REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1466 OF 2012

JEVASE KARIUKI NYINGI ……..…….CLAIMANT

VERSUS

M/S EAGLE WATCH CO. LIMITED

MR. JOHN M. KARANJA [MD].....RESPONDENT/APPLICANTS

RULING

1. On 20.6.2017 I wrote judgment in this case while in Mombasa and it was delivered on my behalf by Nduma J on 30.6.2017. Two years later the respondents/Judgment Debtors filed a Notice of Motion dated 24.7.2019 seeking review and setting aside the said Judgment and Decree and the suit to be marked as fully settled. The application is based on the grounds set out in the body of the motion and the Supporting Affidavit sworn by the second respondent on 24.7.2019. In brief, the applicant's case is that the suit was fully settled before the impugned judgment was passed and the claimant signed a Discharge Voucher dated 21.1.2013 in favour of the employer. In their view, the judgment and decree are vitiated by an apparent error on the face of the record.

2. The claimant has opposed the application vide his Replying Affidavit sworn on 25.2.2020. In brief, the claimant's case is that he was paid the sum of Kshs. 103,822 by the respondents and signed a Discharge Voucher but avers that the same had any relation with the impugned judgment. According to him, the said payment was in respect of leave, salary underpayment for 2010-2012, rest days and public holidays and not in full settlement of the suit.

3. The application was argued on 6.7.2020 by Mr. Munawa learned Counsel for the Applicant and Mr. Mageto learned Counsel for the Claimant.

4. Mr. Munawa submitted that the impugned judgment was entered as a result of misinformation and concealment of information that the suit was fully settled in January 2013 and the claimant signed a Discharge Voucher. He contended that the said settlement was full and final and the claimant discharged the employer from any further claim. Consequently, the counsel further consented that the claimant ought not to have proceeded with the suit after the said settlement and prayed for the application to be allowed with costs.

5. On the other hand, Mr. Mageto prayed for the application to be dismissed with costs because the applicant has not established any of the grounds for review set out under Rule 33 of the ELRC Procedure Rules. He submitted that there was no consent settlement recorded in court as the said settlement was done by the parties to the suit without involving counsel. He contended that the applicant has come to court with unclean hands. He further contended that the money paid to the claimant in January 2013 does not form part of the impugned judgment. Finally, he contended that the application is incompetent because it does not annex the impugned judgment.

6. In rejoinder, Mr. Munawa submitted that the copy of the impugned judgment is annexed to the Application as exhibit 11.

Issues for determination and analysis

7. After careful consideration of the application, affidavits and submissions by counsel, the main issue for determination is whether the application has met the legal threshold for granting the order sought as set out by **Rule 33 of the Employment and Labour Relations Court Rules** which provides as follows: -

> ***33. (1) 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.

(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.

8. In Shanzu Investment Ltd vs. the Commissioner of Lands, Civil Appeal No. 100 of 1993 [1993] eKLR the Court of Appeal held that:

"The court has a wide discretion to set aside judgment and there are no limitations and restrictions on the discretion of the judge except if the judgment is varied, it must be done on terms that are just''

9. Again the Court of Appeal in **Nyamongo and Nyamongo Advocates v Kogo [2001] EA 173** held as follows regarding what constitutes an error apparent on the face of the record as a ground for review that:

"We have carefully considered the submissions made to us by the advocates of the parties to this appeal. 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 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 an 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."

10. In this matter, the Applicants submitted that the Claimant/Respondent concealed from the court that payment had been made to him in full settlement in 2013 pursuant to a Discharge Voucher dated 21/01/2013, which is a patent error on the face of the Record. The Claimant/Respondent on the other hand submitted that the annexed discharge voucher does not relate to the judgement given on 30/06/2017 and execution of the orders thereto.

11. I have carefully considered the court record and I agree with the claimant's submissions that no consent judgment was recorded by the parties before the trial and the passing of the impugned judgment. However, it is clear is that the parties negotiated an out of court settlement at kshs. 103,822 as full and final settlement of this suit and the claimant's counsel wrote the letter dated 17.1.2013 acknowledging the settlement and even called for payment in two instalments, on 21.1.2013 and 21.2.2013. It is also clear that on 21.1.2013, the claimant acknowledged receipt of kshs. 52000, cash and accepted to be paid the balance by cheque on 21.2.2013. It is also common ground that the claimant signed a Discharge Voucher on 21.1.2013 and the same was witnessed by his counsel. The effect of the said Discharge Voucher was that the claimant accepted the said sum as full and final settlement of this suit and discharged the respondents from any further claim in respect of this suit.

12. It follows that the applicant has proved by evidence that the suit was fully settled and the claimant bound himself by the said settlement agreement not to pursue the suit. It is now trite law that a settlement agreement binds the parties thereto and it cannot be defeated or set aside unless there is evidence of any of the factors that can vitiate a contract. I gather support from **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** where the Court of Appeal set aside an award of compensation for unfair termination of employment and held that:

"21. In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties. In Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited [2015] eKLR this Court, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed:

"The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged."

13. In view of the foregoing, I find that proceeding with the trial without revealing to the court that the parties had signed a Discharge Voucher was mischievous and an abuse of the court process on the part of the claimant. I am therefore satisfied that there is a sufficient reason to warrant review of the judgments. I am also satisfied that the impugned judgment ought not to have been entered and it remains an error apparent on the face of the record. Accordingly, I allow the application for review dated 24.7.2019 and proceed to set aside the entire judgment. The claimant will pay costs of this application to the applicants.

Dated and delivered at Nairobi this 24th day of September, 2020.

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 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