



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 753 OF 2017

JAMES MUSYOKA MUINDI.....CLAIMANT

-VERSUS-

KENYA PORTS AUTHORITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th March, 2020)

RULING

On 27.07.2018 the Court upheld the preliminary objection that the Court lacked jurisdiction in the suit because the suit was time barred under the relevant statutory provisions. The claimant has filed a notice of motion on 23.09.2019 through Muoki & Company Advocates. The motion is under Order 45 Rule 1 and Sections 3 and 3A of the Civil Procedure Act and all enabling provisions of law. The application is based on the attached affidavit by the claimant. The applicant prays for orders:

- 1) That the decree/order and or judgment of the Honourable Court dated 27.07.2018 be reviewed or varied.
- 2) The Honourable Court to order a fresh hearing between the parties.
- 3) That costs of the application be provided for.

The application is based on the grounds that there is an error on the face of the record; the suit ought not to have been struck out against a party who had properly instituted the suit and had obtained an order on leave to institute the suit; the order of 27.07.2018 is extremely prejudicial to the applicant; the suit is properly on record; upholding the; and preliminary objection was a shortcut to justice and denied the trial of triable issues raised for the claimant.

The respondent opposed the application by filing on 28.11.2019 grounds of opposition through Addraya Dena Advocate. The grounds of opposition can be summed up as follows:

- a) The Court is *functus officio* after ruling on 27.07.2018 that the Court lacked jurisdiction because the suit was time barred.
- b) The applicant has not demonstrated an error on the face of record.
- c) The ruling was on 27.07.2018 and application was filed after inordinate delay on 23.09.2019, more than one year that is not explained.
- d) There is no new development in law that would grant the Court jurisdiction in the case.
- e) The application seeks to squander the precious judicial time.
- f) The application is misconceived, frivolous, vexatious, and a total abuse of the Court process.

The Court has considered the parties' respective grounds and submissions. The Court makes findings as follows.

In upholding the preliminary objection, the Court stated thus, **“The Court has considered the submissions and finds the defendant’s submissions as valid. The leave granted has been successfully challenged as given without jurisdiction and the suit stands time barred. The Court therefore lacks jurisdiction. The plaintiff must have been under impression that the suit was properly before the**

Court in view of the leave granted and in that consideration each party will bear own costs of the suit.” The Court finds that in urging the Court to review the judgment, decree or order the applicant has revisited the same issue that the applicant had obtained an *ex-parte* leave of Court to file the suit. As urged for the respondent, it is clearly an abuse of court process to move the court to reconsider a matter the court already determined. The abuse of court process in the instant application is clearly manifested in the doctrine of *res judicata*. The application must fail in that regard and needless to state, the applicant has not established any error apparent on the record but simply seeks to urge the Court to change its mind – obviously not a proper case for an application for review.

Further as urged for the respondent the applicant has not explained the delay of over one year in bring the purported application for review. The inordinate delay is inexcusable in the circumstances of the case. The failure by the applicant to invoke the rules of this Court on review and as urged for the respondent serves as an impetus for dismissal of the application.

In conclusion the claimant’s application filed on 23.09.2019 is hereby dismissed with costs.

Signed, dated and delivered in court at Nairobi this Friday, 6th March, 2020.

BYRAM ONGAYA

JUDGE