



**Aballa v Chanya Investment Limited (Cause 2241 of 2016)
[2022] KEELRC 117 (KLR) (26 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 117 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2241 OF 2016
NZIOKI WA MAKAU, J
APRIL 26, 2022**

BETWEEN

ROBERT OLAHI ABALLA APPLICANT

AND

CHANYA INVESTMENT LIMITED RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 10th January 2022 seek orders that leave is granted for the firm of Bikambo & Co. Advocates to come on record for the Applicant and that this Honourable Court be pleased to review, set aside and/or vary the judgment delivered on 28th September 2021 and the orders issued subsequently. He further seeks for a temporary stay of execution of the said orders issued against the Claimant pending the hearing and determination of this Application. The Application is premised on the grounds that the Court in its judgment found his Claim as unsuccessful and dismissed it with costs. That the said judgment was made without the Respondent fully disclosing to this Court that they were deducting and remitting NSSF dues and which non-disclosure was meant to deprive him of his right to fair labour practice. The Claimant/Applicant further asserts that the said judgment did not make reference to his bundle of documents, more so the letter dated 23rd December 2005 which introduced him as the new Manager of the Respondent and that this vital evidence was withheld from this Court by both the Respondent's and Claimant's erstwhile Advocates. That it is clear the orders were not made to serve the interests of all parties and that no prejudice will be occasioned on the Respondent if the orders sought are granted as opposed to the Claimant/Applicant who stands to be highly prejudiced and suffer substantial loss if the same are not granted.
2. The Application is supported by the Claimant/Applicant's Affidavit wherein he avers that he blames his former Counsel for failing to file his bundle of documents and for incompetence. The Claimant asserts that he only learnt of the same after diligently scrutinising his file when the said Advocates



handed it over to him after conclusion of the suit. That his erstwhile Advocates clearly let him down and which is the basis of this application and that it is only fair that judgment be arrived at after scrutiny of all material facts and available evidence. He further avers that this Honourable Court has the discretion to set aside the judgment as requested herein and that failure to do so would be tantamount to condemning him unheard.

3. The Respondent filed a Replying Affidavit sworn on 11th February 2022 by a Director, Ruth Kabura Mwangi who avers that the Claimant's Application is an abuse of the court process and an attempt to resuscitate a matter already heard and determined on merits by this Court. She avers that the Respondent has not been served with the NSSF statements marked as annexure ROA-1 in the Claimant's supporting affidavit. She avers that she is duly advised that the orders sought by the Claimant are incapable of being granted because:
 - i. The Claimant's Counsel does not require leave to come on record since the Claimant's previous advocates had executed a consent allowing the Claimant to act in person in the matter.
 - ii. There are no grounds for this Court to exercise its discretion in reviewing the judgment because the said NSSF statements were within the Claimant's and his Advocate's knowledge from the inception of the suit.
 - iii. It is not the Respondent's fault that the Claimant failed to file the NSSF statements and thus judgment in this suit cannot be reopened because the Claimant now casts aspersions on his previous counsel.
 - iv. This Honourable Court arrived at a just decision on merits after considering all the evidence and documents presented to it by the parties.
 - v. The allegation that the Honourable Court failed to refer to certain documents in its judgment may be a ground for appeal and not for review.
 - vi. The application for review herein is an abuse of the court process because the Claimant has filed an appeal against this Court's judgment as shown in annexure RKM 2 in the deponent's affidavit.
 - vii. The Court has nothing to stay in this suit because it was dismissed with costs to the Respondent and that it is further not clear what the Claimant wants the Court to review in the judgment dated 28.09.2021.
 - viii. Litigation must come to an end and parties should not be allowed to jam the courts with frivolous and vexatious applications.
4. In response, the Claimant/Applicant filed a Further Affidavit dated 28th February 2022 averring that the Respondent's Replying Affidavit is marred with falsehoods. He avers that a notice of appeal is merely an intention to appeal and is not the appeal itself and that the record is clear that there is no appeal challenging the impugned judgment. The Claimant asserts that the Respondent has not denied that they remitted his NSSF payments as his employer and that it is only an employer who remits NSSF on behalf of its employees. He asserts that he should not suffer injustice due to his advocate's acts of commission or omission and that in any event the onus was upon the Respondent to show through employment records that his NSSF remissions were not the obligations of the employer. Furthermore, the Respondent has now annexed the said NSSF statement in their Reply to the application herein which is crucial in providing a link of his employment relationship with the Respondent.



