



REPUBLIC OF KENYA



Muliango v Masaka (Cause 989 of 2018)
[2023] KEELRC 2722 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2722 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 989 OF 2018
JK GAKERI, J
NOVEMBER 2, 2023

BETWEEN

MONICA IMALI MULIANGO CLAIMANT

AND

CATHERINE MASAKA RESPONDENT

RULING

1. Before the court for determination is the Respondent's Notice of Motion dated 14th June, 2023 filed under Certificate of Urgency seeking ORDERS THAT;
 1. Spent.
 2. Spent.
 3. Spent.
 4. The Honourable Court be pleased to vary, review and/or set aside the judgement delivered on 29th May, 2023 and allow the Respondent to give her evidence.
 5. The Respondent bear costs of this application.
2. The Notice of Motion is expressed under Section 12 of the *Employment and Labour Relations Court Act*, Rules 17 and 34 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Order 42 Rule 6 of the Civil Procedure Rules, is based on the grounds set out on its face and supported by the Affidavit of Catherine Masaka, the Respondent sworn on 14th June, 2023.
3. The affiant deposes that being dissatisfied with the decision delivered on 29th May, 2023, she applied for certified copies of proceedings which are still pending and opted to seek a review of the judgement.
4. That the Claimant/Respondent is likely to execute the judgement rendering the appeal nugatory.



5. The affiant states that when the matter came up for hearing on 1st February, 2023, the Claimant was logged from the village in Rusape, Zimbabwe but halfway through, the connection broke and communication dropped for the rest of the session until the Claimant had finished giving her evidence.
6. That the Respondent was not given the opportunity to give evidence and the judgement was against her.
7. The affiant depones that it is fair and just that she be granted the opportunity to adduce her evidence for the court to set aside and/or review the decision and the Claimant/Respondent will not be prejudiced if the orders sought were granted since security was deposited as directed.
8. That the application was made without undue delay.

Respondent's case

9. In her grounds of opposition dated 22nd June, 2023, the Respondent states that the instant application is incompetent and misconceived as the applicant had already filed a notice of appeal and having elected to do so cannot come back to seek a review of the same judgment and, in any case the applicant had not established for review of the judgement as it was entered regularly.
10. That the application was intended to stall taxation and execution of the decree.
11. That the application is bad in law and an abuse of the court process.

Applicant's submissions

12. Counsel isolated three issues for determination, touching on reasons for re-opening of the matter, threshold of stay of execution and the legal threshold for review.
13. As regards the 1st issue, counsel submitted that the applicant was seeking an order to re-open the suit so as to defend it and the court had discretion to do so.
14. Counsel submitted that although the Claimant's case was closed on 27th September, 2022, counsel sought an adjournment as the applicant was unable to log into the session owing to power fluctuations in Zimbabwe and a mention was slated on 13th October, 2022 for purpose of a hearing date and hearing was fixed for 19th December, 2022 by consent on which day the Respondent sought an adjournment for the applicant's inability to log into the session and hearing was slated for 1st February, 2023 and parties were ready to proceed and time allocation was provided at which time the applicant was no longer logged into the virtual court session and counsel urged the court to adopt the applicant's witness statement dated 6th July, 2018 but the Respondent's counsel objected and the court declined the request.
15. That given the power fluctuations in Zimbabwe, the applicant was unable to testify and had thus made a case for the re-opening of the suit so as to testify.
16. On the legal threshold for stay of execution, counsel relied on the provisions of Section 123(i) and (viii) of the *Employment and Labour Relations Court Act* as well as Order 22 Rule 25 on the interim preservation orders and stay of execution respectively.
17. According to counsel, the power fluctuations in Zimbabwe are sufficient reason to re-open the applicant's case to give evidence and, in any case the applicant had deposited the sum of Kshs.323,138.51 as security.



18. As regards the threshold for review, counsel relied on Rule 33(1)(c) of the Employment and Labour Relations Court (Procedure) Rules, 2016 to urge that the applicant had sufficient reason for a review.
19. Reliance was also made on Order 12 Rule 7 of the Civil Procedure Rules, 2010 on setting aside of the judgement or dismissal of a suit.
20. The decisions in *Joseph Gachoka V Kisiwa Guesthouse Lodge*, *Reuben Ngila Kitonyi V Central Bank of Kenya* and *Leonard Gethoi Kamweti V National Bank of Kenya & 2 others* were cited in support of the submissions.

Respondent's submissions

21. Counsel submitted that the applicant's request for the setting aside of the judgement was too late as it should have been done before filing of submissions and counsel would have conceded.
22. The parties filed submissions, confirmed and judgement was delivered on 29th May, 2023 and the applicant did not lodge any application.
23. Counsel urged that under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010, a party could not apply for review and again appeal the same decree or order.
24. That having elected to appeal, the applicant could not try her luck with a review while leaving the appeal pending.
25. Counsel urged that the applicant should not be accorded a second bite of the cherry and the application was an abuse of the process of the court.
26. Counsel further submitted that the applicant had her chance in court but failed to attend and had not demonstrated what had changed in Zimbabwe.
27. That the Respondent closed her case without calling a witness and was at all material times represented by counsel.
28. According to counsel, failure to attend court by the applicant was not an error on the face of the record as the application should have been made earlier and in particular the directions issued on 1st February, 2023 on the filing of submissions.

Determination

29. The issues for determination are;
 - i. Whether the application has a competent Notice of Motion application for review of the judgement delivered on 29th May, 2023.
 - ii. Whether the application for review herein meets the requisite threshold.
 - iii. Whether the application for setting aside of the judgement delivered on 29th May, 2023 meets the requisite threshold.
30. As regards the 1st issue, the applicant's Notice of Motion dated 14th June, 2023 seeks an order to vary or review the judgement herein which is provided for under Rule 33(1)(d) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which 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 judgement or ruling –
 - a. . . .
 - b. . . .
 - c. . . .
 - d. for any other sufficient reason.

31. According to the applicant, the allegation that there were power fluctuations on the date of hearing and previous two adjournments was a sufficient reason to justify a review of the judgement.

32. Noteworthy, the application makes no reference to the particular part of the judgement to be reviewed.

33. More significantly, however, no attempt was made to demonstrate that the grounds relied upon in the application fell within the meaning of the phrase “any other sufficient reason” as used in Rule 33(1) (d) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which replicates Order 45 Rule 1 of the Civil Procedure Rules, 2010 which derives its power from Section 80 of the Civil Procedure Act.

34. In *Ajit Kumar Rath V State of Orisa & others* 9 Supreme Court cases 596 at 608, the Supreme Court of India stated as follows;

“ . . . It may be pointed out that the expression “any other sufficient reason” . . . means a reason sufficiently analogous to those specified in the rule.”

35. A similar view was expressed in *Sadar Mohamed V Charan Singh and another* (1963) EA 557.

36. In *Tokesi Mambili and others V Simion Litsanga* (2004) eKLR, the Court of Appeal stated inter alia;

“Where the application is based on sufficient reason, it is for the court to exercise its discretion.”

37. Guided by these foregoing sentiments, the court is not persuaded that the grounds relied upon by the applicant fall within the scope of “any other sufficient reason” as used in Rule 33(1)(c) of the Rules, 2016 as it must be construed ejusdem generis the preceding items.

38. In *Nasibwa Wakenya Moses V University of Nairobi & another* (2019) eKLR, Mativo J. (as he then was) expressed himself as follows, as regards the power of review;

“It is well settled that the review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 45, Rule 1. Any other attempt, except on grounds falling within the ambit of the above rule, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement or order . . .

The underlying object of this provision is neither to enable the court to write a second judgement nor give a second innings to the party who has lost the case because of his negligence or indifference . . .”

39. The court is guided accordingly.



40. Having found that the grounds relied upon by the applicant do not appear to be analogous to those set out in Rule 33(1)(a)(b) and (c) of the Employment and Labour Relations Court (Procedure) Rules, 2016, the court is not persuaded that the applicant has a competent application for review of the court's judgement dated 29th May, 2023.
41. Closely related to the foregoing and as submitted by the Respondent's counsel, an application for review and an appeal against the same judgement or order do not appear to have been intended to co-exist.
42. Rule 33(1) cited above states that;
- “A decree or order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed.”
43. This would appear to suggest that a person who has filed an appeal against an order or decree ought not to simultaneously apply for review of the same order or decree as the applicant purports to do.
44. In her Supporting Affidavit sworn on 14th June, 2023, the applicant deposes that she lodged a Notice of Appeal dated 31st May, 2023 and applied for certified copies of the proceedings, which she has attached and further disposes that the appeal will remain pending as she had opted for review of the judgement.
45. It is unclear as to whether the applicant proposes to revive the pending appeal in case the instant application fails.
46. The potential scenario was considered by Odunga J. (as he then was) in HA V LB (2022) eKLR, where the learned Judge stated as follows;
- “. . . But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from the review and an appeal against the order sought to be reviewed amounts in my view, to an abuse of the process of the court. It would also contravene the overriding objective as provided under Sections 1A and 1B of the *Civil Procedure Act* . . .
- To find otherwise would amount to giving the courts seal of approval to persons who wish to play lottery the judicial process. Accordingly, I associate myself with the decision in The Chairman Board of Governors Highway Secondary School V William Mmosi Moi Civil App. No. 277 of 2005 that both options cannot be pursued concurrently or one after the other.”
47. The court is in agreement with these sentiments.
48. As to whether the reason relied upon by the applicant meets the threshold for review, the Respondent's counsel urges that it does not. The applicant's sole ground is that she was not accorded an opportunity to be heard. That her non-appearance was occasioned by fluctuation of power and internet in Zimbabwe.
49. Puzzlingly, the applicant adduce no evidence to proof the alleged power fluctuations.
50. Before delving into the relevant facts, it is essential to note that contrary to the applicant's deposition that the Claimant testified on 1st February, 2023, the date was taken by consent on 19th December, 2022 for a defense hearing. Hearing was slated at 10.35 am but the applicant was unavailable at 10.35 am and the court gave directions with a view to progress the matter.



51. Needless to emphasize, the applicant did not attend the hearing on 27th September, 2022 when the Respondent/Claimant testified and was cross-examined and re-examined and an adjournment was granted at the applicant's counsel's instance, a scenario repeated on 19th December, 2022, the next hearing date when the court gave the last adjournment to the applicant.
52. On 1st February, 2023, the applicant's counsel expressed his frustration and applied for the adoption of the applicant's witness statement which the Respondent opposed arguing that the statement raised serious issues that necessitated cross-examination of the witness.
53. The court found the statement inadmissible as evidence and the applicant's case was closed and directions on the filing of submissions given.
54. The applicant's counsel was accorded 14 days after service of the Respondent/Claimant's submissions as requested.
55. Confirmation of filing of submissions was scheduled for 27th February, 2023 but did not take place owing to the unavailability of the judge who was away on official duty.
56. A judgement date was given on 20th March, 2023 in the presence of both counsels.
57. It is unclear to the court why the applicant did not apply for the setting aside of the directions made on 1st February, 2023 before they were complied with and a judgement delivered and as submitted by the Respondent's counsel, the applicant was at all material time represented by counsel who participated in the proceedings and raised no objection.
58. For the foregoing reasons, it is the finding of the court that the applicant has failed to establish on a balance of probabilities that it is entitled to a review of the judgment dated 29th May, 2023.
59. Finally, besides the prayer for stay of execution of the judgement, the applicant also seeks the setting aside of the judgement to enable her adduce evidence.
60. The applicant cites Order 12 Rule 7 of the Civil Procedure Rules, 2016 which provides for the setting aside of a judgement on application.
61. The court may set aside or vary the judgement or order on such terms as it may deem just and as correctly submitted by the applicant's counsel, the power of the court to set aside a judgement or order is discretionary and is intended to facilitate just disposal of cases.
62. The applicant urged the court to exercise its discretion favourably and allow the application.
63. Intriguingly, the applicant's counsel did not submit or demonstrate that the applicant was denied the opportunity to be heard, perhaps because the applicant was represented by counsel throughout the trial and her counsel in fact suggested the way forward on 1st February, 2023 by applying that the Respondent's witness statement be adopted which application the court found unmeritorious.
64. Similarly, the applicant has neither alleged that the provisions of *the Constitution* of Kenya, 2010 or any other law were violated nor alleged that impugned judgement was irregular.
65. More importantly, however, while the decision to close the Respondent's case was made on 1st February, 2023 and directions on the filing and exchange of submissions made, and the Respondent's counsel filed and served submissions, the instant application was only made after judgement had been delivered more than 4 months later.



66. Finally, the applicant has not demonstrated when the power and internet were stabilized in Zimbabwe to guarantee expeditious disposal of the suit if the court was inclined to set aside the judgement delivered on 29th May, 2023.
67. For the forgoing reasons, the court is not persuaded that the order to set aside the judgement delivered on 29th May, 2023 is merited.
68. In the upshot, the Notice of Motion dated 14th June, 2023 is unmerited and is accordingly dismissed.
69. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF NOVEMBER 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

