



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 115 OF 2018

JOSEPH MAINGI KARIUKI.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. This Ruling is in respect to the Respondent/Applicant's Notice of Motion dated 1st December, 2021 filed under certificate of urgency on even date pursuant to section 12, 13, 16 and 20 of the Employment and Labour Relations Court Act and Rule 27, 28 of the Employment and Labour Relations Court (Procedure) Rules 2016 and all enabling provisions. seeking the following Orders; -

- 1) That, this application be certified urgent and service in the first instances instance be dispensed with.**
- 2) That the court be pleased to stay execution of the judgement and decree of this Honourable Court issued on the 1st October, 2021 pending the hearing and determination of this Application.**
- 3) That this Honourable Court be pleased to review and set aside its Orders issued on the 1st October, 2021 in its entirety and hear the Applicants application filed herein.**
- 4) That the Applicant/Respondent's submissions filed on 16th August,2021 be deemed to be properly on record.**
- 5) That the Honourable Court be pleased to review its orders issued on the 1st October, 2021 and have the same set aside.**
- 6) That the costs of this Application to be provided for.**

2. The Application herein is based on the grounds on the face of the Application and the supporting Affidavit deposed upon on the 1st December, 2021 by **CHARLES KAMONJI**, the Respondent's process server and based on the following grounds; -

- a) That this matter was heard on the 1st July, 2021 and parties closed their cases and thereafter the Court directed parties to file submissions within 14 days and a mention date slated for 29.7.2021.
- b) When the matter came up for mention on the 29.7.2021, the claimant was absent and had not filed their submissions. The court then extended time for filling and gave the Respondent 14 more days to comply then slated the matter for judgment on the 12th October, 2021.later on 30.7.2021 they were served with the claimant's submission.
- c) The applicant avers that it filed its submissions through the court email address being ekusi@court.go.ke, josphat.burudikalo@court.go.ke and mwendezau12@gmail.com
- d) That the Applicant was surprised when reading the judgment to find out at paragraph 22 of the Judgement that their submission was not placed on record.
- e) The deponents avers that if the court had considered its submissions, it could not have arrived at its judgement which he states is prejudicial to the respondent.
- f) That the failure to place the submissions on the court file was mistake of the Court's registry which should not be visited upon the Respondent.

g) The Deponent then urge this Court to review its judgement and consider the submissions therein.

3. In response to the application, the Claimant/Respondent filed a replying affidavit deposed upon on the 31st January, 2022 based on the following grounds; -

a) That the judgement of the court was arrived at after both parties were heard on merit therefore that the judgement was not exparte and does not fall within the ambit of setting aside of judgement provided for under the Civil Procedure Act.

b) That the prayers are ambiguous and do not conform with the grounds of review provided for under Rule 33 of the Employment and Labour Relations Court Procedure Rules, 2016.

c) It was further stated that submissions are to persuade a judicial officer and are not meant per se to be bidding on the Court.

d) Further that, the Applicant has filed a Notice of appeal dated 19th October, 2021 which is duly signed by the Deputy registrar on the 2nd November, 2021 therefore that the applicant has exhausted its right to review.

e) That the setting aside of an inter-parte judgement is within the domain of the appellate Court and not the trial Court therefore the claimant urge this Court to dismiss the Application herein.

4. The application herein was disposed of by way of written submissions.

Applicant's Submissions.

5. The Applicant submitted that this Court has powers to review its judgement as provided for under section 16 of the Employment and Labour Relations Court Act. It was further submitted that Rule 33 of this Court's rules lays out the grounds for review to include; discovery of new evidence, mistake or error apparent on the face of record, and if the judgement requires any clarification and for any other sufficient reason. In support of its argument the applicant relied on the case of **National Bank of Kenya Limited V Ndungu Njau [1997] eklr.**

6. Accordingly, it was submitted that the Applicant is seeking review of the judgement on the basis that the court did not consider its submission in rendering its judgement when they had filed submissions on the 16th August, 2021 which time was within the timelines given by the court therefore that it was erroneous for the court to state that submissions had not been filed.

7. It was then submitted that the error is evident on record as held in the case of **Sergii Gergel V ARFA AFRA Limited t/a Imax Africa Ltd [2020] eklr.**

8. On whether this Court is functus officio as submitted by the Respondent, it was submitted that this court is not functus officio and that its empowered under section 16 of the Employment and Labour Relations Court Act as read with Rule 33 of this Court Rules to review its decisions.

