



**Nderi & another (Suing as the Legal Representatives of the Estate of Peter Nderi Kinyua ( Deceased)) v Highway Carriers Limited (Employment and Labour Relations Appeal 84 of 2020) [2022] KEELRC 4091 (KLR) (4 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4091 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 84 OF 2020**

**M MBARŪ, J**

**APRIL 4, 2022**

**BETWEEN**

**ELIZABETH NJERI NDERI ..... 1<sup>ST</sup> APPELLANT**

**SARAH WANGITHI MWANGI ..... 2<sup>ND</sup> APPELLANT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PETER  
NDERI KINYUA ( DECEASED)**

**AND**

**HIGHWAY CARRIERS LIMITED ..... RESPONDENT**

**RULING**

1. The respondent, Highway Carriers Limited filed application dated November 10, 2021 seeking for orders of stay of execution of the judgement delivered on October 28, 2021 and there be a review of the judgement.
2. The application is supported by the affidavit of Edward Mungai Wambui and on the grounds that following judgement by the Court of Appeal in Civil Appeal No 340 of 2014 in HCCA No 11 of 2010 and judgement delivered on August 6, 2019 directing the court to adjudicate on quantum both parties attended herein and agreed to address the matter through written submissions.
3. When the matter came for mention on October 12, 2021 to confirm filed submissions the advocates experienced technical challenges and could not address the court. Judgement was secured for October 28, 2021. Such date was obtained prematurely as the appellants had not served written submissions to enable a response.



4. Submissions were served on October 12, 2021 and taking into account judgement date had been allocated the respondent's advocates filed written submissions on October 18, 2021 and a hard copy delivered in court.
5. By the time judgement was delivered the respondent's submissions were not addressed.
6. Aggrieved, the respondent filed the instant application seeking that judgement herein be revised as it stands prejudicial of the respondent who did everything to ensure that the written submissions were submitted.
7. In his supporting affidavit, Wambui avers that when the matter came u for mention on October 12, 2021 to confirm filed submissions the advocate logged in and was admitted but experienced technical hitch and could not unmute to address the court and the court proceeded to issue a date for judgement on 28<sup>th</sup> October. Such was premature since the appellant had not served their written submissions and the respondent could not respond. The respondent only filed written submissions on October 18, 2021 but the court did not take these into account in the judgement which is prejudicial and seek the judgement be set aside, reviewed and varied.
8. In reply, the appellant filed the replying affidavit of Rita Wangui Warunigi and who avers that the orders sought by the respondent for a review of the judgement is lame excuse for late filing of written submissions which cannot be justified. The matter has dragged through the court for over 14 years and the appellant should be allowed to enjoy the fruits of the judgement.
9. The appellant served the respondent with written submissions on May 29, 2021 and not October 12, 2021 as alleged. Upon contact for service of the written submissions, the appellant served against and on April 29, 2021 the court allowed parties to file their submission and take a date at the registry.
10. The mention date taken to confirm the filed submissions had allowed the parties more than 4 months to comply. The court closed the process sand issued a date for judgement for good cause. The respondent cannot blame any party or the court for failing to file written submissions in time. The application is just but another effort to delay the matter and should be dismissed with costs.  
Both parts addressed the application through written submissions.
11. The respondent as the applicant submitted that on October 12, 2021, when the matter came up for mention to confirm filing of submissions, its advocates experienced a technical hitch that deterred them from carrying on with the proceedings. A judgment date was secured in their absence. The judgment date was obtained prematurely, as the appellants' advocates had not served them with their submissions to enable them to prepare and file their written submissions. Taking note of the judgment date filed their submissions on the October 18, 2021 but by the time the judgment was being rendered on October 28, 2021, the submissions had not been placed in the court file and judgment was delivered without considering the same.
13. Section 80 of the *Civil Procedure Act*, and order 45 rules 1 and 3 of the *Civil Procedure Rules* provide that any party aggrieved by a decree on account of some mistake or error apparent on the face of the record may apply for the review of a judgment; to the court which passed the decree without unreasonable delay. The respondent herein stands prejudiced, as the judgement delivered on October 28, 2021 was made on account of an error apparent on the face of the record in that the court did not take account of the written Submissions



14. In *Attorney General & others v Boniface Byanyima*, the court citing *Levi Outa v Uganda Transport Company*, held as follows:

'The expression 'mistake or error apparent on the face of record' refers to an evident Error which does not require extraneous matters to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record'

15. The respondent further submitted that there is no intentions of undermining the court's judgment and only seeks to have this court take into account its duly filed submissions. In *Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR*, the court held that the fundamental duty of the court is to do justice between the parties and that parties should be allowed a proper opportunity to put their cases upon the merits of the matter. It is a fundamental principle of natural justice that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. Further that having filed the instant application without delay, it is in the interest of justice as enshrined in article 48 of the *Constitution* and in the spirit of according the respondent a fair hearing pursuant to article 50 of the *Constitution* that the court do grant its review application and considers its written submissions on the compensation payable to the deceased in the matter.
16. The appellants submitted that order 45 rule 1 of the Civil Procedure Rules does not excuse every error or mistake even it inadvertent. It excuses these mistakes and allow a party to introduce document which it could not lay it hands on despite due diligence as held in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR*. The respondent has shown lack of diligence in addressing the issue as to why they failed to file written submissions in time and before judgement was delivered. This cannot be justified as an error apparent on the record to justify a review of the judgement as held in *Abdulkarim Saleh Muhsin v Nedim Mohammed Ibrahim & 3 others [2021] eKLR*.

### Determination

17. Whether the court should set aside the judgement delivered on October 28, 2021; Whether the court should review, vary or revise the judgement herein; and who should pay costs.
18. The case is that the judgement herein delivered on October 28, 2021 be stayed, reviewed and set aside on the grounds that when the matter came up on October 12, 2021 for the parties to confirmed their filed written summations the respondents' advocate logged into the online session and was admitted but could not unmute so as to address the court. This was due to a technical hitch. He had not filed written submission and the court allocated a date for judgement prematurely before the respondent could file the written submissions which they did on October 18, 2021 and these were not put into account in the judgement.
19. The court's power to set aside a judgment is exercised with a view of doing justice between the parties. Where a judgement is regular, the court will not set it aside the judgment unless it is satisfied that there is sufficient cause as held in *Jomo Kenyatta University of Agriculture and Technology -v- Musa Ezekiel Oebal [2014] eKLR*, that the purpose of clothing the court with discretion to set aside judgment is;
- To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.
20. In *Habo Agencies Limited v Wilfred Odhiambo Musingo (2015) eKLR* the court held that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions



- in the conduct of litigation. Good cause must exist for the court to set aside its judgement validly delivered.
21. In the case *Ruga Distributors Limited v Nairobi Bottlers Limited HCCC 534 of 2011*, where court stated that it is not enough for a party to blame their advocates but to show the tangible steps taken by him in following up his matter.
  22. In this case, the respondent's advocates admit that the matter came up for mention on October 12, 2021 to confirm the filed written submissions; he logged in to the online session and was admitted. He however had a technical hitches and remained unmuted. He was not able to address the court. In his presence, the court allocated a date for judgement on October 28, 2021.
  23. At the time of writing judgement, the court did not have the written summations filed by the respondent on October 18, 2021 which is noted at page 2 of the judgement delivered on October 28, 2021.
  24. The issue at hand for the determination of the court in the judgement was single. The assessment of the compensation due to the appellants following judgement of the Court of Appeal in Civil Appeal N0 340 of 2014.
  25. The court assessed the compensation due to the appellants strictly in adherence to the provisions of the *Work Injury Benefits Act, 2007* being the sole issue left for determination.
  26. Where the respondent's advocate was unable to unmute and experienced technical challenges to address the court, he sat back and waited until after judgement was delivered on October 28, 2021 to file the instant application on November 10, 2021 well after and with the advantage of having read the gist of the judgement.
  27. Where indeed counsel felt aggrieved by the orders and directions on October 12, 2021 and that judgement date issued prematurely, which was not the case here, nothing was done to secure the respondents' rights and to ensure the judgement was arrested until the counsel was able to address the technical hitches and be able to unmute and address the court.
  28. It cannot be good basis to stand helplessly and wait until judgement is delivered and two weeks later assert that judgement date issued prematurely. See *Elizabeth Kavere & another v Lilian Atho & another [2020] eKLR* where the court held that main objective of the court being invited to set aside its judgement is an invitation to exercise discretion so as to avoid injustice but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
  29. In this case, the court find no good cause demonstrated by the respondent to the extent that when they became aware of the judgement date on October 12, 2021 they waited until after judgement was delivered on October 28, 2021 so as to file the instant application. Such judgement is valid and proper.
  30. With regard to orders sought for review of the judgement, it is trite that to vary and or review the judgement of this court, rule 33 of the Employment and Labour Relation Court (Procedure) Rules, 2016 is applicable. There must exist a mistake, error on the record or there is need for clarification or that there exists sufficient cause to justify such a review. No matter has been outlined by the respondent in this regard that the principles of rule 33 have been addressed.
  31. Accordingly, the court finds application dated November 10, 2021 is without merit and is hereby dismissed. Costs to the appellants.

**DELIVERED IN COURT AT NAIROBI THIS 4<sup>TH</sup> DAY OF APRIL, 2022.**



**M MBARŪ JUDGE**

**In the presence of:**

Court Assistant: Okodoi

..... and .....

