



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 256 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

WALTER EDWIN OGARA ODHIAMBO.....CLAIMANT

VERSUS

SGS KENYA LIMITED.....RESPONDENT

RULING NO. 2

Pending for determination before this Court are two Applications. The first Application is the Notice of Motion Application dated 29th October, 2020. The Application is filed by the Claimant/Applicant under Certificate of Urgency seeking the following orders:

1. That this Application be certified urgent and heard ex parte in the first instance.
2. That the Honourable Court do issue an Order of Status quo visavis the Claimant's employment relationship with the Respondent pending the interpartes hearing and determination of his Application for review.
3. That the Claimant/Applicant be forthwith granted leave to amend his Memorandum of Claim filed on 22nd June, 2020 as per the annexed draft.
4. That Order of injunction do issue restraining the Respondent from further implementing the notice of intended redundancy dated 26th October, 2020 or otherwise terminating the services of the Claimant pending the hearing of the Application and the main suit.
5. That the Honourable Court do be pleased to review its ruling delivered on 16th October, 2020.
6. That the costs of this Application be provided for.

The Application is premised on the grounds as set out on the face of the Notice of Motion Application, in which the Applicant contends that this Court delivered its ruling dismissing the Claimant/Applicant's Application dated 22nd June, 2020 on the grounds that the same was speculative as the notice of intended redundancy was a draft which was yet to take effect.

It is further contended that subsequent to the Court's Ruling the Respondent did proceed to issue the Claimant with a separation notice of intended redundancy that was to take effect on 2nd November, 2020.

The Affiant maintained that the said notice is malafides and is intended to circumvent his suit. He further maintained that there is a mistake apparent on the face of the record as the Court's ruling only makes reference to the draft notice whereas there were two separate notices one that was a draft and an actual notice of intended redundancy both of which were dated 17th June, 2020.

It is on this basis that the Claimant/Applicant averred that he had sufficient reasons to warrant the review of this Court's Ruling delivered on 16th October, 2020.

He argued that his Application is merited and urged this Court to allow it in terms of the reliefs sought therein.

The Application is further supported by the Affidavit of **WALTER EDWIN OGARA ODHIAMBO**, the Claimant herein sworn on 29th October, 2020 in which he reiterates the grounds on the face of the motion.

In response to the Application the Respondent filed its grounds of opposition dated 10th November, 2020 raising the following grounds:

1. The Application is bad in law.
2. The Application is made mala fides
3. There is no ground to warrant the grant of injunctive orders.

The Claimant/Applicant filed yet another Notice of Motion application dated 25th November, 2020 in which he prays for the following orders that:

1. This Application be certified urgent and heard *ex parte* in the first instance.
2. The Honourable Court be pleased to issue an order suspending the Respondent's Second Redundancy Notice dated and issued on 25th November, 2020, terminating the services of the Claimant and that the status quo ante 25th November, 2020 be maintained pending interpartes hearing of this Application.
3. The Respondent be restrained forthwith from carrying out any adverse action on the employment relationship between the parties pending the ruling of the Application dated 29th October, 2020.
4. The costs of the Application be borne by the Respondent.

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

- a. The Respondent has purported to terminate the Claimant's employment vide its notice of redundancy issued on 25th November, 2020 which notice is intended to take effect immediately prior to this Court's delivery of its ruling to the Claimant's Application dated 29th October, 2020.
- b. The notice served dwells on matters that are actively litigated and pending determination by this Court.
- c. The Respondent's conduct is egregious, an abuse to the Court process and will render the Claimant's suit and pending notice of motion Application nugatory.
- d. It is in the interest of justice that the Application be allowed in terms of the reliefs sought therein.

The Application is further supported by the Affidavit of **JOHN OCHOLA**, Counsel on record for the Claimant herein sworn on 25th November, 2020 in which he reiterates the averments on the face of the motion.

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

Submissions by the Parties

In his Submissions the Claimant/Applicant maintains that it is necessary for him to make amendments to his Claim as the same was based on an earlier notice of intended redundancy which was subsequently issued to him on 26th October, 2020 and the Respondent intends to proceed with the Redundancy thus necessitating the amendment. The Claimant/Applicant relied on the case of **Mose Nyambega Ondieki v Vice Chancellor, Maasai Mara University & 3 Others (2018) eKLR** on amendment of claims where the Court opined that Amendments should be granted freely by Courts provided there are justifiable reasons for doing so.

He further submitted that he has met the threshold for the grant of the injunctive orders he seeks and therefore urged the Court to grant the same. For emphasis he relied on the cases of **Popat Investment Limited & Another v Barclays Bank of Kenya Limited (2009) eKLR**, **Mrao Limited v First American Bank of Kenya & 2 Others (2003) KLR 125** and **Moses C. Muhia Njoroge & 2 Others v Jane W. Lesaloi & 5 Others (2014) eKLR** all on temporary injunctions.

The Claimant/Applicant argued that the fact that the Respondent can be able to pay damages as compensation should not be a basis for this Court to deny him the injunctive orders that he now seeks. For emphasis he relied on the Courts findings in the cases of **Mwambeja Ranching Company Limited & Another v Kenya National Capital Corporation Limited (Kenya) & 6 Others (2015) eKLR** and **Kanorero River Farm Limited & 3 Others v National Bank of Kenya Limited (2002) 2 KLR 207**.

He further maintains that there is a mistake on the face of the record which led the Court to arrive at its decision on his Application dated 22nd June, 2020 and therefore has satisfied the legal requirement for review of the said Court ruling.

He argued that the mistake was that the Court failed to consider two separate notices of intended redundancy and made reference to the draft notice of intended redundancy.

It is on this basis that the Claimant urged the Court to allow its prayer for review.

In conclusion the Applicant urged the Court to allow his Application in terms of the reliefs sought therein.

Respondent's Submissions

The Respondent on the other hand submitted that Prayers 1 and 2 of the Application dated 29th October, 2020 had been spent and/or overtaken by events and that it was not opposed to leave been granted to the Applicant to amend his Claim.

It however sought for leave from the Court to file its amended response within 21 days of service of the amended Claim.

The Respondent further submitted that the Application for injunctive orders has been brought under the wrong provisions of the law and is therefore bad in law, fatally defective and incapable of being granted in the circumstances.

On whether the Applicant has met the threshold for grant of the orders it maintained that no evidence has been adduced by the applicant to prove that he has met the threshold for the grant of the orders he so seeks.

The Respondent contends that damages (if any) can adequately be compensated by way of monetary award and that the Applicant has not demonstrated that it will not be able to pay the same.

The Respondent argues that the Claimant's Application is in fact premature and misinformed and therefore urged the Court to dismiss it in its entirety with costs to the Respondent.

With respect to the prayer for review the Respondent avers that the Applicant has not met the threshold for the grant of the orders as provided under Rule 33 of the Court Rules.

In conclusion the Respondent urged the Court to find the Application devoid of merit and to dismiss the same with costs.

Analysis and Determination

I have carefully considered the grounds in support of the applications as set out on the face of the motions and the Supporting Affidavits, the averments in the Replying Affidavit and the submissions made by the parties, I find that the following are the issues for determination: -

1. Whether the Application dated 29th October, 2020 is merited.
2. Whether the Application dated 25th November, 2020 is merited.

This court is clothed with powers to review its judgments and/or rulings 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 or on account of some mistake or error apparent on the face of the record.

The pertinent issue for determination herein, therefore, is whether the Claimant/Applicant has established grounds based on ground (b) above to warrant an order of review.

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 Applicant in this matter contended that there is an error apparent on the face of the record as the Court in its ruling makes no reference to an actual notice of redundancy but only to a draft yet there were two separate notices that bore the same date but issued separately.

He further maintained that following this Court's delivery of its ruling on 16th October, 2020, on 26th October, 2020 the Respondent proceeded to issue a separate notice of intended redundancy together with an email bringing into effect the redundancy as from 2nd November, 2020.

The Applicant maintained that given the circumstances of his case it is necessary for this Court to review its ruling delivered on 16th October, 2020.

The Respondent on the other hand contended that the Claimant/Applicant has failed to meet the threshold for the grant of the orders he seeks in his Application dated 29th October, 2020 and that his Application is premature and misconceived.

The Respondent maintains that the Application is purely speculative in nature and therefore urged the Court to dismiss it with costs.

It is further the Respondent's argument that there is no error apparent on the face of the record exhibited as the Applicant has failed to demonstrate what he meant by error apparent on the face of the record and that the Applicant is trying to reopen an Application that is already spent.

It is further submitted that the Application herein raises issues that can only be determined before a Court of Appeal and therefore the Applicant ought to proceed to Appeal in the event he is dissatisfied with the Court's verdict on his Application.

I find that the instant Application does not meet the threshold for grant of the orders sought. The Applicant has failed to establish that the court did not take into account the fact that there were two separate notices of redundancy, one a draft and the other an actual notice. The email relied upon by the applicant was before the court and the same was considered in the ruling. In any event the court ordered a status quo to the date of the ruling which in itself was a stay of whatever notices of redundancy that may have been issued by the Respondent. My understanding of the two notices referred to by the applicant is that the draft was sent to him for his input and he declined to comment whereupon the same notice was reissued in the same format, but without his input. That does not make the second notice a different notice.

The Claimant further sought for leave to amend his Memorandum of Claim filed on 22nd June, 2020 as per the annexed draft.

This prayer is overtaken by events having already been allowed by the Court on 30th November, 2020 and the Respondent having been allowed corresponding leave to respond to the Amended Claim.

Prayer No. 4 fails as it is equally overtaken by events the Claimant's termination having already been effected.

The upshot is that the Claimant's Application dated 29th October, 2020 fails save for prayer No. 3 that had already been granted.

Whether the Application dated 25th November, 2020 is merited

Having considered the Orders issued by Nduma J. on 30th November, 2020 I find that the Application dated 25th November, 2020 is also overtaken by events since the Claimant's termination has already taken effect. The Application dated 25th November, 2020 is accordingly dismissed.

Parties should therefore proceed to fix the main Claim for hearing and determination at the registry on a priority basis as directed by Nduma J.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH 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