



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

APPEAL NO. 30 OF 2020

(Being an appeal from the entire ruling and order of Hon. C.N Ndegwa, Senior Principal Magistrate, delivered on 07.12.2020 at Mombasa in Employment and Labour Relations Cause No. 460 of 2018 in the Chief Magistrates' Court at Mombasa, Andrew Mwasame –Versus- Unigroup Transporters Limited)

UNIGROUP TRANSPORTERS LIMITED.....APPELLANT

- VERSUS -

ANDREW WANYONYI MWASAME.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 11th June, 2021)

RULING

The appellant filed on 23.04.2021 an application by way of a notice of motion and through Muriithi & Masore Law Advocates. The notice of motion is under sections 3(1) (2), 12(3) (i), 16, 20(1) of the Employment and Labour Relations Court Act, 2011, rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016, section 78 of the Civil Procedure Act Cap 21, Articles 50(1) and 159 (2) (a) of the Constitution of Kenya 2010. The appellant prays for orders:

- 1) The application be certified urgent and service be dispensed with in the first instance.
- 2) The Honourable Court be pleased to reopen the appeal.
- 3) Upon reopening the appeal, the Honourable Court be pleased to grant a stay of execution of the judgment sated 27. 11. 2019 and the resultant decree issued on 20.01.2020 by Hon. C. Ndegwa in Msa CM ELRC Cause 460 of 2018, Andrew Wanyonyi Mwasame –Versus- Unigroup Transporters Limited pending hearing and determination of this application.
- 4) Upon reopening the appeal, the Honourable Court be pleased to grant a stay of any form of execution and taxation of costs relating to these proceedings following the Court's decision of 23.04.2021 pending hearing and determination of the application.
- 5) The Honourable Court be pleased to review and set aside the order dismissing the appeal carried in the Court's decision of 23.04.2019 and substitute therefor an order for re-hearing of the appeal.
- 6) Upon ordering re-hearing of the appeal, the Honourable Court be pleased to grant a stay of execution of the judgment dated 27.11.2019 and resultant decree issued on 20.01.2020 by Hon. C. Ndegwa in Msa CM ELRC Cause 460 of 2018, Andrew Wanyonyi Mwasame –Versus- Unigroup Transporters Limited pending hearing and determination of the appeal.
- 7) Upon ordering re-hearing of the appeal, the Honourable Court be pleased to grant the appellant leave to file and adduce additional evidence namely Memorandum of Appearance dated 19.12.2018 and file and filed on an even date, statement of reply dated 19.12.2018 and filed on even date and receipt in payment of Court filing fees on 19.12.2018 all with respect to Msa CM ELRC Cause 460 of 2018, Andrew Wanyonyi Mwasame –Versus- Unigroup Transporters Limited.
- 8) Costs be in the cause.

The application was based on the annexed supporting affidavit of Teddy Onyango and upon the following grounds:

- 1) The Court dismissed the appeal by the judgment delivered on 23.04. 2021.The respondent is at liberty to execute the decree in

- 2) The Court has power to reopen the appeal by reviewing and setting aside the judgment delivered on 23.04.2021.
- 3) The applicant has discovered new and important matter or evidence which despite due diligence, was not within the knowledge of the appellant and could not be produced by the appellant at the time the trial Court delivered the ruling appealed against and delivered on 07.12.2020 and at the time the Court delivered its judgment in the appeal on 23.04.2021.
- 4) The new matters include that Ambwere T.S & Associates Advocates entered appearance on behalf of the appellant in the suit giving rise to the appeal herein and also filed a statement of reply on behalf of the appellant; both dated 19.12.2018. The new evidence is credible, needful and directly relevant to the issue before the Court and when admitted will influence the outcome of the appeal.
- 5) The Court has wide powers to take additional evidence on appeal or to remit the matter to the trial Court for reconsideration upon admission of the additional evidence having regard to fairness and the interest of justice.
- 6) The respondent will not suffer prejudice because the additional evidence is not voluminous and the respondent can respond effectively; on balance of proportionality the appellant stands to suffer immense prejudice if the additional relevant evidence is not considered; the decretal sum is already deposited in a joint interest earning account in the joint names of parties' advocates; and the Court will determine the dispute expeditiously and the respondent will not wait for a long time.
- 7) The respondent financial means is unknown and the appellant might not recover the decretal amount of over Kshs.1, 000, 000.00 once released to the respondent.
- 8) It is in the interest of justice that the orders prayed for are granted.

The supporting affidavit is by Teddy Onyango, the applicant's Legal Officer who joined the respondent in 2020 as in-house counsel. It is stated that the applicant appointed Ambwere T.S & Associates to act in the matter. The applicant was under impression that it had not appeared and filed a response in the suit subject of the present appeal per the affidavit of its human resource manager Mercy Njoroge dated 18.02.2020. During an audit of the respondent's legal audit in April 2021, it was discovered that the applicant had in fact entered appearance and filed a reply in the suit. The discovery was made at a time files handled by Ambwere T.S & Associates were being audited by the said Teddy Onyango. The suit was at a time Ambwere T.S & Associates was acting for the applicant in several redundancy claims filed in Courts. The fact of filing of the appearance and the reply to memorandum of claim appears not to have been notified by Ambwere T.S & Associates to the applicant's subsequent Advocates Matata & Mwabonje Advocates LLP and which for unexplained reasons were not placed in the trial Court's file; and which were not before the trial Court as it delivered the ruling on 07.12.2020 and when the Court delivered judgment in the appeal on 23.04.2021. Thus the present application has been made in view of discovery of the memorandum of appearance and the reply to the memorandum of claim. The same would not have been discovered earlier because the respondent was a lay person incapable of auditing the various legal suits against it; haulage of cargo by SGR disrupted applicant's operations, Ambwere T.S & Associates never notified about filing of the documents; the documents were not placed on trial Court's file despite their being filed; and Ambwere T.S & Associates never handed over the file to the immediate outgoing applicant's advocates, Matata & Mwabonje Advocates LLP.