9. It was then submitted that the indication under paragraph 22 of the Judgement that the applicant's submissions were missing is a mistake and an apparent error on the face of the Judgement that ought to be corrected by this Court. In this it cited the case of **Republic V Public Procurement Administrative Review Board & 2 others [2018] eklr**, where the Court held as follows;-

“Also, to succeed in a review application, an applicant has have to show that there was a mistake or error apparent on the face of the record. The power of review is available when there is an error apparent on the face of the record. The order the subject of this application does not suffer any such error apparent on the face of the record. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law or exercised his discretion would amount to exercise of Appellate Jurisdiction, which is not permissible.”

10. The Applicant in conclusion, urged this Court to allow its application and review its judgement to capture its submissions.

Claimant/Respondent's submissions.

11. The Claimant/Respondent herein submitted that the Applicant did not file its submissions within the required timelines and even if they did then their lack of submission on record and lack of consideration thereof could not affect the final outcome of the Court's decision since the Court is persuaded with pleadings and evidence tendered before it when rendering its decision.

12. The Respondent submitted that filing of this application by the applicant after instituting an appeal amount to abuse of court process and relied on the case of **Albert Yawa Katsenga V Kenya Revenue Authority [2020] eklr.** where the court held that; -

“The rule provides circumstances under which this Court can grant orders for review and this include circumstances as indicated. In the Applicant's position, review sought on the account of an error on record because the Court failed to consider their submissions which had been filed.23. Indeed, the time of writing this judgement, the Respondent's submissions had not been filed. They were also not on record. That notwithstanding, this Court considered the evidence of the Respondents on record and also considered the law and facts in arriving at Court's determination. Failure to consider the submissions of the Respondents does not in my view prejudice the Respondents at all since all facts and the law in this case was considered.24. There is therefore no valid reason for me to consider a review order as sought

13. It was further submitted that Rule 33 of the Employment and Labour Relations Court (Procedure) Rule, 2016 presupposes a situation where the application is made on discovery of new evidence which is not true in this case therefore that the application is ripe for dismissal. In this he relied on the case of **National Bank of Kenya Limited V Ndungu Njau [1997] Eklr** and the case of **Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi and another [2014] eklr**.

14. I have examined all the evidence and submissions of the parties herein. As submitted by the applicant, this court made directions for filing of submissions on 1/7/2021 that the claimant files their submissions within 14 days and respondent within 14 days. The case was set for mention on 29/7/2021.

15. On 29/7/2021 the court made an order directing the respondents to file their submissions in 14 days. The claimant had then filed his submissions on 29/7/2021.

16. Judgment was scheduled for 12/10/21. At the time of writing the court's Judgment the court noted that the respondent had not filed any submissions.

17. The applicant now avers that he indeed filed his submissions which were sent to the court through Emails indicated being:-

[Particulars withheld\]@court.go.ke](mailto:Particulars withheld]@court.go.ke) [Particulars withheld\]@court.go.ke](mailto:Particulars withheld]@court.go.ke) and [Particulars withheld\]@gmail.com](mailto:Particulars withheld]@gmail.com).

18. The applicant has not indicated to court the authority or directive he had to file submissions at the said addresses.

19. Indeed the Emails indicated are private Emails and not official court Emails.

20. There is also no indication that the submissions were actually sent to the said Email Addresses.

21. The assertion by the applicant that they actually send the Emails therefore remains just as that and there is no proof that these Emails were actually sent nor that the applicant had directions to send submissions to those Email addresses.

22. Apart from lack of evidence in sending the said Emails with submissions attached, this court in writing its Judgment relied upon the evidence submitted before it.

23. Despite this court not relying on submissions that may have been filed by the respondent if at all, I find that the court nevertheless relied on the evidence before it on reaching its determination.

24. The court also relied on the law which is available to both the claimant and the respondent.

25. It is my finding that the respondents suffered no prejudice when their submissions were not considered by court.

26. The submissions were also sent to an address if at all that is not authorized by court. I therefore find the application for review has no merit and is therefore disallowed.

27. On the other hand, the application to set aside the Judgment and orders issued on 1/10/21 is also not tenable.

28. As for orders of stay, the Applicants have demonstrated that they have filed an appeal now pending before the Court of Appeal since October 2021.

29. In my view the Court of Appeal is properly seized of this matter and is capable of making any orders it deems fit.

30. It is my finding that this court is functus officio and would not make any further orders.

31. Costs to abide the outcome of the appeal.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF APRIL, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

IN THE PRESENCE OF:-

GITAU FOR APPLICANT – PRESENT

MAINGI FOR RESPONDENT – PRESENT

COURT ASSISTANT – FRED