REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2187 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BERNARD KIIRU MWANGI **CLAIMANT**

VERSUS

FAULU MICROFINANCE BANK LIMITED **RESPONDENT**

RULING

Pending for determination before this Court is the Respondent's Notice of Motion Application dated 13th July, 2020 seeking the following orders **THAT**:

1. This Application be certified as urgent and be heard ex-parte in the first instance.

2. There be a stay of execution of the Judgment of Onyango J. of 19th of June, 2020

3. The Judgment of this Court of the 19th of June, 2020 be reviewed and set aside

4. The Respondent's Submissions dated 22nd April 2020 and duly filed on the 18th of May, 2020 be considered in the Judgment.

5. The costs of this Application be in cause.

The Application is premised on the grounds **THAT**:

a) The parties herein had agreed at the hearing on 18th November, 2019 in a bid to expeditiously resolve this matter agreed to adopt their respective statements and documents and dispose of the matter by file their respective written submissions.

b) Both parties put in their respective submissions with the Respondent/Applicant filing its submissions on 18th May, 2020 at 12:55 pm and proceeded to serve the Claimant with the said submission on the same date at 4:30 pm.

c) Judgment in this matter was thereafter scheduled to be delivered on 10th July, 2020.

d) Unknown to the Respondent/Applicant this Court proceeded to deliver its Judgment on 13th July, 2020 and indicated therein at Page 4 that the Respondent had not filed its submissions to the Claim.

e) There is an error apparent and mistake on the face of the record and at no fault to the parties hereto.

f) It is extremely prejudicial and great injustice to the Respondent/Applicant if all its documents duly filed within the requisite timelines are not considered by this Court.

g) The Submissions as filed raises issues of both law and fact that

would have assisted this Court in writing its decision and therefore the need to be considered by the Court.

h) It is purely in the interest of justice that this Court allows the instant Application in terms of the reliefs sought therein.

The Application is further supported by the Affidavit of **JOB ACHOKI,** Counsel on record for the Respondent/Applicant herein sworn on 13th July, 2020 in which he reiterates the grounds as set out on the face of the Notice of Motion Application.

The Application is filed under Rules 17, 32 and 33(1)(b and d) of the Employment and Labour Relations Court (Procedure) Rules, 2016, Sections 3, 12 and 16 of the Employment and Labour Relations Court Act, 2011 and Article 159 of the Constitution of Kenya, 2010.

In response to the Application the Respondent filed a Replying Affidavit sworn by **OKWEH ACHIANDO**, counsel on record for the Claimant herein on 5th October, 2020 in which he contends that the application as filed is made in bad faith and is calculated to mislead the Court and therefore urged the Court to dismiss it with costs.

He confirmed that parties hereto did agree to dispose of the hearing by way of written submissions and directions issued by this Court with relation to filing of individual submissions which the Respondent/Applicant failed to comply with.

The Affiant further averred that Judgment in this matter was thereafter delivered on the 19th June, 2020, which date was within the Respondent's knowledge.

He further maintained that the Respondent has no defence as submissions would not alter the terms of a judgment significantly nor do they raise any issues therein.

Counsel maintained that the Application has also been filed with undue delay the same having been filed over a month after Judgment was rendered by this Court.

The Claimant argued that the instant Application is unmerited and is only meant to delay him from enjoying the fruits of the judgment entered in his favour as against the Respondent herein.

In conclusion the Claimant urged this Court to dismiss the Application in its entirety with costs.

Parties agreed to dispose of the application by way of written submissions.

Submissions by the Parties

The Respondent/Applicant submitted that it has established grounds for review of Judgment as provided under the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. The Respondent/Applicant relied on the Court of Appeal decisions in the cases of **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR** and **Muyodi v Industrial and Commercial Development Corporation & Another (2006) 1 EA 243.**

The Applicant maintained that the Court rendered its decision without considering all the facts in this matter as it failed to consider its submissions despite the difficulties the applicant faced to ensure filing of the same within the set timelines.

The Applicant further maintained that it brought its Application without undue delay and therefore urged this Court to allow it in terms of the reliefs sought therein. For emphasis the Applicant relied on the case of **Jaber Mohsen Ali & Another v Priscillah Boit & Another (2014) eKLR.**

The Respondent/Applicant further contended that no evidence was availed to prove that it was notified of the change in dates for the delivery of the Court's verdict from 10th July, 2020 to 19th June, 2020. It is on this basis that the Respondent maintained that the delay (if any) was not deliberate but was occasioned by the change in delivery of the Court's decision which was not communicated to it.

The Respondent/Applicant argued that it has indeed established a case for the grant of the orders sought in its Application and therefore urged this Court to allow the same as prayed. The Respondent relied on the case of **Republic v Public Procurement Administrative Review Board & 2 Others (2018) eKLR** where the Court held that its duty is to do justice between parties following hearing each party on merit. The Court went on to state that in the event the principle is not followed, the aggrieved party is entitled *ex-debitio justiciae* to have such a determination set aside.

In conclusion the Respondent/Applicant urged this Court to find merit in its Application and allow it in terms of the reliefs sought therein.

Claimant's Submission

The Claimant on the other hand submitted that the Applicant has failed to meet the threshold for review of this Court's decision as highlighted under the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010. The Claimant relied on the case of **Paul Odhiambo Onyango & Another v Kalu Works Limited (2020) eKLR** where the Court held that failure to take into account submissions is not tantamount to an error apparent on the face of the record and that such an error is no ground for review although it may be for Appeal.

The Claimant further maintained that the Application filed was not filed in a timely manner as it was filed more than a month after judgment was delivered in this matter and no plausible explanation was tendered for the delay. For emphasis he relied on the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR** where the Court directed that a party seeking review of a decree or order on whatever basis must apply without unreasonable delay.

The Claimant contended that the Application as filed is a non- starter and that it is only meant to delay him from enjoying the fruits of the judgment entered in his favour as against the Respondent/Applicant.

The Claimant argued that this Court having rendered its final decision

in this matter is *functus officio* and can therefore not hear and determine the instant Application. For emphasis the Claimant relied on the case of **Abdullahi Mohamud v Mohammud Kahiye (2015) eKLR** where the Court was of the view that the Application for review was faulting failures by the Judge to consider the evidence on record and was therefore a basis for appeal and not for review.

In conclusion the Claimant urged this Court to find that the instant Application is devoid of merit and therefore urged this Court to dismiss it in its entirety with costs.

Analysis and Determination

Having considered the application, the Affidavits on record, the submissions of the parties hereto and the Authorities cited in support of the said submissions, I find that the issue for determination is whether the instant Application is merited.

This court is clothed with powers to review its judgments as provided under Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016.

The circumstances under which this court may exercise the discretion

to review its decisions are set out under Rule 33 are as follows –

> ***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.***
>
> ***2. ...***
>
> ***3. A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.***
>
> ***4. The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.***
>
> ***5. Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.***
>
> ***6. An order made for a review of a decree or order shall not be subject to further review.***

The instant Application is pegged on ground (b) which is in respect of review on account of some mistake or error apparent on the face of the record.

In order to respond to the above question this Court ought to consider what is an error apparent on the face of the record.

The Court of Appeal in the case of **Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243**, described an error apparent on the face of the record as follows:

> *"…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 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. This laid down principle of law is indeed applicable in the matter before us."*

Further in **Chandrakhant Joshibhai Patel v R [2004] TLR, 218** it has been held that an error stated to be apparent on the face of the record:

> *"...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."*

The Respondent argues that there is an error apparent on the face of the record as this Court failed to consider its Submissions filed with respect to the main claim. It is further argued that the Court did render its decision without proper notice to the parties herein.

The Claimant on the other hand maintains that the grounds raised by the Respondent/Applicant herein do not form a basis for the review of this Court's decision but are rather grounds for Appeal.

The question that arises is whether the failure to consider submissions is an error apparent on the face of the record and if such error warrant the review of this Court's Judgment as prayed by the Applicant herein.

The Respondent/Applicant based its argument for review on this Court's failure to consider its submissions in its final decision. In my view this reason is not tantamount to an error on the face of the record as contended by the Applicant.

The review must be confined to error apparent on the face of the

record. What the Respondent alleges is that it filed submissions which the Court failed to take into account. It is a fact at the time the judgment was written the Respondent's submissions were not on the Court file. It is further a fact that by 18th May, 2020 when judgment date was taken, the Respondent's submissions were not on record.

On that date the counsel for the Respondent informed the Court that he would file by close of day. The Submissions attached to the Respondent's affidavit are dated 22nd April 2020. The Respondent states it filed on the same date at 12.55 pm and submitted evidence to prove the same. It also states it served the claimant's counsel on the same date at 4.30 pm.

Be that as it may, would that omission by the court warrant a review or setting aside of the judgment delivered on 19th June 2020?

I have considered the submissions filed by the Respondent on 18th May 2020 and find nothing therein that would make me decide the case differently. The reason for the decision made in the judgment was that the Claimant was not given a hearing before his employment contract was terminated. This has not been controverted by the Respondent in the submissions. In the judgment, the court stated: -

> *"The fact that the claimant was placed on a Performance Improvement Plan and issued with two warning letters on his performance does not mean replace or disentitle him to a hearing. I therefore find that the Respondent has failed to justify the reasons for terminating the Claimant's employment as the reasons it relied on were never tested through any disciplinary hearing. The termination was therefore unfair.*
>
> ***Whether the Claimant is entitled to the reliefs sought***
>
> *The Claimant is not entitled to an order for reinstatement as the same is only available within 3 years from the date of an employee's termination as provided under Section 12(3)(vii) of the Employment and Labour Relations Court Act.*
>
> *The claimant is further not entitled to payment of salary and benefits to date of retirement. The Claimant cannot be awarded remuneration for the unserved period as he cannot enjoy remuneration which he did not work for. Awarding such a relief would amount to unjust enrichment. In the cases of **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] eKLR** and **D. K. Njagi Marete v Teachers Service Commission [2013] eKLR**, the court declined to award such prayers on grounds that they would not be commensurate with the loss suffered by the claimant as a consequence of termination of his employment.*
>
> ***a) Maximum compensation for loss of employment***
>
> *The Claimant is entitled to compensation for loss of employment. I award him compensation equivalent to 10 months' gross salary in the sum of Kshs.872,000. In arriving at this I have considered the length of the Claimant's service and the circumstances leading to the termination.*
>
> *The prayers for general damages, aggravated and exemplary damages fail as the claimant's case does not meet the criteria for grant of the same.*
>
> *The respondent shall pay the claimant's costs for this suit and the decretal sum shall accrue interest at court rates from date of judgment."*

Even had the court had the benefit of reading the submissions, the decision would still have been the same.

It is further worthy to note that submissions are not pleadings and the failure to consider the same would not be fatal if the Court has

considered all the facts and issues that arise from the pleadings. (Refer to the decision of the Court of Appeal in **Daniel Toroitich Moi V Stephen Muriithi & Another (2014) eKLR** and the Supreme Court decision in **Gideon Sitelu Konchellah V Julius Lekakeny Ole Sunkuli & 2 Others (2018) eKLR**).

For these reasons I find the Application by the Respondent not merited and dismiss the same.

Each party will bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE