REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 5 OF 2019

STELLA NDUNGE KIMATU also known as

STELLA NDUNGE MUE.....CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 29.6.2020 brought under sections 1A, IB, 3A & 80 of the Civil Procedure Act and Order 45 Rule 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules. The application seeks orders that:

> ***a. The Honourable Court be pleased to review/vary its judgment dated 29.4.2020 to the extent that the Honourable Court did not address prayers v, vi and vii of the Applicant's Amended Statement of Claim dated 2.4.2019.***
>
> ***b. The Honourable court be pleased to pronounce itself accordingly on prayers v, vi and vii of the Applicant's Amended Statement of Claim dated 2.4.2019.***
>
> ***c. The costs of the application be provided for.***

2. The application is premise on grounds that:

> a. The Court inadvertently failed to address prayers v, vi and vii of the Applicant's Statement of Claim.
>
> b. Having found in favour of the Applicant, it would have been in the interest of justice that the Court pronounces itself on the said prayers.
>
> c. Failure by the Honourable Court to pronounce itself on the prayers means that the issues remain undetermined and that the omission by the Court amounts to an error apparent on the face of the record.
>
> d. No appeal has been preferred against the Judgment of the Court, the same having turned in favour of the Applicant.

3. The application is supported by the affidavit of Stella Ndunge Kimatu, the Applicant herein sworn on 29.6.2020 in which she reiterates the averments on the face of the motion.

4. In response to the application, the Respondent filed grounds of opposition stating that the application and the prayers set out therein amounts to an appeal against the Judgment of the Court and does not fall within the ambit of Rule 33 of the Employment and Labour Relations Court Rules; that the reliefs granted by the Court are clear on the face of the judgment and require no clarification; that the court exercised its discretion judiciously and that the Court having rendered its decision is *functus officio* and has no jurisdiction to determine the issue in the application which amounts to an appeal against its own decision.

5. The application was canvassed by way of written submissions with each party filing its respective submissions.

Applicant's submissions

6. The Applicant submitted that Rule 33 (1) of the Industrial Court Rules 2011 provides for the conditions that an applicant has to satisfy for grant of grant of an order for review of judgment. She relied on **Sergii Gergel v ARFA AFRA Ltd t/a IMAX Africa Ltd [2020] eKLR** where the Court held that Rule 33 of the Employment and Labour Relations Court Rules, 2016 identifies grounds for review.

7. She argued that application seeks to have the judgment of the Court reviewed on grounds that the judgment requires clarification; that the lack of pronouncement by the Court constitutes an error on the face of the record and that these reasons constitute sufficient reasons for this Court to review its judgment.

8. She contended that the principles in deciding whether or not to grant review of judgment on the basis of an error apparent on the face of the record were spelt out in **Nyamogo & Nyamogo v Kogo (2001) EA 170** which was cited in **Veleo (K) Limited v Barclays Bank of Kenya Limited [2008] eKLR** that an error apparent on the face of the record cannot be defined precisely and that an error on a substantial point of law stares one in the face.

9. It was therefore her submission that the failure by the Court to pronounce itself on prayers v, vi and vii of the Statement of Claim is an apparent error or omission which is self-evident and requires no elaborate argument on the part of the Applicant.

10. She further submitted that the Courts have also established what would constitute sufficient reasons for the review of a decision of a court, namely, only for correction of a patent error of law or fact which stares in the face without any elaborate argument and cannot be claimed for a fresh hearing or correction of an erroneous view that was taken earlier.

11. She further submitted that the application was been brought without unreasonable delay since judgment was rendered on 29.4.2020 and the application was filed on 29.6.2020. She contended that the slight delay was due to the fact that judgment was delivered without the applicant's notice and the court's scaled down its court operations due to the Covid -19 pandemic.

12. In her view, she has proved that her case satisfies the conditions laid therein and ought to be reviewed in the interest of justice. Finally, she urged that costs of the application be awarded to her.

Respondent's submissions

13. The Respondent submitted that the relevant provision under which the application ought to have been made is Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court Procedure (ELRC) Rules which outline the grounds for review of this Court's decisions. In its view the application has been brought wrongfully under the provisions of the Civil Procedure Act.

14. On the other hand, the respondent submitted that the application questions the Court's discretion on the award granted and that it is neither within the ambit of Order 45 of the Civil Procedure Rules nor Rule 33 of the Employment and Labour Relations Court Rules. In its view the application invites the court to sit on appeal over its own judgment contrary to the provisions of the law. It relied on **Eastern and Southern African Development Bank v African Green Fields Ltd & others (2002) 2 EA 371** cited in **Alex Toya Indasio v Mini Bakeries (Nrb) Ltd** where the court held that an order cannot be reviewed where it is shown that the judge decided the matter on a foundation of incorrect procedure or that there was a misapprehension of the laws.

15. It argued that once a Court has rendered its decision it becomes *functus officio* and has no jurisdiction to determine the issue set out in the application. It cited the finding in **Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others [2017] eKLR** that finality should not be disregarded except in exceptional circumstances as determined by the court.

16. It argued that the failure by the Court to grant all the reliefs sought does not amount to an error apparent on the face of the record and that the reliefs granted were clear and specific and there was no glaring omission or mistake to warrant review of judgment.

17. It relied on the **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** that if an error is not self-evident and requires long debate and process of reasoning, it cannot be treated as an error apparent on the record under Order 45Rule 1 of the Civil Procedure Rules. It also relied on the **Nyamogo & Nyamogo case [supra]** and urged the Court to dismiss the application with costs.

Analysis and determination

18. I have considered the application, and the rival submissions from both sides and it is common ground that court entered judgment in favour of the claimant in which she was granted prayer (i) to (vii) of the Amended Statement of Claim. It is also clear that under paragraph 39 of the judgment, only four orders were listed down excluding prayer (v), (vi) and (vii) in the Amended Statement of Claim. The main issues for determination are:

(a) Whether the application herein is incompetent for not being brought under the ELRC Procedure Rules.

(b) Whether the application has met the legal threshold for the court to review its judgment.

Incompetent application

19. I have considered the submissions by the respondent that the application is brought under the wrong provisions of the law. However, I will not belabour on the said contention because courts have been unanimous that citation of a wrong provision of the law or failure to cite any provision at all does not render an application fataly incompetent unless it is so done so deliberately with intention to mislead the Court. In this case, the respondent has not established that the citation of the Civil Procedure as opposed to ELRC Procedure Rules was deliberately done to mislead this court. Consequently, I reject the said objection and proceed to determine the application on the merits.

Legal threshold for review of court's own judgment.

20. Rule 33 (1) of the Employment and Labour Relations Court (Procedure),2016 provides:

> ***"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."***

21. On the issue of time, the applicant contended that the application was filed within reasonable time, considering that the judgment was delivered without her notice, and also the scaling down of the Court operations due to the Covid-19 pandemic. After considering the court record, it clear that the claimant's counsel was, vide the email dated 23.4.2020, notified that judgment would be delivered electronically on 29.4.2020. It is therefore not correct for her to accuse the court of delivering judgment without notice.

22. However, the court appreciates that due to Covid-19 pandemic, the operation of the court was scaled down and that denied litigants free access to Court premises. I am therefore satisfied that the delay of 2 months in the circumstances of the ongoing pandemic is not unreasonable.

23. As regards the merit of the application, the Applicant's contention is that the Court did not address prayers v, vi and vii of her Amended Statement of Claim and that this omission amounts to an error on the face of the record. In the Judgment delivered on 29.4.2020, the Court held:

> ***"In view of the foregoing finding, I must, which I do, return that the Claimant is entitled to prayer (i) to (vii) in the amended claim and proceed to enter judgment for her in the following terms: -***
>
> ***(i) A declaration that the Respondent's decision to reduce/slash/cut the claimant's salary was unlawful and therefore null and void.***
>
> ***(ii) A declaration that the Respondent's decision to demote the claimant was unlawful and therefore null and void.***
>
> ***(iii) An order permanently restraining the respondent, its officers, agents, employees, or any other person whomsoever from implementing, proceeding with, or acting on the respondent's decision of demoting and reducing/cutting/slashing the claimant's salary and other allowances.***
>
> ***(iv) An order reinstating the claimant to the position of Senior Teacher 1, Job Group L with all the salary, allowances and benefits applicable thereto."***

24. Prayer (i) to (vii) in the amended Statement of Claim were pleaded as follows:

> ***(i) A declaration that the Respondent's decision to reduce/slash/cut the claimant's salary was unlawful and therefore null and void.***
>
> ***(ii) A declaration that the Respondent's decision to demote the claimant was unlawful and therefore null and void.***
>
> ***(iii) An order permanently restraining the respondent, its officers, agents, employees, or any other person whomsoever from implementing, proceeding with, or acting on the respondent's decision of demoting and reducing/cutting/slashing the claimant's salary and other allowances.***
>
> ***(iv) An order reinstating the claimant to the position of Senior Teacher 1, Job Group L with all the salary, allowances and benefits applicable thereto.***
>
> ***(v) Payment of the salary and allowances arrears from May 2018 till payment in full.***
>
> ***(vi) Payment of interest on salary and allowances arrears from May 2018 till payment in full.***
>
> ***(vii) Costs of the suit."***

25. From the foregoing, it is clear that the court intended and indeed granted prayer (i) t0 (vii) but a typographical error occurred while listing down the said prayers by omitting prayer (v), (vi) and (vii). The said prayers concerned arrears of the claimant's salary and allowances, interest thereon and costs of the suit. The said error or mistake is apparent on the face of the record as it stares one on the face and it does not require any long arguments to establish it.

26. In the **Nyamogo case** cited by both parties, the Court of Appeal held that:

> ***"An error apparent on the face of the record cannot be defined precisely and 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 a 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 a 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."***

27. The Respondent contended that allowing the review would be tantamount to this Court sitting on appeal of its own judgment. I do not agree with this position for reason that the Court made it clear that prayer (i) to (vii) had been granted to the claimant. The court did not compute the salary and allowances payable to the claimant because there was no invitation to do so. It was therefore upon the employer to make the computation and pay after receiving the decree of the court.

28. The foregoing view is fortified by paragraph 32 of the said judgment where the court observed that:

> ***"All what was remaining in the promotion process according to Rw1, was to issue the Claimant with a letter to communicate the promotion and pay her backdated arrears. It follows therefore that the delay in issuing the promotion letter and paying salary arrears did not negate the fact that the claimant had already been promoted to Job Group L."***

29. The Court of Appeal in **Nguruman Limited v Shompole Group Ranch & Another [2014] eKLR** held that:

> ***"The problem as regards this Court's Jurisdiction to re-open and re-determine a matter previously concluded by it has kept on popping up every now and then notwithstanding efforts made not only by this Court but also its predecessor, the Court of Appeal for Eastern Africa, to find a lasting solution to it. It is on the same footing that we have now been invited to re-address this same issue. In the case of Valla Bhdas Karsandas Ranica versus Mansukhlal JivraJ and others [1965] EA700, the central proposition in it was that "a slip order will only be made where the Court is fully satisfied that it is giving effect to the intention of the Court at the time when Judgment was given or in the case of a matter which was overlooked where it is satisfied beyond doubt as to the order which it would have made had the matter been brought to its attention." In Lakhamshi Brothers Limited versus R. RaJa & Sons [1966] EA313, at page 314 paragraph E-F, Sir Charles Newbold, P. made the following observation: -***
>
> ***"Indeed there has been a multitude of decisions by this Court on what is known generally as the slip rule, in which the inherent Jurisdiction of the Court to recall a Judgment in order to give effect to its manifest intention has been held to exist. The circumstances however, of the exercise of any such Jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to Judgment to give effect to the intention of the Court when it gave its Judgment or to give effect to what clearly would have been the intention of the Court had the matter not inadvertently been omitted…"***

30. In view of the foregoing binding precedents, and having considered all submissions by the parties, I am satisfied that the applicant has established that there is an error or mistake apparent on the face of the judgment which was occasioned by an inadvertent omission while typing the orders granted. Accordingly, it is my holding that the applicant has met the legal threshold upon which this court can exercise discretion to review the impugned judgment and proceed to allow the application by adding the following in paragraph 39 immediately after order number (iv):

> ***(v) Payment of the salary and allowances arrears from May 2018 till payment in full.***
>
> ***(vi) Payment of interest on salary and allowances***
>
> ***arrears from May 2018 till payment in full.***
>
> ***(vii) Costs of the suit.***

31. The rest of the judgment remains unchanged. Each party shall bear own costs of the application.

32. As a parting shot, and without prejudice to the foregoing, I am of the opinion that the error in the judgment herein is also in the nature contemplated by Rule 34 of the ELRC Procedure Rules, where the court is given jurisdiction to make corrections on typographical errors and omission with or without application by the parties to the suit. The said Rule provides that:

> ***"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."***

Dated, signed and delivered this 5th day of February, 2021.

ONESMUS O. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE