REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 135 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2020)

AGNES WACU GATOTO.....PETITIONER/ RESPONDENT

VERSUS

KENYA KAZI SERVICES LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant, Kenya Kazi Security Services Limited filed a Notice of Motion application dated 6th February 2020 seeking to be heard for orders that this Honourable Court be pleased to review, vary and/or set aside the Judgment delivered on 13th January 2020 and for the costs of this Application to be awarded to the Applicant.

2. The Application is based on the grounds that on 13/01/2020, Honourable Lady Justice Helen Wasilwa delivered judgment in the matter herein which was not read in its entirety. That on 15/01/2020 they applied for a copy of the same for their attention and which copy was furnished to them on 22nd January 2020. That upon perusal, they noted the terms of the judgment were not clear as the Court ordered the Applicant herein to supply the information sought by the Petitioner within 30 days where in default, it would be assumed the information does not exist or if it exists it is prejudicial to the Applicant.

3. That the aforesaid terms of the Judgment have left the Respondent/Applicant in an unknown state since it expressly averred in its Affidavit in support of the Reply to Petition sworn on 9th July 2019 that the information sought do not exist. That it is therefore instructive to note that the Court erred on the face of record by failing to consider the averments of the Applicant in its determination.

4. The Applicant is apprehensive that if the Application herein is not heard on priority basis, the Respondent would at the lapse of the 30 days' stated in the Judgment cite the Applicant for contempt. That the Application has been filed without inordinate delay and is necessary to avert a miscarriage of justice.

5. The Applicant also filed a Supporting Affidavit sworn on 6th February 2020 by its Head of Human Resource-Kenya, Helgah Kimanani who is the custodian of the Respondent/Applicant's employment related records. She avers that ***Paragraphs 20 and 28 of the Affidavit in support of the Answer to Petition*** and ***Paragraph 41 of the Respondent/Applicant's Submissions filed on 17/10/2019*** expressly and categorically stated that there does not exist a ''DISCIPLINARY PANEL DELIBERATIONS" document as alleged by the Petitioner/Respondent.

6. That the Respondent/Applicant further averred in ***Paragraph 30 of the aforesaid Affidavit*** that it supplied the Petitioner/Respondent herein with all documents pertaining to the termination her employment. She contends that the Judgement is contradictory as it has not determined whether the document existed or not and therefore lacks clarity and distinctness.

7. She further avers that the Court declaring the Petitioner/Respondent's right to access information has been infringed is an error apparent on record since the said information does not exist and was never denied. She prays for the said Court's Judgment to be reviewed and set aside and/or varied so that the Court makes a clear and ascertainable determination.

8. The Petitioner/Respondent, Agnes Wacu Gatoto filed a Replying Affidavit dated 28th February 2020 and avers that if the Respondent/Applicant herein was dissatisfied with the decision of the Court, it ought to have preferred an Appeal against the judgment. That the Respondent/Applicant does not meet the threshold for review of the Court judgments as provided under **Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016** and that the application is intended to re-open the case or prosecute the Petition afresh.

9. She contends that the Respondent/Applicant has not produced any new evidence which was not within its knowledge nor demonstrated that there is a mistake or error apparent on the face of the record to warrant a review of the judgment and/or given any sufficient reason to enable the court set aside its decision. She believes that the application herein is an abuse of the court process and should be dismissed.

Respondent/Applicant's Submissions

10. The Applicant submits that **Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016** sets out the following parameters for a review to be allowed:-

> **1. A 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.**
>
> **2. There must be some mistake or error apparent on the face of record.**
>
> **3. If the Judgment or Ruling requires clarification or**
>
> **4. Any other sufficient reason.**

11. It submits that the aforesaid Court's Judgment is also ambiguous and erroneous on the face of record. That on one hand the Court determined that the Applicant herein should supply the information required within 30 days and in default it would be assumed that the information does not exist while on the other hand, the Court states that in default it would be assumed that if the information exists it is prejudicial to the Respondent.

12. The Applicant submits that the error in the instant case is self-evident on the face of the record as shown in the extract of the Judgment; that the error is of a substantial point of law; and the error is not one that requires a long drawn process of reasoning or on points where there may conceivably be two opinions. It relies on the case of **Grace Akinyi v Gladys Kemunto Obiri & another [2016] eKLR** where the court cited **Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Niau** where the Court of Appeal held that:-

> **"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law."**

13. That in **Zablon Mokua v Solomon M. Choti & 3 others [2016] eKLR** the Court while describing an error apparent on the face of the record stated as follows:-

> **"In Nyamogo & Nvamogo -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."**

14. On who should be awarded costs, the Applicant prays that the Petitioner/Respondent bears the costs as the present application has been necessitated by the outcome of the Petition, which was based on misapprehension of the law and misrepresentation of facts. It relies on the case of **Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another [2016] eKLR** where Mativo J relied on the case of **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd** wherein the Court held as follows:-

> **"The issue of costs is the discretion of the Court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."**

Petitioner/Respondent's Submissions

15. The Petitioner/Respondent relies on the Supreme Court case of **Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR** in submitting that an application for review is not an opportunity for a party to re-litigate his/her case and as such, the grounds upon which a party may invoke a Court's review jurisdiction are limited by law. That the limitations imposed by law are informed by an important public policy element; to wit, that litigation must come to an end and that this position was succinctly captured by Bosire, J.A in **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2007] eKLR**.

16. The Petitioner/Respondent submits that the rival evidence on the existence of Disciplinary Panel Deliberations was contained in the Affidavits of the said Helgah and the Affidavit of Jackson Kiilu, the Respondent's representative at the disciplinary proceedings. That the Court in assessing the rival positions took into account the fact that: ***25. "...The Respondents have not denied that such a meeting ever occurred."*** and that the Court was therefore convinced that the information sought existed in making its Orders. That there is nothing ambiguous or contradictory about the judgment and decree of the Court as both assumptions made by the Court are perfectly logical and that

judgment was delivered in reliance of the evidence adduced by both parties during the hearing of the Petition.

17. She submits that an Applicant's dissatisfaction with the finding and reasoning of the court does not constitute an error of law or fact apparent on the face of the record that would justify a review. That if the Court had reached a wrong conclusion in its interpretation of the evidence before it, an aggrieved party should appeal especially when the alleged error requires relooking at the evidence as the case herein. She relies on the case of **National Bank of Kenya Ltd -Versus- Ndungu Njau (1996) KLR 469 (CAK)** to argue that error or omission must be self-evident and should not require an elaborate argument to be established.

18. The Petitioner/Respondent further submits that review jurisdiction is not for the purpose of reopening cases that have been concluded and judgment rendered and that it is also not intended to give parties the opportunity to change the character of their case to achieve a different outcome in the already. That the same was similarly found by the Court in **Sergii Gergel v ARFA AFRA LTD t/a IMAX Africa Ltd [2020] eKLR** that the effect would:-

> **"...open litigation to endless process in which litigants would wait for a judgment or ruling and thereafter, decipher the weaknesses in their cases as found in the judgment or ruling, and seek to cure the weaknesses through reopening the cases in disguised review applications."**

19. I have examined the averments of the Parties herein.

20. The Applicant seeks review of this Court's ruling dated 13/1/2020. They aver that the ruling does not address issues raised in their submissions that they don't have a "disciplinary panel deliberations". Indeed this Court made a finding having addressed this fact.

21. The Applicants have not expressed the error on record or new or important matter that would require review. In my view, the Applicants filed this application to further delay disposing of the main claim because there is nothing that this Court has to review.

22. I find the application without merit and I dismiss it. Costs in the cause.

Dated and delivered in open Court this 16th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Anyoka for Claimant – Present

Omemo holding brief Kimathi for Applicant – Present