REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1748 OF 2013

CONSOLIDATED WITH

CAUSE NO. 2053 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF HAIR AND

BEAUTY SALON WORKERS UNION................. CLAIMANT

VERSUS

METAL CROWNS LIMITED............................. RESPONDENT

RULING

Before me, for determination is the Claimant/Applicant's Notice of Motion Application dated 22nd January, 2019. It seeks the following orders that:

a. Spent.

b. The Court be pleased to review, vary and/or set aside its Judgment dated 17th December 2018 and delivered on 20th December, 2018 together with its consequential orders dismissing the suit.

c. The Court be pleased to reinstate this matter for hearing and delivery of fresh Judgment on a priority basis.

d. The Court be pleased to consider the Claimant's Amended and consolidated Memorandum of Claim dated and filed on 3rd October, 2018 before delivery of a fresh Judgment.

e. The Court be pleased under Rule 21 of this Court's Rules to consider the Claimant's written submissions and Authorities dated and filed on 24th October, 2018 before a fresh Judgment is delivered.

f. The Court be pleased to consider the Witness Statements of the Claimant's Witnesses and the Claimant's Further documents referred to in paragraph 6 of the written submissions dated 24th October, 2018.

g. As an alternative to prayer e) above, the Court be pleased to order that this matter proceeds for hearing by way of *viva voce* evidence and thereafter written submissions be considered.

h. In the event that the Claimant's pleading, bundle of document, witness statement, or written submissions is missing in the Court file, the Claimant be allowed to re-submit copies.

i. This matter be heard on priority basis noting that it is a 2013 matter.

j. The Court be pleased to grant any other Orders it deems fit in the interest of Justice.

k. Costs be provided for.

This Application is premised on the grounds that:

1. There are errors apparent on the face of the record for reasons that this Court on 19th October, 208 ordered that this matter proceeds by way of written submissions, which order was duly complied however, the Court at page 5 of its Judgment states that the Claimant did not file its submissions. The Applicant contends therefore that on this basis the Court did not consider the said submissions in its Judgment.

2. It is further contended that the Court failed to consider the Amended consolidated Memorandum of Claim dated and filed on 3rd October, 2018 and instead makes reference to a Memorandum of Claim filed in 2013.

3. The Applicant further avers that in continued error this Court failed to consider its Witness Statements of various grievants as well as the further documents dated and field on 16th October, 2018.

4. The Applicant further contends that the Court did not have the benefit of an accurate picture of the Claimant's case. It is therefore the Claimant's apprehension that its case was not heard.

5. The Applicant avers that it has raised sufficient grounds for review under Rule 33(1)(d) of this Court's Rules. It further contended that it has the right to fair hearing as protected under Article 50(1) of the Constitution of Kenya, 2010 as well as a right to access justice as envisaged under Article 48 of the Constitution of Kenya, 2010.

6. The Applicant urged this Court to allow its Application in the interest of Justice.

The Application is further supported by the Affidavits of CECILY MWANGI, the Secretary General of the Claimant Union and HARRISON MWONGELA, a clerk at the firm of Macharia Burugu and Company Advocates on record for the Claimant/Applicant both sworn on 22nd January, 2019 in which they reiterate the grounds as set out on the face of the Notice of Motion Application.

The Application is filed under Articles 48 and 50(1) of the Constitution of Kenya, 2010, Rule 33(1)(b) and (d) and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all enabling provisions of the Law.

The Respondent opposed the Application by filing its grounds of opposition to the Application dated and filed in Court on 25th July, 2019 raising the following grounds:-

1. That the Application is fatally defective and otherwise an abuse to the Court process as it seeks to review a Judgment without specifying the grounds for the review as provided under the Employment Court (Procedure) Rules, 2016

2. That the Application to vary orders of the Court have been premised on the wrong procedure and therefore the Court lacks jurisdiction to sit as an appellate to decide an issue that has been decided by a Judge of similar jurisdiction and powers.

3. That the prayers sought in the Application cannot be dealt with after judgment has been delivered as this Court cannot order for reopening of a suit on grounds other than those anticipated under the law otherwise the Application is overtaken by events.

