



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 868 OF 2014

JULIE KARIUKI.....CLAIMANT

v

DYER & BLAIR INVESTMENT BANK.....RESPONDENT

RULING

1. On 28 February 2020, the Court delivered a judgment in which it found that there were no valid and fair reasons for the dismissal of Julie Kariuki (Claimant). The Court awarded the Claimant Kshs 600,000/-.

2. The Respondent was aggrieved and it filed a Motion dated 1 April 2020 seeking orders

1. **THAT** this Court be pleased to review its Judgment delivered on 28th February 2020.

2. **THAT** the result of such review be that the Claimant's claim be dismissed and that Judgment be entered in favour of the Respondent as prayed in the Counterclaim.

3. **THAT** in the alternative, this Court be pleased to review its Judgment delivered on 28th February 2020 on such terms as this Honourable Court might deem fit and just in the circumstances.

4. **THAT** there be no order as to the costs of this application.

3. Despite the pendency of the Motion, the Claimant moved to execute and this prompted the Respondent to file another Motion on 9 July 2020 seeking orders

1. ...

2. **THAT** this Court be pleased to stay the execution of its judgment and decree dated 28th February 2020 pending the hearing and determination of the Respondent's application dated 1st April 2020 or until further orders of the Court.

3. **THAT** interim orders in terms of prayer No. 2 be issued pending the *inter partes* hearing of this application.

4. **THAT** there be no order as to the costs of this application.

4. The Claimant filed grounds of opposition to the Motion on 21 September 2020.

5. When the Motion was placed before the Court on 22 September 2020, it directed the parties to file and exchange submissions.

6. The Respondent filed its submissions on 23 October 2020 (should have been filed by 30 September 2020) while the Claimant's submissions were not on record by the agreed timeline.

7. The Court, after considering the record, is of the view that a determination of the Review Motion should be undertaken first as the findings thereon would render a determination of the stay of execution Motion a mere academic exercise.

Respondent's arguments on the Review Motion

8. In seeking a review of the judgment of 28 February 2020, the Respondent asserted that there were errors apparent on the face of the record

(the judgment) because the Court had stated that it had called only 1-witness while it (Respondent) had called 2-witnesses and that the Court had dismissed the Counterclaim on the ground that evidence had not been led whilst the correct position was that evidence had been led through the second witness.

9. According to the Respondent, the evidence of the second witness, which the Court failed to consider was crucial to the Respondent's case both in terms of defending the Cause and prosecuting the Counterclaim.

10. The errors, the Respondent submitted, were apparent on the face of the record and reference was made to *Nyamogo & Nyamogo Advocates v Kogo* (2001) EA 170 and *Republic v Cabinet Secretary for Interior & Co-Ordination of National Government ex parte Abulahi Said Salat* (2019) eKLR on the ingredients of an error apparent on the face of the record.

11. In opposition, the Claimant contended that the applications were fatally defective; vexatious; an abuse of the court process; brought after an inordinate delay; the court was *functus officio*, and that the only available recourse was through an appeal.

12. In the view of the Claimant, the Respondent had not demonstrated grounds to justify a review of the judgment.

13. The law on review on the ground of apparent error on the face of the record has followed a well-trodden path (see *Muyodi vs. Industrial and Commercial Development Corporation & Ar* (2006) 1 EA 243).

14. The error or omission must be self-evident and should not require an elaborate argument to be established. It is not a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

15. The Court also ought to consider whether it is necessary to correct an apparent error or omission on the part of the Court.

16. It is correct as posited by the Respondent that the Court failed to consider crucial evidence from one of its witnesses.

17. It cannot therefore be gainsaid that consideration of the evidence may have substantially influenced the outcome of the case (differently). The failure to consider the evidence, it can be argued is akin to a substantial procedural violation of the right to a fair hearing.

18. The question begging to be answered is, therefore, whether the error in the instant case is reversible upon review, or upon appeal to the Court of Appeal.

19. In the humble view of this Court, if it were to allow the application for review, it would be obligated to go backwards and review and examine the evidence on record. Such a course would entail a possibility that the Court would substantially alter and or vary the judgment it had delivered.

20. Following such a route, in the view of the Court, entails over-stretching the principle of review as contemplated by the applicable statutory framework.

21. The Court, in the circumstances, declines to review its judgment, but on the basis that the failure to consider evidence on record amounted to a substantial procedural violation of the right to fair hearing, orders that the judgment be set aside and hearing commence *de novo* before any Judge in the Nairobi Court Station.

Conclusion and Orders

22. From the foregoing, the Court vacates and sets aside the proceedings hereto taken including the judgment and orders that the Cause proceed to hearing *de novo*.

23. Each party to bear own costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 25th day of November 2020.

Radido Stephen

Judge

For Claimant Ms. Mushokambere instructed by Miller & Co. Advocates

For Respondent Mr. Mbaluto instructed by Oraro & Co. Advocates

Court Assistants Lindsey/Judy Maina/Chrispo Aura