



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1312 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

PAUL ODHIAMBO ONYANGO.....1ST CLAIMANT

CHRISTOPHER KYALO MUSAU..... 2ND CLAIMANT

VERSUS

KALU WORKS LIMITED..... RESPONDENT

RULING

The Respondent/Applicant, Kaluworks Limited filed a Notice of Motion dated 20th February 2020 under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. It seeks orders that the Judgment delivered by Onyango J. on the 31st January 2020 together with all other consequential orders be reviewed; the Respondent's submissions filed on 8th October 2019 be taken into consideration in reaching judgment; and the costs of the application be in the cause.

The Application is made on the grounds that the Respondent's submissions filed on 8th October 2019 were handed to the court clerk in open court on 30th October 2019 but he failed to place the same on the court file and the said submissions were not taken into consideration in reaching judgment. That the Respondent's advocates only became aware that the said submissions were not placed on the court file upon reading the judgment delivered on 31st January 2020. It contends that the Respondent is greatly prejudiced by the failure to have its submissions considered, particularly on the factors that the court should consider in assessing compensation. That the Claimants will not suffer any prejudice if the judgment is reviewed and that there has not been inordinate delay in filing this application.

The Application is supported by the Affidavit of the Respondent's Advocate, Lucy Kabura Nyaencha who avers that the said Respondent's submissions were duly filed as shown in the annexures marked **LKN1** and **LKN2** and were duly served upon the Claimants' Advocates on 24th October 2019. She further avers that she attended court on 30th October 2019 and handed the court's copy of the submissions to the court clerk in open court and confirmed to the court that the Respondent's submissions had been filed, after which the court reserved judgment for 31st January 2020. She was not personally present when judgment was delivered but was informed that someone held her brief. That when she later obtained a copy of the typed judgment, she was surprised to find a remark by the Honourable Judge to the effect that there is no copy of the Respondent's submissions on the court record.

She continues to aver that at no time before delivery of judgment was it brought to her attention that the Respondent's submissions had not been placed on the court file and she does not know why the same were not on the court file. That there is therefore an error on the record as the court proceeded on the premise that no submissions had been filed on behalf of the Respondent and that it is fair and just that the Respondent's application be allowed in the interest of justice.

The Claimants filed a Replying Affidavit dated 4th March 2020 wherein their Advocate, George Ogembo avers that **Rule 2 of the Employment and Labour Relations Court (Procedure) Rules, 2016** clearly defines a 'Registry' as any office designated by the court for filing pleadings while **Rule 10** requires a party desirous of filing a pleading to deposit them at the Registry and pay the prescribed fees. That there is no other alternative procedure for filing substantive pleadings or court documents including in court during live proceedings.

He avers that the Respondent's counsel has confirmed at **Paragraph 5 of the Supporting Affidavit** that she never deposited any copy of the document at the Registry but instead chose to wait for 21 days from the date it was stamped at the registry on 8th October 2019 to attempt to allegedly hand over the copy to the court clerk whom she has not named. That it is not that a correctly filed pleading went missing from the court file but this is a case of a party failing to file pleadings as provided by law and then seeking the court to re-open the case on account of error on the face of the record. That the ground of error apparent on the face of record is not meant to cure the mistake or irregularity

occasioned by a party who failed to properly file a document as the same is tantamount to setting aside the Judgment and proceedings. He contends there was no filing of the Respondent's Written Submissions at all for the following further reasons:

- a. A document not placed in the court file cannot be considered to have been filed at all and the Court places a lot of premium in placing the document in the file at the Registry when it made an order that no document should be filed within 3 clear days of the hearing.
- b. The purpose of the said prohibition is to prevent a situation where a party merely proceeds to pay the prescribed fees but omits to place the document in the court file and then later attempts to 'sneak' it in on the day of the hearing.
- c. A Court Clerk sitting in court during the proceedings is not a Registry Clerk who receives and places the documents in the court file and mere "handing over" of any document to the said officer cannot be construed as filing the document.

He continues to aver that there is no requirement in law or practice for the court to arrest the delivery of Judgment to request a party to file a document as it is not the responsibility of the court but of the parties to properly file pleadings. That even though the record states that Counsel for the Respondent indicated to court she had filed written submissions, it is not clear whether she was referring to the "filing" on 8th October 2019 or the purported "filing" on 30th October 2019 and that this confusion cannot be visited on the court which is now functus officio as regards the Judgment delivered.

He contends that the failure to file a document as prescribed by law is not a ground for review of the orders of the court and submissions alone is not evidence that could change any material factual findings of the court as pronounced. Further, that assessment of compensation according to the law is at the discretion of the trial Judge taking into account the evidence presented and the grounds already outlined in Section 49 of the Employment Act. He avers that it is a cardinal principle of justice that litigation must come to an end and this being a 2012 matter it is now close to 8 years for the Claimants. That where no proper basis has been laid to re-open the Judgment on account of error, the court should proceed and confirm the Judgment and he prays that the Application be dismissed with costs.

Respondent/Applicant's Submissions

The Respondent/Applicant submits that it is a well-known practice which is even encouraged by the court that submissions are physically handed in during mention of the case to avoid being misplaced at the court registry. That their submissions were indeed duly presented at the registry and court fees duly paid and that it cannot be faulted for having physically handed over their submissions to the court clerk during the mention of the case.

To demonstrate sufficient reason for reviewing the judgment, the Respondent/Applicant specifically refers to the said Respondent's submissions that:

"even if the Claimants were entitled to compensation for unfair termination (which we submit they are not), the court would have to take into account among other factors the fact that the Claimants were advised to collect their final dues if any. Further, the Claimants were given ample opportunity to give an explanation on the shortfall of Kshs. 264,874/- which they failed to do."

