



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1349 OF 2016

(Before Hon. Lady Justice Monica Mbaru)

EDNA SEMITL.....CLAIMANT/RESPONDENT

VERSUS

INTEX CONSTRUCTION LTD.....RESPONDENT/APPLICANT

RULING

The application before the court is dated 11th January 2021 and filed on the 14th January 2021 under a certificate of urgency. The application was filed under a notice of motion brought under section 12 and 13 of the Employment and Labour Relations Court, and all enabling provisions of the law. The applicant seeks the following orders:

- a) *Spent*
- b) *Spent*
- c) *That this Honourable Court be pleased to review and/or set-aside its orders issued on 11th November 2020 granting conditional stay of the execution of the judgment delivered on 28th January 2020.*
- d) *That without prejudice to prayer 3 hereinabove, this Honourable Court be pleased to enlarge/extend time for the Respondent/Applicant to comply with the orders of this court issued on 11th November 2020.*
- e) *That Pending the Hearing and determination of the Respondent/Applicant's*
Intended Appeal, this Honourable Court be pleased to stay the execution of the judgment delivered on 28th January 2020.
- f) *Spent*
- g) *That this court be pleased to make such other orders and/or such directions as it considers appropriate for the proper, fair and effective determination of the Application before it.*
- h) *That costs of this application be provided for.*

The application is based on the grounds on the face of the application and the Supporting Affidavit of Sharon E Mwakugu sworn on 11th January 2021.

The Applicant herein was on 28th January 2020 condemned to pay the Claimant /Respondent a total sum of Kshs 5,525,000 and costs of the suit. Aggrieved by the said Judgment, the Respondent decided to exercise its right of appeal. Consequently, the Respondent on 30th June 2020 filed an application for stay pending appeal. On 11th November 2020, this court allowed the said application on condition that the Respondent pays the Claimant half the decretal amount and deposits the balance in a joint interest earning account within 60 days failure to which the respondent be at liberty to execute.

Upon lapse of the 60 days, the Respondent/Applicant has filed this instant application seeking a review of the earlier orders or extension of time for it to comply with the aforementioned orders

The Respondent/Applicant avers that the Respondent is an individual with no disclosed source of income and as such it is apprehensive that if half the decretal amount of Kshs 3,038,750 is released to the claimant it will be unable to recover this sum should the appeal be successful. Further that it would suffer substantial loss in the event the intended appeal is successful. This, according to the respondent, warrants intervention by this Honourable Court by way of review.

The Respondent/Applicant further avers that this application was filed without unreasonable delay and therefore prays that the orders sought be granted.

The Claimant/Respondent vehemently opposed the application via a replying affidavit sworn on 22nd January 2021. In opposing the said application, the claimant avers that the grounds relied on by the Respondent are similar to the grounds in the application dated 30th June 2020. Further that the present application is mischievous to the extent that as at 15th December 2020, the advocates for the two parties had completed the process of opening a joint account with Standard Chartered Bank.

The Claimant concludes that this application is an afterthought and lacks merit and is only brought before this court to further delay or circumvent the compliance of the orders of the court issued on 11th November 2020. She therefore prays that the instant application be dismissed for lack of merit.

On 14th January when this Application came up under certificate of urgency, the court ordered the Respondent/Applicant to deposit the entire decretal amount within seven (7) days. On 26th January 2021 when the instant application was coming up for mention for directions, counsel for the claimant confirmed that the Respondent/Applicant had complied with these orders. The counsel for both parties also agreed to dispose the application by way of written submissions within ten days. The Respondent/Applicant was also granted leave to file and serve a further affidavit.

At the time delivering this ruling, neither of the parties had filed their submissions.

DETERMINATION

On the Application and Affidavits by both parties, I have arrived at the conclusion that the only issue for determination is whether the Respondent/Applicant is entitled to the prayer for review of the orders issued on 11th November 2020 granting conditional stay of the execution of the judgment delivered on 28th January 2020.”

The relevant law that guides the court before making a determination on review of judgments is Rule 33(1) (d) of the Employment and Labour Relations Court (Procedure) Rules 2016. The said Rule provides that:

(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.

Review proceedings in employment matters have to be within the scope and ambit of the above Rules. Any other attempt except for grounds falling within the ambit of these rules would amount to an abuse of the liberty given to this court to review its judgments or orders. I must now apply my mind on the reasons advanced by the Applicant and establish whether they fall under the above requirements.

The reason advanced by the Respondent/Applicant is that the claimant is an individual with no disclosed source of income and is therefore apprehensive that if half the decretal amount is released to the claimant, the Respondent will be unable to recover this sum and will consequently suffer substantial loss. These averments and submissions are without any evidence. This is by no means discovery of new matter to justify a review of the court orders.

This reason by all standards cannot amount to some mistake or error apparent on the face of the record, a judgement or ruling requires clarification or any other sufficient reason.

The Respondent, aggrieved by the judgement and orders of the court ought to have filed an appeal. A review application does not in any way address the matters addressed.

On the matters at hand, the court has already pronounced itself. in **Francis Origo & another v Jacob Kumali Mungala [2005] eKLR** where the Court of Appeal held:

Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal. They were proceeding in the wrong direction. They have

now come to a dead end.

Accordingly, I find that the reason advanced by the Applicant does not fall within the scope for review as contemplated under Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016.

Accordingly this application is dismissed with costs.

Delivered in open court at Nairobi this 26th day of January, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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