Claimant/Applicant's Submissions

5. On the question of representation, the Claimant/Applicant relies on the court's decision in *Kazungu Ngari Yaa v Mistry V. Naran Mulji & Co.* [2014] eKLR and Order 9 Rule 9 of the *Civil Procedure Rules 2010* which provides that a party who wishes to change advocates or act in person after delivery of judgment has to do the same with the leave of court after serving all the concerned parties of with consent of concerned advocates. It is the Applicant's submission that there has never been a consent adopted as an order of this Honourable Court and therefore the Respondent's argument on representation ought to be disregarded. He further submits that his application has met the threshold for review set out in Rule 33 (1) of the *Employment and Labour Relations Court (Procedure) Rules 2016* which allows the Court to review its orders if: the same has not been appealed against; the application is made without inordinate delay; and any of the grounds set in Rule 33(1) is proved. On the issue of appeal, the Claimant/Applicant submits that his intention to appeal the Court's decision does not affect his right to seek a review and that he relies on the Court of Appeal's decision in *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 2 Others* [2018] eKLR. The Claimant submits that the Respondent has also not demonstrated what prejudice they will suffer when the orders sought herein are granted despite his having filed a notice of appeal prior to filing the application herein. As to whether the application is mad without inordinate delay, he submits that he brought this application as soon as he obtained copies of the proceedings and judgment. Thirdly, he submits that in regards to the grounds set out in Rule 33(1), he has established on a balance of probability that there is discovery of important matter or evidence which is sufficient grounds for this Court to exercise discretion to review the impugned judgment. The Claimant submits that he has demonstrated that the alleged information of his NSSF statement was intentionally withheld by the Respondent and his erstwhile advocate and which relevant fact would have altered swayed the court's mind to arrive at a different verdict.

Respondent's Submissions

6. The Respondent submits that it is trite law that for an application for review to succeed it must meet the threshold established in Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules 2016*, for instance, the Applicant should not have preferred an appeal against the judgment they are seeking to review like what the Claimant has done herein. The Respondent relies on the case of *Bernard Ndungu Mbugua v Nairobi Water & Sewerage Company Limited* [2021] eKLR wherein Onyango J. held that the application failed as the claimant/applicant had preferred an appeal vide a Notice of Appeal which had yet to be withdrawn or appeal abandoned. The Respondent further invites the Court to refer to the Court of Appeal decision in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR that it is not permissible to pursue an appeal and an application for review concurrently and that a party who chooses to appeal automatically loses the right to ask for a review of the decision sought to be appealed. The Respondent submits that the Claimant's request for review thus ought to be dismissed so that he can pursue his appeal before the Court of Appeal.
7. The Respondent further submits that the Claimant should have filed the NSSF statements if they were of any probative value to his case but failed to do so. The Respondent submits that this notwithstanding, the NSSF statement attached to the Applicant's further affidavit does not show that the remittance of the Claimant's NSSF contributions was made by the Respondent and that the member indicated is Apelli Olahi Robert, who is probably not the Claimant, and the date of employment is 1st June 1976. The Respondent submits that there is thus no legitimate ground for this Court to review the judgment because the said NSSF statements, if any, were within the Applicant's and his advocate's knowledge. Furthermore, the allegation that this Court failed to refer to certain



documents in its judgment may be a ground for appeal and certainly not a ground for review as asserted by the Court of Appeal in *Christopher Musyoka Musau v N.P.G. Warren & 8 Others* [2017] eKLR. The Respondent also relies on the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR wherein the Court held that litigation must come to an end and that the end came for the applicant when she applied for review and appealed the decision made on the review application.

8. It behoves the Court to restate the law in respect to reviews before the Employment and Labour Relations Court. When can a party seek review of a decision made? Under Section 16 of the *Employment and Labour Relations Court Act* and Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules* of the Court, there is provision for a review. Rule 33(1) provides as follows:-

- (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 [Emphasis supplied].

9. The parameters are clearly set out above. The Claimant/Applicant has filed a notice of appeal against the decision of the Court. He asserts that the notice of appeal merely signifies the intent to appeal and that it is not an appeal. It bears repeating that an appeal is lodged in the Court of Appeal through a Notice of Appeal and as of this moment the Court of Appeal is seized of an appeal against my decision. As such, the Claimant has shut, by his own hand, the door to a review before me much the same way a review before me (prior to filing the notice) would have shut the door on any appeal he may have contemplated. As the application is completely devoid of merit, the same is dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2022

Nzioki wa Makau

JUDGE