That it is clear there is a manifest error on the face of the record by the failure to take into account the Respondent's submissions in reaching the judgment, which merits review of the Judgment delivered by this Court on 31st January 2020 pursuant to **Rule 33(1) (b) of The Employment and Labour Relations Court (Procedure) Rules, 2016**. Further, that it has satisfied the conditions of establishing existence of an error apparent on the face of the record set out in **National Bank of Kenya v Ndung'u Njau [1997] eKLR** and **Nyamogo and Nyamogo Advocates vs. Kogo 2001 [EA] 173** which cases were followed in **Nairobi ELRC No. 37 of 2012 Joyce Wambui Karuu v Kenya Nut Company Limited [2020] eKLR**.

Claimants' Submissions

The Claimants/Respondents submit that they entirely rely on their Replying Affidavit filed on 4th March 2020 and further contend that the Applicant has not met the necessary threshold of review on account of error apparent on the face of the record as outlined in Rule 33 of the Rules. That there is the danger that parties who out of their own negligence fail to properly file documents will seek to have the Judgments recalled and written afresh on account of their failure, which would occasion an abuse of the court process. This is the reason why the same cannot be a ground for review of the orders of the Court.

They submit that the Respondent/Applicant avoided compliance with the rules of the procedure for filing pleadings in the court registry as outlined in **Rule 10 of the Employment and Labour Relations Court (Procedure) Rules** and that it has further not discharged the burden within the balance of probability that submissions were indeed submitted to court at all. They also submit that the parties herein were extensively heard by the court which considered all the factual documents in court and arrived at a proper determination of the matter. That further, no novel point has been raised in the Respondent's submissions that would alter the way the court assessed the compensation which would make it alter its Judgment. That as indicated at **Paragraph 11 of the Supporting Affidavit**, it is clear that the deponent has no issue with the finding on reasons for termination and procedure and only proceeds to state as follows:

"... the Respondent's submissions on liability would be crucial in establishing whether there were factors to be considered in assessing the compensation awarded to the Claimants'

The Claimants further submit that the factors to be considered in awarding compensation are statutory based and even then, what the court could consider or not is based on the facts which in this case are not disputed, were available to court and were indeed considered and that it is hence untrue that only the Respondent's submissions could guide the court. They pray for dismissal of the Application.

Analysis and Determination

Issues for determination:

1. Whether the Court's failure to consider the Respondent's submissions in reaching Judgment is an error apparent on the face of the record to warrant issuance of review orders.
2. Whether the Respondent's submissions were duly filed.
3. Whether the Applicant is entitled to the prayers sought in the Application.

Rule 33 of the Employment and Labour Relations Court (Procedure) Rules provides:

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.**

Makau J. in the case of Kenya Union of Hair and Beauty Salon Workers v Black Beauty Products Ltd; Kenya Scientific Research International & Technical Institutions Workers Union (Interested Party) [2018] eKLR, observed that the power of review is discretionary and unfettered as was held by the Court of Appeal in Shanzu Investment Ltd vs. the Commissioner of Lands, Civil Appeal No. 100 of 1993 [1993] eKLR 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.”

The Respondent/Applicant has submitted that the Court's failure to take into account the Respondent's submissions in reaching judgment is an error on the face of the record meriting a review of the Judgment delivered on 31st January 2020. The Claimants on the other hand argue that the Applicant has not met the necessary threshold of review on account of error apparent on the face of the record as outlined in Rule 33. The issue of mistake or error apparent on the face of the record as a ground for review has been analysed and determined severally by the court as hereunder.

In the case of **Jude Riziki Kariuki v Tharaka Nithi County Government & another [2019] eKLR** Nzioki wa Makau J. relied on the Court of Appeal's decision in **Nyamogo and Nyamogo Advocates v Kogo [2001] EA 173** on what constitutes an error apparent on the face of the record as follows:

“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.”

Failure to take into account submissions which are not on the court record is not an error apparent on the face of the record. It would have been only if the submissions were on record but in error the court failed to consider the same.

Secondly, the Applicant has pleaded that the court did not take into account the mitigating factors for award of compensation on the fact that the claimants were asked to collect their dues but failed to do so. These are not relevant factors in assessing compensation as set out in Section 49(4) of the Employment Act as expressly stated in the judgment, the court considered the years of service, the manner in which the termination process was handled and the failure to pay the claimants at the time of termination, factors which are not contested and which are not addressed in the submissions that the Applicant has annexed to its application.

A perusal of the Respondent's submissions reveals that the document has the registry stamp of 8th October 2019 which is when it would have been deemed duly filed as under **Rule 10 of the Employment and Labour Relations Court (Procedure) Rules, 2016**. It is however not clear neither has the Respondent/Applicant given reason(s) why they opted to allegedly hand over the said submissions to the Court Clerk during mention of the matter on 30th October 2019. I say allegedly because the Respondent's advocate does not indicate the name of the court clerk who received the submissions in open court and to this end, the Applicant has failed to discharge the burden of proof that the

Respondent's submissions were duly filed before delivery of judgment.

In **The Council of County Governors v Kenya Medical Practitioners Pharmacists and Dentists Union & 10 Others [2017] eKLR**, the Court declined to review its orders after finding that the Applicants had not demonstrated to Court any new and compelling issue or pointed out any mistake or error apparent on the record nor any sufficient cause that would warrant review of the Court's orders.

Further, I have not seen any issue in the submissions which if taken into account, would change the award of the court. I thus find no prejudice to the respondent by the failure of the court to take into account its submissions which, in any event, were not on record.

For the foregoing reasons I find no merit in the application and dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2020

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE