REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1204 OF 2018

GEORGE NYAKUNDI OMBABA.....CLAIMANT

-VERSUS-

THE ATTORNEY GENERAL.....RESPONDENT

RULING

1. The application before me is the claimant's Notice of Motion dated 10.8.2020 brought under sections 1A, IB, 3A & 80 of the Civil Procedure Act and all other enabling provisions of the law. The application seeks orders that:

> ***a. The Honourable Court be pleased to review or vary its judgment delivered on 8.3. 2019 so that the amount awarded reads Kshs.844, 790 instead of Kshs.753, 800.***
>
> ***b. The Honourable court do give any other or further order expedient in the circumstances.***
>
> ***c. The costs of the application be provided for.***

2. The application is premise on grounds that the Court inadvertently awarded him Kshs. 753,800 as salary arrears for the period between 17.6.2003 and 26.1.2005 instead of Kshs.844, 790; and that it is in the interest of justice that the application be allowed.

3. The application is supported by the applicant's own affidavit sworn on 10.8.2020 in which he reiterates that the impugned quantum of damages was due to an inadvertent mistake or error on the part of the Court and urged for review of the judgment and the decree to reflect the correct award of salary arrears as Kshs, 844,790. The applicant also filed a Further Affidavit sworn on 1.2.2021 to introduce a further claim for leave allowance for 2005 being Kshs.23585, and two months' salary in lieu of notice being Kshs.90, 166 thus raising the amount sought to Kshs.958, 541. However, no leave was sought to amend the application to incorporate the new claims.

4. In response to the application, the Respondent filed grounds of opposition stating that the Court is *functus officio*: that the application does not meet the threshold for review set out under Rule 33 of the Employment and Labour Relations Court Rules; that the applicant has not introduced new and important matter or evidence which was not within his knowledge or could not be produced at the time when the decree was passed; and that the application has been made after an unreasonable delay. Consequently, he prayed for the application to be dismissed with costs.

5. The applicant never filed any submissions to the application but the respondent did so on 11.3.2021.

Respondent's submissions

6. The Respondent submitted that Rule 33 of the Employment and Labour Relations Court Procedure (ELRC) Rules sets out the grounds for review of this Court's decisions and contended that the application herein does not meet the said threshold. It argued that the applicant has not established a mistake or an error apparent on the face of the record to warrant review of judgment and contended that the court made the award consciously and after proper exercise of discretion.

7. It relied on **National Bank of Kenya v Ndungu Njau [1997] eKLR and Muyodi v Industrial Commercial** and **Development Credit & another [2006] 1 EA 243** to fortify the foregoing submission.

8. As regards delay in making the instant application, the respondent submitted that from 8,3,2019 when the judgment was delivered and December 2020 when the application was made is over one year, 5 months. The said delay, in the respondent's view has not been justified by valid reasons and as such the delay is unreasonable, and prejudicial to it. For emphasis, it relied on **mwangi S. Kaimenyi v Attorney General & another [2014] e KLR** and **Smith v Clay [1967] ER 55** where the court appreciated that it does not aid the indolent and that prejudice to the innocent party should be a factor to consider when dealing with the question of unreasonable delay.

Analysis and determination

9. I have considered the application, supporting affidavits, grounds of opposition and the submissions filed. It is common ground that I entered judgment in favour of the claimant in which I found that the termination of his services by the respondent was wrongful and awarded him salary arrears for the period of 20 months he was placed on suspension. The main issues for determination herein are:

(a) Whether the Court is *functus officio*.

(b) Whether the application has been made after unreasonable delay.

(c) Whether the application meets the legal threshold required for the court to review its judgment.

Is the Court functus officio?

10. I have considered the contention by the respondent that the court is *functus officio* after delivering the impugned judgment. However, Rule 33 (1) of the Employment and Labour Relations Court (Procedure),2016 provides as follows:

> ***"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."***

11. It follows that even after delivering its judgment on a matter, the court can still be moved by an aggrieved party for review of the judgment on the basis of any or all the grounds set out by the foregoing rule. In this case, the application is grounded on an alleged mistake or error apparent on the face of the record. Consequently, I dismiss the allegation that the court is *functus officio*.

Unreasonable delay

12. The respondent contended that the application was filed after inordinate delay. The impugned judgment was delivered on 8.3.2019 and the application was filed on 9.12.2020 representing a delay of about 21 months. The delay has not been explained by the applicant in his Supporting Affidavit and also his Further Affidavit. From the court record, it is notable that the applicant filed a Notice of Appeal against the same judgment on 22.3.2019 and on 5.4.2019 filed a request for typed proceedings from the Deputy Registrar of the court. In view of the foregoing matters, I can only infer that, filing of the instant application almost 21 months after the judgment, and again after filing of a Notice of Appeal, was an afterthought. It cannot be attributed to Covid-19 pandemic or financial constraint on the applicant's part. Consequently, I agree with the respondent that the application has been brought after an unreasonable delay contrary to Rule 33(1) of the ELRC Procedure Rules, 2016.

Threshold for review.

13. The thrust of the application is that in assessing the quantum of damages payable as salary arrears for the 20 months of applicant's suspension, the court did not consider annual increments of Kshs.550, and thereby awarded him Kshs.753, 800 instead of Kshs. 844,790. In the applicant's view, the said omission by the court was inadvertent and it amounts to a mistake or error apparent on the face of the record. However, the respondent contended that the award was the result of the court's conscious judgment and exercise of discretion which has not been faulted by the applicant.

14. In the **National Bank of Kenya v Ndungu Njau [1997] eKLR** the court expressed itself as follows concerning an error or omission apparent on the face of record:

> ***"A review may be granted whenever the court considers that it is necessary to correct an 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 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 the law. Misconstruing a statute or other provision of the law cannot be a ground for review."***

15. Again in the **Nyamogo and Nyamogo v Kogo [2001] EA 174** a 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."

16. I have carefully considered the contentions by the claimant in his two affidavits. At paragraph 19 of the impugned judgment I stated as follows:

"The claimant produced payslip for January 2003 showing that his gross pay was Kshs.37690 made up of Kshs.16, 190 basic pay, Kshs.20, 000 house allowance and kshs.1500 medical allowance. The period of his suspension from 17.6.2003 to 26.1.2005 was approximately 20 months and as such, he is entitled to salary arrears of Kshs.753, 800."

17. The foregoing view was arrived at after considering the evidence of income produced by the applicant as part of his exhibits. During his testimony on 20.11.2018, the applicant stated that he had produced all his documentary evidence during the first trial before the High Court and as such he adopted the same as his exhibits again because they were all in the court file. There was no evidence in support of the annual increment of kshs.550 as at the time of writing judgment.

18. The applicant has now purported to introduce a bundle of documents vide his Further Affidavit including:

(a) 2004 Circular on Harmonization of Terms and Conditions of Service: Review of salaries, and

(b) New Salary Scale for Civil Servants for July 2004.

19. The said documents were not produced as exhibits before the impugned judgment was passed and no explanation was tendered as to why the same is being filed at this time. Accepting the invitation by the applicant to consider the newly introduced evidence after judgment would amount to reopening the trial unprocedurally. Therefore, I decline that invitation because it is prejudicial to the respondent.

20. Rule 26 of the ELRC Procedure rules, 2016 provides that:

"(1) Upon completion of the hearing and the presentation of the facts, evidence statements by the parties, witnesses and experts, if any, the Court shall declare the hearing closed.

(2) The Court shall not re-open a hearing unless, for sufficient reason, it considers it fit to do so."

21. Again Rule 28 of the Rules provides that the Court shall render a written judgment after considering all the relevant facts and supporting documents presented to it. That is what I did in this case when I rendered the impugned judgment on 8.3.2019. I could not have considered documents that were not presented as part of the evidence. Consequently, it clear by now that the alleged mistake or error apparent on the face of the record is non-existent. If there was any, there would be no need of the applicant to introduce new evidence to establish it.

22. Having found that there is no mistake or error apparent on the face of the record, which is the main thrust of the application, I must hold that the application has failed to meet the legal threshold for granting review of the impugned judgment and it is dismissed with no order as to costs.

23. As a parting shot, I wish to state that I have noted some typographical error on the judgment in paragraph 4 at page 3 of the judgment. In my own motion I proceed to correct the error by deleting the first sentence and replacing it with the following sentence:

"4. The claimant testified that he was employed as an Assistant Mechanical Engineer by the Ministry of Works (MOW) on 26th December, 1998 and later rose to become a Mechanical Engineer."

24. The foregoing, is guided by Rule 34 of the ELRC Procedure Rules, which 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."

25. Save for the said correction of the clerical error, the rest of the judgment remains unchanged.

DATED, SIGNED AND DELIVERED ON THIS 13TH DAY OF MAY, 2021.

ONESMUS N. 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 ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (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