



Periasamy & another v Shri Gayatri Borewell (K) Limited (Cause E003 of 2022) [2023] KEELRC 3309 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3309 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
CAUSE E003 OF 2022
B ONGAYA, J
DECEMBER 20, 2023**

BETWEEN

SAMINATHAN PERIASAMY 1ST CLAIMANT

MURUGESAN PERISAMY 2ND CLAIMANT

AND

SHRI GAYATRI BOREWELL (K) LIMITED RESPONDENT

RULING

1. The Claimant filed the instant application dated 28.08.2023 and filed in Court on 30.08.2023 through the firm of Nduati & Company Advocates. The application is brought under Section 3, 16 and 20 (1) of the *Employment and Labour Relations Court Act*, Rules 25, 28, 33 and 38 of the Court's (Procedure) Rules, 2016 and all other enabling provisions of the law. The claimant prays for the following orders:
 - a. That the Honourable Court be pleased to review and set aside its judgment entered on the 28th July, 2023.
 - b. That the Honourable Court be pleased to set aside the proceedings of the 17th March, 2023.
 - c. That the Honourable Court be pleased to reopen both parties' case and allow parties to proceed by oral evidence in support of the witness statements filed by parties.
 - d. That the Honourable Court be pleased to review, vary or set aside all procedural orders, directions and judgment issued by it and allow the hearing to proceed by reliance on oral, written statement and oral evidence.
 - e. That the costs and incidentals of this application be in the cause.
2. The application is based on the supporting affidavit of Saminathan Periasamy, the 1st Claimant herein, sworn on 28.08.2023 and upon the following grounds:



- a. That the Honourable Court entered judgment on 28th July, 2023 wherein it opined that parties opted not to call witnesses and only wished to rely on the documents and pleadings.
 - b. That the Honourable Court assessment of the procedural intentions of the parties herein, and especially the claimants' intentions, is a misrepresentation as the claimants were under the mistaken that the Court will consider the claimants' witness statement filed herein.
 - c. That the claimants are willing, and ready, and with the leave of the Honourable Court, to present their testimony orally in Court.
 - d. That the Honourable Court has procedural powers, at any stage of proceedings, to require the attendance of a deponent or an author of a written statement for the purpose of examination of the facts deponed or written.
 - e. That the procedural oversight that led to the misapprehension, or miscommunication to Court was due to counsel's oversight and the claimants' cause should not suffer due to mistake by Advocate.
 - f. That if this application is not granted, the applicant will suffer irreparable damage.
 - g. That substantial loss will result to the applicant unless the order sought is granted.
 - h. That this application ought to be granted in the interest of equity and justice.
 - i. Representation by Zena Atetwe Jalenga Advocate of Rashid & Rashid advocates for the respondent raises very serious issues of conflict of interest.
3. The respondent opposed the application by filing the replying affidavit sworn by Dipakkumar Manubhai Patel, its Director and filed on 29.11.2023 through Wanjohi Muli & Partners Advocates LLP. It was urged as follows:
- a. The application is misconceived, incompetent and an abuse to the court processes.
 - b. Parties advocates voluntarily consented on the 17th March, 2023 to proceeding with the hearing of this matter by way of written affidavits and submissions. There was no coercion, fraud or misrepresentation to the applicants' advocates at the time so as to warrant the setting aside the judgment given the fact that judgment was entered in the respondent's favour.
 - c. The respondent argues that setting aside or review of the court orders would be tantamount to setting aside of the consent judgment between the parties.
 - d. The respondent further argues that the applicant has not met the threshold for grant of the orders sought in their instant application as no substantial ground has been raised to warrant the reopening of the case so as to proceed by way of oral evidence.
 - e. The respondent urged that the issues raised by the applicant in the instant application can only be addressed in an appeal and not by way of application for review.
 - f. The respondent urged the Honourable Court to find the instant application without merit and thus be dismissed with costs to the respondent.
4. Parties put their respective submissions through Court. The Court has considered the respective positions and resolves as follows.
5. To answer the 1st issue, the Court finds that as submitted for the respondent, on 17.03.2023 parties entered a voluntary consent order that the case be determined on the basis of pleadings and documents



which were deemed duly produced and admitted as filed. That consent has not been shown as defeated on account of coercion, fraud or misrepresentation. It can only be set aside by parties' own consent but which has not been shown to exist at all. The Court finds that the parties are bound accordingly.

6. To answer the 2nd issue, it is obvious that the applicants seek to set aside the directions by consent of the parties on the manner of hearing and determining the suit. It is that in light of the judgment the applicants consider unfavorable, the applicants are seeking to fill the gaps in their failures or their advocates' omissions, mistaken or not, to relitigate the case. The Court considers that it is not the purpose of a review procedure to reopen determined suits with valid judgments and decrees in a calculated move to seek to arrive at a different outcome. At best, the instant case once again is an excellent lesson that litigants must take pretrial steps and pretrial conferences with due seriousness as a most important stage in the proceedings before Courts. That the proper preparation for the hearing or trial is at the core of justice and the subsequent outcomes in litigation. Due preparation may not appear urgent but it is indeed extremely important for success in any endeavor and more so in Court proceedings.
7. To answer the 3rd issue and as submitted for the respondent there exist no suggested and known ground for review in the instant case. It is that the applicant is seeking that the Court should change its reasoning and analysis in the Judgment but such as urged for the respondent should go to appeal. The application must fail. Considering all circumstances each party will bear own costs.
8. In conclusion the application is hereby dismissed with orders:
 1. each party to bear own costs of the application; and,
 2. the Deputy Registrar to forthwith return the case file to the Machakos Court's Sub-registry..

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 20TH DECEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