4. That the Application before Court is an Appeal in the legal parlance hence an abuse to the Court process.

Parties thereafter filed written Submissions to the Application.

Submissions by the Parties

It is submitted on behalf of the Claimant/Applicant that the instant Application ought to be allowed as prayed as the Court decided a different case and not the one set out by the Claimant. The Claimant termed this as an error apparent on the face of the record and therefore urged this Court to allow the Application as prayed.

The Claimant further submitted that a fresh hearing is necessary as the Applicant's right to fair hearing and access to justice as protected under Articles 48 and 50 of the Constitution of Kenya 2010 have been violated.

The Applicant further submitted that the errors it complains about are not points of law to necessitate determination in an appeal. It further submitted that the Notice of Appeal filed is not an appeal in itself until a Record of Appeal is filed. The Claimant relied on the Court findings in the cases of **Republic Vs Anti Counterfeit Agency and 2 Others ex-parte Surgipharm Limited (2014) eKLR** and **Emma Carol Wanjiru Vs Airworks (K) Limited (2016) eKLR.**

The Applicant further relied on the findings in the cases of **SKM Vs PNM (2016) eKLR**, **Henry Lukhanyu Vs Pioneer General Philipus Steyn and 2 Others (2013) eKLR** and **Muriel OgoudjobiVs Mara Ison Technologies Kenya Limited (2016) eKLR.**

Respondent's Submissions

The Respondent on the other hand submitted that the Claimant/Applicant has not met the test for review as envisaged under Rule 33 of the Employment and Labour Relations Court Rules, 2016. It is further submitted that despite the fact that the Claimant contends that there was an error apparent on the face of the record, there was no such error as the Claimant has failed to demonstrate what it means by error on the face of the record. the Respondent relied on the case of **Moyondi Vs Industrial and Commercial Development and Another (2006) 1 EA 243.**

It is further contended that the Hon. Judge in his Judgment did consider all the pleadings in the matter unlike the Claimant's submissions, that submissions do not form part of pleadings and that the Court made its decision based on the evidence as pleaded. The Respondent relied on the case of **Daniel Otieno Migore Vs South Nyanza Sugar Company Limited (2018).**

In conclusion the Respondent urged this Court to dismiss the instant Application with costs.

Analysis and Determination

I have considered the application, the Affidavits on record, the submissions of the parties hereto and the Authorities cited in support of the said submissions and opine that the only 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 <u>from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed</u>, 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.** *[emphasis added]*

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

The pertinent issue for determination therefore, is whether the Claimant/Applicant has established solid 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 vs. 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 was 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 judgment makes reference to unamended Memorandum of Claim and further that the hearing proceeded interpartes yet the matter proceeded by way of written submissions.

The Applicant further contended that the Hon. Judge indicated in his Judgment that the Claimant did not file its submissions yet it filed the same. It therefore contends that in arriving at its Judgment the Court did not consider the Claimant/Applicant's case.

The Applicant further admitted having filed a notice of Appeal but contended that the same is not an Appeal in itself until a record is filed.

The Respondent on the other hand contended that submissions are not pleadings per se and that the Court in its judgment considered the pleadings in this matter.

It is further the Respondent's submission that there is no error apparent on the face of the record exhibited as the Applicant has failed to demonstrate what it meant by error apparent on the face of the record.

It is further submitted that the Application herein raises issues that can only be determined before a Court of Appeal and therefore this Court being of concurrent jurisdiction cannot allow the Application as it will be sitting on its own appeal.

I find that the instant Application raises issues for appeal and can therefore not be entertained by this Court.

The review must be confined to error apparent on the face of the record. A re-appraisal of the entire evidence or how the Judge applied or interpreted the law or exercised his discretion would amount to exercise of appellate jurisdiction, which is not permissible. See the case of **Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170.**

Further, the applicant filed a notice of appeal that has not been withdrawn. Order 42 Rule 6(4) of the Civil Procedure Rules provides –

> **(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

Having lodged an appeal, the application for review is incompetent

as a review can only lie where an appeal has not been preferred or where an appeal does not lie as provided in Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

In the circumstances, I find no merit in the instant Application with the result that the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE