Nguru v Buds 7 Blooms Ltd (Employment and Labour Relations Cause 7 of 2018) [2022] KEELRC 13576 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13576 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS CAUSE 7 OF 2018

HS WASILWA, J

DECEMBER 20, 2022

BETWEEN

SAMUEL NGURU ..... CLAIMANT

AND

BUDS 7 BLOOMS LIMITED ..... RESPONDENT

RULING

1. This ruling is in respect of the respondent/ applicant's application dated September 28, 2022, filed under certificate pursuant to sections 3, 12 and 16 of the *Employment and Labour Relations Court Act*, rules 17, 32, 33 and 34 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* , section 1A, 1B, 3A of the *Civil Procedure Act*, order 51 rule 1 of the *Civil Procedure Rules* and all other provisions of the law, seeking for the following orders;-

    1. Spent.

    2. That this honourable court be pleased to stay execution of the judgement and decree issued herein on September 20, 2022 pending the hearing and determination of this application.

    3. That this honourable court be pleased to review its judgement delivered on September 20, 2022 on account of some mistake or error apparent on the face of the record or for any other sufficient reason and set aside the finding that the claimant is entitled to 1-month salary in lieu of notice and the costs of this suit be paid by the respondent and substitute it with an order dismissing the claimant's case.

    4. That the costs of this application be provided for.

2. The application is based on the fact that judgement delivered by the court has an error apparent on record because on one end the court stated that the contract was for a fixed term which expires on effluxion of time but that the court went ahead and awarded the claimant one month salary in lieu of

notice together with costs when it had made a finding that a contract for affixed term does not need notice upon expiry.

3. That the claimant has served the respondent with a letter dated September 22, 2022 demanding the Kshs 15,525 together with costs of the suit of Kshs 140,670 which in the opinion of the respondent should not be payable and is not due to the claimant in light of the judgement by the court.

4. The application is supported by the affidavit of Fridah Inyanji, the respondent's account's clerk, deposed upon on the September 28, 2022. She reiterated the grounds in support of the application and in addition stated that the contract provided for one month notice before termination or a month salary pay in lieu but since there was no termination of contract, the claimant ought not be paid salary in lieu of notice because the contract ceased by effluxion of time.

5. It was stated further that the claimant was paid all his dues and he even signed a discharge voucher affirming that he received all his dues including gratuity due to him. Also that before the said contract expired, the claimant had taken his terminal leave as evidence by exhibit 9 produced by the respondent and it being a fixed term contract does not ordinarily carry with it any rights, obligation or expectation beyond the contract period.

6. On that grounds, the affiant avers that from the reading of the entire judgement and the conclusion, there is error apparent on record as the body of the judgment contemplated that the contract rightfully came to an end on expiry of the contract while the conclusion is contrary and makes an award of salary in lieu of notice.

7. She states that this court is clothed with power to review its judgment under the law and make the necessary correction to the said Judgement. She thus urged this court to review its judgement and disallow the one-month salary in lieu of notice together with costs awarded.

8. It is the applicant's case that the application has been filed without any unreasonable delay and that if stay orders are not granted, they will be prejudiced because the claimant is a man of straws with no known source of income.

9. It is the respondent's prayer that stay of execution should issue till the said review is made to avoid any further prejudice that will be visited on them.

10. The application is opposed by the claimant/ respondent who filed a replying affidavit sworn on the 6th of October, 2022. In the said affidavit the claimant avers that there is no error on the face of record capable of any rectification. He stated that an error apparent on record should be one that is obvious and need no elaboration or reasoning.

11. The claimant avers that the explanation given by the respondent including the tendering of evidence to justify its application for review goes against an application for review because the explanation given will require the court to re-read the entire of its judgement to make a determination on the application.

12. It is stated that the proper method of seeking redress for the issue raised by the respondent was in the appeal and not a review. The claimant maintained that the judgement was proper and no error is apparent on record.

13. It is also stated that review of judgement will trigger an appeal on the part of the claimant because the contract of employment was renewable automatically on good performance and since there was no issue of performance raised and being that the contract was intended to come to an end, the respondent ought to have served him with a notice as such the judgement was well reasoned.

14. The application was disposed of by way of written submission.

Claimant's Submissions.

15. The claimant submitted that section 16 of the *Employment and Labour Relations Court Act* confers the court with powers to review it judgments and orders. Further that rule 33 (1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* gives circumstances where the court can review its orders as follows; -

> "33 Review-
>
> (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."

16. Based on the above quoted Rule, the claimant submitted that the application before court has not satisfied any of the reason given for review. It was argued that the error allegedly apparent on record is not obvious instead it will require a reading of the entire judgement and further explanation to understand therefore an interpretation of the said error might arrive at different conclusion. That the mistake is not an obvious mistake that can be corrected. To support its argument he cited the case of *Nasibwa Wakenya Moses v University of Nairobi and another*[2019] eKLR where the court held that;-

> " The Indian Supreme Court made a pertinent observation that is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. In Attorney General & O'rs v Boniface Byanyima, the court citing Levi Outa v Uganda Transport Company, held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter 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. It may be an error of law, but law must be definite and capable of ascertainment."

17. It was submitted that the issue that the respondent/applicant is seeking to review are issues outside the review purview and reserve for the appellate court. It was argued that the respondent is not seeking to correct any errors but challenging the findings of the court and the application of the law by the court on the issue which is an issue of the appellate court. To support this argument the claimant cited the case of *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR where the court held that;-

> " It seems clear to us that the appellant, in basing his review application on the failure by the court to apply the law correctly faulted the decision on a point of law. That was a good

ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus officio and have no appellate jurisdiction."

18. Accordingly, the claimant submitted that since the issue was on applicability of the law on the issues, the same is not an error on the face of the record contemplated for review thus the application is unmerited and ought to be dismissed with costs to the claimant.

Applicant's Submissions.

19. The applicant submitted on only one issue for determination; whether this honourable should review its judgment delivered on September 20, 2022 on account of some mistake or error apparent on the face of the record.

20. It was argued that an application for review and correction of errors are governed by Rule 33 and 34 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* which provide as follows:

> "33 (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. The court shall, either at the request of the parties or on its own motion, cause any clerical mistake, incidental error or omission to be rectified and shall notify the parties of such rectification."

21. It was submitted that rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 is pari material with order 45 of the *Civil Procedure Rules* as was held in *Re Estate of Simoto Omwenje Isaka (Deceased)* [2020] eKLR, where the High Court summarized the jurisprudence of our superior court's on review as follows;

> " 9 In Muyodi vs Industrial and Commercial Development Corporation & another (2006) 1 EA 243, the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:
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> "In Nyamogo & Nyamogo vs Kogo (2001) EA 174 this court said that 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 a 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 said to 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 is certainly no ground for a review although it may be for an appeal."

10 In Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR, it was said:

"... a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

The court went on to say- The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of order 45 rule 1 of the Civil Procedure Rules and section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/ tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/ decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it."

22. Accordingly, that it is clear that the error in the subject of the application ought to be so glaring that there can possibly be no debate about it. On that note the applicant submitted that the employment of the claimant came to an end by effluxion of time which does not carry with it any right and obligation and therefore the respondent should not be condemned to pay the claimant notice pay and costs of suit when the suit was not ruled in favour of the claimant.

23. They also cited the case of *Republic vs Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abullahi Said Sald* [2019] eKLR, the court observed, with respect to any other sufficient reason:

" A court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed vs Charan Singh and another [19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [20]

(writing on order 47 rule 1 of the Civil Procedure Code of India), (the equivalent of our order 45 rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement. '

24. The applicant submitted with regard to the instant application that judgment should be reviewed on account of an error apparent on the record and also on the basis of sufficient reason demonstrated in the application.

25. With regard to the fixed term contract, the applicant cited the case of *Ronald Ongori Gwako v Styroplast Limited* [2022] eKLR the court held: -

> " Having found that the claimant was in employment under a fixed term contract and that the contract came to an end at the appointed time that were, i am of the view that any relief sought by the claimant on basis of his assertion that his employment was unfairly terminated is automatically not available to him."

26. In light of the foregoing authorities, the applicant submitted that the court having held that the claimant's employment ended by effluxion of time on August 31, 2016, the contract between the parties also ended and the parties were discharged from their obligations under that contract. Therefore, the respondent had no obligation to give claimant 1 month's salary or notice in lieu as per a contract that had already expired due to effluxion of time.

27. He reiterated that this error apparent on the record is self-evident and urged the court to allow the application for review and correct the said mistake.

28. I have examined the averments of the parties herein. The applicants have sought an order of stay and also review indicating that there is an error on the record.

29. In determining whether to review this judgment, I refer to rule 33 of ELRC Rules (cited) in this judgment which envisages review can be considered if there is discovery of new and important matter on evidence not previously available, on account of a mistake or error on record, if judgment requires clarification and for any other sufficient cause the applicants submitted that there is an error on record.

30. The applicants pointed out what they consider an error as it relates to the findings of the court.

31. In my view the finding of the court is not a matter of review but a substantive issue which can only be considered in an appeal.

32. The application for review in my view is therefore not tenable and is dismissed.

33. As concerns the stay application, I find it is not premised on any subsisting reason.

34. It is therefore also not tenable and is therefore dismissed.

35. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mugure holding brief for Konosi for Applicant – present

Matoke holding brief for Nyagaka for Claimant – present

Court Assistant – Fred