The respondent opposed the application by filing his replying affidavit on 06.05.2021 and through Otieno Asewe & Company Advocates. It is stated and urged as follows:

- 1) Trial Court delivered judgment on 27.11.2019 in favour of the claimant for payment of Kshs. 878, 565.00. The notice of entry of judgment was served upon the applicant by the letter dated 02.02.2019.
- 2) Applicant filed in trial Court application dated 18.02.2020 to set aside judgment on account Ambwere T.S & Associates had, despite instructions, failed to enter appearance and to file defence. The trial Court dismissed the application on 07.12.2020.
- 3) The present appeal was filed and stay of execution granted on 18.12.2020 subject to deposit of Kshs.1, 059, 789.10 in an interest earning account in joint names of parties' advocates. Judgment on the appeal was delivered on 23.04.2021. The appeal was dismissed. By letter dated 23.04.2021 the respondent's Counsel demanded release of the deposited amounts. The present application was then filed on 28.04.2021 seeking to reopen the appeal.
- 4) In all previous affidavits the applicant's case was that no defence had been filed for the applicant and the memorandum of appearance and reply to claim have miraculously surfaced. The documents as filed herein are not verified as having been filed in the trial Court.
- 5) The applicant has not met threshold in order 45 rule 1 of Civil Procedure Rules on applications for review. If Counsel failed in his responsibilities as was instructed, then the same ought to be handled in established manner. Inaction of Counsel is not an excusable mistake.
- 6) The case belonged to the applicant and it had an obligation to prosecute the defence diligently.
- 7) The orders for review ought to have been sought before the trial Court and the Court with appellate jurisdiction.
- 8) The application is calculated to deny the respondent enjoyment of fruits of his successful litigation. Litigation should come to an end.

9) The application is not meritorious.

The Court has considered the submissions filed for the parties together with the all the material for and against the application. The Court finds as follows.

1) As submitted for the applicant, the Court may grant a review on account of discovery of new and important matter or evidence which after exercise of all due diligence was not within its knowledge and could not be produced at the time when the decree was passed or order made, and, as provided in rule 33(1) (a) of the Employment and Labour Relations Court Rules, 2016. The alleged new material is the memorandum of appearance and the statement of reply said to have been filed on 19.12.2018 in the suit as commenced in the Magistrate's Court. The applicant at paragraph 10 of the supporting affidavit says the two documents were discovered recently in the month of April 2021. Teddy Onyango, in-house Counsel who says he discovered the documents has at paragraph 3 of the supporting affidavit stated that he joined the respondent in 2020. He is not specific on the date he joined the respondent or discovered the documents in April 2021. The Court considers that with due diligence and the memorandum of appeal having been filed on 18.12.2020, the said Teddy Onyango has not offered any explanation why, with knowledge of the preferred appeal, the two documents said to be fresh evidence could not have been placed before the Court prior to the judgment on the appeal. The Court has considered that the appeal has throughout been handled by Advocates and at a time the in-house Counsel was in place and there was ample chance to avail the two documents but no explanation has been offered to justify that failure. Thus, the Court finds that with due diligence on the part of the respondent by itself and by its in-house counsel and advocates on record, the two documents ought to have been availed in the proceedings prior to the judgment delivered in the present appeal on 23.04.2021.

2) The Court has considered the respondent's case that the veracity of the fact of filing the two documents in issue in the trial Court is open to doubt. The applicant has not alleged and shown that the documents were ever served upon the respondent's Counsel. It is true that the applicant's case and all material before the trial Court and in the appeal (prior to the present review application) show that the applicant had not filed a defence or entered appearance. The two documents while remotely amounting to evidence for purposes of appeal, they are essentially pleadings and processes prescribed by the rules of the Court for the applicant to have file in the trial Court. The documents have not been certified as true court documents and the respondent's doubts are found to be reasonable. Further, there is no correspondence between the applicant and the trial Court to seek clarification on whatever may have been the fate of the two documents if indeed they were filed before the trial Court. The Court finds that the respondent's view as valid, that, the issue of filing the documents and their validity ought to have been pursued with the trial court as of first instance but that was not done. As against the trial Court, the Court finds that the two documents were essentially part of pleadings and not evidence and therefore could not justify a review on account of fresh evidence. The Court considers that issues surrounding the two documents and their existence amount to administrative and case management issues that ought to have been raised before the trial Court and not belatedly and before this Court long after determination of the appeal.

3) For the foregoing findings the Court considers that the application is liable for dismissal with costs. The prayers made are found unjustified because they were predicated on a review being allowed but which has been declined.

In conclusion it is hereby ordered:

- 1) The application filed for the appellant dated 28.04.2021 is hereby dismissed.
- 2) The applicant to pay the respondent's costs of the application.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 11th June, 2021.

BYRAM ONGAYA

JUDGE