



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 11 OF 2019

NAQEEB IMTIAZ KARA.....CLAIMANT/RESPONDENT

VERSUS

MEDANTA AFRICARE LIMITED.....RESPONDENT/APPLICANT

RULING

1. Before court is the Applicant's application dated 19th January, 2022, expressed to be brought pursuant to Orders 45 and 51 of the Civil Procedure Rules, and Sections 1A & B and 3A of the Civil Procedure Act. The Applicant seeks orders that:

- i. Spent
- ii. Spent
- iii. This Honourable Court be pleased to set aside/vary and/or review the orders issued on 11th June, 2020 in this matter.
- iv. The costs of this application be provided for.

2. The application is premised on the grounds on the face of the motion and the supporting affidavit of **Ruth Wambui Mburu**, the Counsel on record for the Applicant. The crux of the application is that the court vide a ruling delivered on 11th June, 2020, allowed the Respondent's application on the premise that the same was unopposed, yet as a matter of fact, the same was opposed vide the Applicant's replying affidavit sworn by their legal officer on 12th March, 2019.

3. It is the Applicant's further contention that the subject ruling was delivered in her absence and without prior notice of the delivery of the ruling.

4. The Respondent/Claimant opposed the application vide grounds of opposition dated and filed on 24th January, 2022. The Respondent contend that the instant application is an afterthought as the orders it seeks to set aside were served on 14th October, 2021.

5. It is the Respondent's position that the Applicant is in breach of the orders of the court for having failed to deposit the sum of Kshs. 5,200,000/- in court as ordered.

6. It is the Respondent's position that the application is incompetent and an abuse of the court process.

7. Parties filed submissions in the matter, and which have been duly considered.

Determination

8. I have considered the application, the grounds in support thereof, the grounds of opposition and the parties' submissions. The issue for determination is whether the application meets the threshold for grant of orders of review.

9. The orders in issue were rendered in a ruling delivered on 11th June, 2020, but extracted on 5th October, 2021, and served on the Applicant on 14th October, 2021.

10. The basis upon which the court allowed the application is that the same was unopposed, yet the court record indicate that the application

in issue was actually opposed vide a replying affidavit sworn on 12th March, 2019. Further, the Applicant's Counsel evidently filed submissions in response to that application which then goes to show that the application was indeed opposed.

11. It is also telling that after getting the orders on 11th June, 2020, the Respondent/Claimant extracted the orders in October, 2021, more than one year after the orders were granted.

12. It is the Applicant's further case that no notice was issued prior to the delivery of the said ruling and hence the ruling was made in error and hence their prayer to set it aside.

13. The issue for this court is whether the court ruling was made in error to warrant the setting aside of the orders or their review. The Court of Appeal described an error in the case of **Nyamogo & Nyamogo v Kogo (2001) EA 174** as follows:

“This court said that an error apparent in the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and must be left to be determined judicially on the facts of each case.”

14. In the instant case, the court made the orders on the basis that the application before it was not opposed, yet the record says otherwise. This in my view, is an error apparent in the face of the resultant orders, and which qualifies for review and/or setting aside.

15. The upshot is that the ruling delivered on 11th June, 2020 and the orders of 5th October, 2021 are hereby set aside in their entirety.

16. The matter be fixed for hearing on priority basis.

17. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST DAY OF APRIL, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Nyanga present for the Claimant/Respondent

Mr. Ruiru present for the Respondent/Applicant

Christine Omollo – C/A