipt.
 - f) that stamping of the replying affidavit by the Court's Registry indicating receipt on 9/12/2021 as opposed to 8/12/2021 when the Court received payment and issued a receipt is entirely in the Court's own control.
3. The Respondent filed grounds of opposition, dated 13/2/2023, in opposition of the application and stated:-
- a) that the application as conceived and formulated is untenable and bad in law, and orders sought therein are not for granting.
 - b) that the application does not meet the legal threshold for granting of the orders sought, either for review and/or for setting aside of a valid dismissal order of the Court.
 - c) that the Applicant is guilty of inordinate delay and unexplained laches in bringing the instant application.
 - d) that the Honourable Court lacks Jurisdiction to entertain the instant application by dint of being functus officio, having pronounced itself with finality in the matter, and thus the only avenue available to the Applicant is to prefer an appeal against the dismissal order.
4. Having considered matters set out in the application, the affidavit sworn in support of the application and annexures thereto, and the Respondent's grounds of opposition, two issues emerge for determination. These are:-
- a) whether this Court has jurisdiction to review and to set aside its own orders and decisions.
 - b) whether the orders sought by the Claimant/Applicant are merited.
5. Before determining the aforesaid two issues, it is important to restate the basis of the order sought to be reviewed. On 17/11/2021, this Court's Deputy Registrar issued a notice to the parties herein under Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules* 2016, calling upon them to attend Court on 1/12/2021 and show cause why the suit could not be dismissed for want of prosecution. On 1/12/2021, I made the following self-executing orders in the presence of Counsel for both parties:-
- a) the Claimant is granted 7 days to file an affidavit showing cause why the suit should not be dismissed for want of prosecution, failing which the suit shall stand dismissed for want of prosecution.
 - b) mention on 19/1/2022.



6. On 19/1/2021, Counsel for the Claimant told the Court:-

“we filed an affidavit in response to the Notice to show cause. The affidavit was filed on 9/12/2021. The affidavit appears to have been filed outside the 7 days granted by the Court on 1/12/2021. I pray that the Court admits the affidavit.”

7. There is, indeed, on record a replying affidavit of one Mutiokoh Mwanzia Advocate, shown to have been sworn on 6/12/2021 and filed in Court on 9/12/2021. The same is stamped with this Court’s Registry date stamp for 9/12/2021. The Court was not addressed by the Claimant’s Counsel on the alleged fact of the said affidavit having been presented to the Court’s Registry on 8/12/2021 and Court filing fees having been paid on the said date. Instead, Counsel for the Claimant pleaded late filing and even sought to have the affidavit admitted.
8. It always behoves parties and/or their respective legal Counsel to always acquaint themselves with the documents that they file in Court at any given time, and the Court’s orders on filing of such documents, where such orders are given. That way, there will be accuracy in what parties and/or their legal Counsel tell the Court.
9. One of the documents annexed to the affidavit sworn in support of the application is a copy of a Court payment receipt for ksh. 75, issued to IRB Mbuya & Company (the Claimant’s Counsel) on 8/12/2021 at 16:03:44 regarding Case No. ELRC 173/2015(the suit herein). The document that was being filed is described on the said receipt as Replying Affidavit. Based on this, the Court is convinced, on a balance of probability, that the Claimant’s Counsel complied with this Court’s order dated 1/12/2021 by filing a show cause/replying affidavit within 7 days of the said orders; and that “the suit did not stand dismissed.” In my view, Court documents are deemed duly filed upon presentation of the same to the Court and upon payment of the assessed Court filing fees.
10. Turning to the issues already isolated herein for determination, this Court can, indeed, review and set aside its orders and decisions, but within the parameters of the law and set down procedure. The Court’s power to review its own decree or order is provided for in Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules* 2016 which provides as follows:-

“ 33.

- (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.”



11. Rule 33(5) provides that where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
12. In the present case, I am satisfied that there is an error that is apparent on the face of the record. The affidavit ordered by the Court on 1/12/2021 to be filed within 7 days was filed within the time ordered, on 8/9/2021. The self executing order of this Court given on 1/12/2021 did not, therefore, take effect; and the suit did not, stand dismissed.
13. The Court of Appeal stated as follows in *Muyodi -vs- Industrial And Commercial Development Corporation & Another* [2006] E.A.243:-

“In *Nyamogo & Nyamogo -Vs- Kago* [2021] 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 indefinites 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 be an error apparent on the face of the record. Again, if a view adopted by the Court in the original records is a possible one, it cannot be an error or wrong view, is certainly no ground for review, although it may be for an appeal.”

14. As already stated in this ruling, it is my finding that there is an error apparent on the face of the record, on account of which this Court can safely review, and set aside its order finding the Claimant’s suit as having been dismissed by dint of its orders dated 1/12/2021. Consequently, and having considered written submissions filed by Counsel for both parties, I allow the Claimant’s Notice of Motion dated 14/12/2022 in terms of prayer no. 1 thereof, and make the following orders:-
 - a) this Court’s Order dated 24/3/2022 marking the Claimant’s suit herein as dismissed is hereby set aside.
 - b) the Claimant’s suit shall be prosecuted within 90 days of today, failing which the suit shall stand dismissed.
 - c) each party shall bear its own costs of the application.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH SEPTEMBER 2023

AGNES KITIKU NZEI

JUDGE

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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.

