REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO. 1 OF 2022

(FORMERLY ELRC CAUSE NO 788 OF 2017, NAIROBI)

FREDRICK MWANIA MUSAVA.....CLAIMANT

VERSUS

ALPHARAMA LTD.....RESPONDENT

RULING

1. Before me is an application by the Claimant dated 24th September 2021 seeking to review the court's judgment delivered on 10th September 2021. The gist of the application is that the court's decision declining to grant the Claimant severance pay is in conflict with the dictates of section 40 of the Employment Act as read with the court's pronouncement that the Claimant was terminated on account of redundancy.

2. The application is opposed by the Respondent. This is through a replying affidavit sworn by one Pamidimukkala V S Siva.

3. If I understand the application well, the Claimant's advocates contention is that since the court found that the redundancy declaration against the Claimant was unlawful, it necessarily made a determination that the termination was occasioned through a redundancy albeit unlawfully. As a result, the court ought to have ordered that the Claimant be paid redundancy dues under section 40 of the Employment Act. In other words, all that the Claimant's advocates are saying is that the court misapprehended and misapplied the law in this respect. This, in a nutshell, is the main and perhaps the only ground in support of the application for review.

4. In order to have a proper perspective of the application, it is perhaps necessary that I reproduce salient sections of the court's judgment that addressed the issue at hand. Paragraphs 28, 29 and 31 of the judgment are significant in this respect. This is what I said in the said paragraphs: -

> ***''……. to the extent that the Respondent did not provide the reason for the redundancy in terms of section 40 of the Employment Act, the court finds that the Respondent did not justify the redundancy termination on substantive grounds.***
>
> ***Therefore, and to the extent of the failure to observe the dictates of section 40 of the Employment Act, the Respondent's decision to terminate the services of the Claimant was flawed. In terms of section 45 of the Employment Act, the purported declaration of redundancy in effect constituted a wrongful termination of the Claimant.***
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> ***The Claimant has prayed for severance pay. However, as the purported declaration of redundancy against him has been found to have been irregular, I do not think that the Claimant is entitled to this remedy. This payment is made under section 40 of the Employment Act on the assumption that there has been a valid declaration of redundancy. Where the declaration is found to be irregular, the resultant termination becomes unlawful. Thus, the affected employee can only pursue awards under section 49 of the Employment Act and perhaps as well sections 35 and 36 of the Act.''***

5. I think that the above paragraphs, particularly the last one, are fairly clear both in text and content. By this, I simply meant that what was purported to have been a redundancy was, in law, a wrongful termination. It did not qualify as a redundancy. That is why I describe it as a ''purported redundancy''. And this being the case, the Claimant could only claim damages for wrongful termination as guided by section 49 of the Employment Act. He could not claim for redundancy payment under section 40 of the Act because his case did not qualify as one of redundancy but unlawful termination.

6. I still hold the same position as expressed in the judgment. However, and as is clear from the application before me, counsel for the Claimant has a different viewpoint on the issue. This may as well be a case of misapprehension of the law by me on the issue as argued by counsel. But it can only yield a case for variance in interpretation of this provision of law. It certainly is not a matter that constitutes an error apparent on the face of the record. I do not see any error on record.

7. Indeed, I agree with the position expressed by the Respondent's counsel that a misapprehension by the court of evidence or the law is not a suitable ground for review of a decision. It is more suited as a ground for appeal.

8. This position has been expressed in a number of decisions, some of them set out by counsel for the Respondent in their submissions to the court. In ***Golden Real Estate Limited v First Community Bank Limited [2019] eKLR,*** the court was said to have misapprehended the evidence that was tendered by failing to take into account an arbitration agreement that had been produced in evidence. On an application for review, the learned judge observed as follows: -

> ***''Although the applicant states there was a fundamental error on the record none is really shown to be. The court, as will be noted, considered all the documents attached to the applicants Chamber Summons dated 16th April 2018. There is no error apparent on the record. In this case if the applicant was aggrieved by the Ruling of 9th May 2019 the applicant should have filed an appeal.''***

9. In ***Pancrast Swan v Kenya Breweries Ltd (2014) eKLR*****, the court observed as follows on applications for review: -**

> ***"The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power.***
>
> ***The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of the Civil procedure. Thus re-assessing evidence and pointing out defects in the order of Court is not proper"***

10. In *Muyodi –vs- Industrial and Commercial Development Corporation & Anor (2006) 1EA 243* as quoted in *Barclays Bank of Kenya Ltd –vs- Abdi Abshir Warsame & Anor (2006) eKLR*, the court said the following on applications for review: -

> ***"…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 the mere erroneous decision and an error apparent on the face of the 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 case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions can hardly 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 or wrong view and is certainly no ground for a review although it may be for an appeal"***

11. In *Abasi Belinda v Fredrick Kangwamu & Another [1963] EA 557,* the court made the following observations on the same subject: -

> ***"..... a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground of appeal..."***

12. What the Claimant raises in the application before me as a ground for review is that I took an erroneous view of the law on the issue of redundancy pay. This is not the same thing as saying there is an error on record. As said earlier in the ruling and as is evident from the plethora of case-law on the issue, such matters properly belong to the realm of appeals and not reviews.

13. The net result of the foregoing is that I must dismiss the application which I hereby do. I ward costs of the application to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 24TH DAY OF MARCH, 2022

B. O. M. MANANI

JUDGE

In the presence of:

Muli for the Claimant/Applicant

Odoyo for the Respondent

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE