



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.713 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 11th November, 2020)

ALBERT YAWA KATSENGA.....CLAIMANT/RESPONDENT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT/APPLICANT

RULING

1. The application before Court is the Applicant's Chamber Summons dated 10th August, 2020 seeking the following orders: -

a) *Spent.*

b) ***THAT** there be stay of the orders issued on 28th May, 2020 pending the hearing and determination of this application.*

c) ***THAT** this Honourable Court be pleased to review and set aside its orders issued on 28th May, 2020 in its entirety and hear the applicant's application filed herein.*

d) ***THAT** the Applicant/Respondent's submissions filed on 20th March, 2020 be deemed to be properly on record.*

e) ***THAT** this Honourable Court be pleased to review its order issued on 28th May, 2020 and have the same set aside.*

f) ***THAT** the costs of this application be provided for.*

2. The application is premised on grounds that: -

a) *On 5th February, 2020 the Court directed parties to file and exchange written submissions to the main claim and mention the matter on 11th March, 2020. The Claimant/Respondent was granted 14 days to file and serve the Respondent/Applicant with its submissions.*

b) *On 11th March, 2020 the Applicant sought 14 days to file its submissions because the Respondent served it late with its submissions, contrary to the court directions.*

c) *The Court granted the Respondent 10 days to file its submissions and reserved a Judgment date for 7th May, 2020 and they filed their submissions on 20th March, 2020 within the statutory timelines.*

d) *Upon filing the submissions, the Court registry was not accepting receipt of any hard copy documents in line with the Chief Justice directive that courts were to be closed due to the Covid-19 pandemic.*

e) *The Applicant's clerk sought assistance from the Deputy Registrar who advised him that he would communicate the official email address to send the written submissions. On 3rd April, 2020 the Applicant's clerk sent its submission to the following emails elrcdr2020@gmail.com and court2@court.go.ke.*

f) *The Applicant at all times believed that the submissions had been received by Court since the Deputy Registrar acknowledged that he has received and would ensure they were placed in the Court file.*

g) The failure of the court to receive the Respondent's written submissions was not its mistake since he followed all the instructions in ensuring that the submissions were sent.

3. The application is supported by the affidavit of Linda Handa, the Respondent's process server sworn on 10th August, 2020 in which she reiterates the grounds set out in the application.
4. The Respondent filed his Replying Affidavit sworn on 9th September, 2020. He deposes that his advocates received service of the Respondent's submissions on 9th June, 2020 which was 129 days after the directions of the Honourable Court made on 5th February 2020. He deposes that as at this time, the Court had already entered judgment in the matter.
5. He avers that the fact that his advocates were served so late and the Applicant's advocate failed to ensure that the documents had been filed as alleged, is a clear indication of indolence on their part. He avers that during the entire course of the proceedings, the Applicant had opportunity to and did exercise its right to be heard including calling witnesses in support of its case.
6. He contends that a cursory look at the Judgment shows that the Judge considered the Applicant's Statement of Response dated 8th June, 2018. He further contends that the Applicant's advocate ought to clearly provide the legal basis for its application and it ought to be done in proper form.
7. He contends that the application dated 10th August, 2020 was filed under the wrong provisions of the law as it ought to have been brought under Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules.
8. He contends that Rule 33 provides that the application be by way of a Notice of Motion and that the judgment to be reviewed must be filed alongside the application. He further contends that the fact that the application has been filed 75 days after delivery of judgment is a clear indication of indolence and undue delay.
9. He avers that the application is an afterthought and calculatedly designed to deny or delay him the fruits of his judgment and that he will be greatly prejudiced if the same is allowed.
10. The application was canvassed by way of written submissions.

Applicant's submissions

11. The Applicant submitted that the application meets the threshold provided under Section 32 of the Industrial Court Rules 2010. It submitted that paragraph 7 of the Judgment is erroneous as it duly filed its submissions but the Court did not get the opportunity to appreciate the legal arguments before making its determination.
12. It submitted that the failure of the Court to obtain submission should not be visited upon it since it followed the procedure advised by the Deputy Registrar. It relied on the case of **Julius Wafula Chebi v Gibon Akifuma & Egap Solutions Limited Cause 1013 of 2013** where the Court cited the case of **Phillip Chemwolo & Another v Augustine Kubende [1982-88 1 KAR]** that it does not follow that because a mistake has been made by a party, a party should not suffer penalty of not having his case heard on merit.
13. It submitted that its right to be heard was infringed upon because the Court did not appreciate its technical and legal arguments. It relied on the case of **Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya [2019] eKLR** where the High Court held that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires examination or argument to establish it. It submitted that the error apparent on the record can only be cured on review.
14. It submitted that the application has been made without delay because judgment was delivered on 28th May, 2020 and the application was made on 10th August, 2020. It urged the Court to allow its application.

Respondent's submissions

15. He denied that the Applicant's right to be heard was violated during the proceedings and submitted that the Court acted impartially and showed clear disinterest throughout the entire course of the proceedings as it referred to the cases presented by both parties exhaustively.
16. He argued that the Applicant relied on Section 32 of the Industrial Court Rules 2010, which are no longer in use instead of Section 16 of the ELRC Act and Rule 33 of the ELRC (Procedure) Rules 2016. He submitted that the law is particular that procedure ought to be followed and the Court should not entertain any proceedings not in line with these requirements.
17. It submitted that the Court's power of review in section 16 of the ELRC Act and Rule 33 of the ELRC (Procedure) Rules, 2016 is a derivative of Section 80 of the Civil Procedure Act read with Order 45 Rule 1 (1) of the Civil Procedure Rules. He relied on the case of **Nyamogo & Nyamogo v Kogo (2001) EA 174** that held that there is a distinction between a mere erroneous decision and an error apparent on the face of record and that the latter cannot be defined precisely or exhaustively and must be left to be determined judicially on the facts of each case.
18. He argued that the application seeks to alter this Court's decision even though no evidence was presented to Court during trial in support of the Respondent's case that the termination of the Claimant/Respondent was fair and justified. He also relied on the decision in the **Phillip Chemwolo case** and **National Bank of Kenya v Ndungu [1997] Eklr.**

19. He argued that the Respondent seeks to reopen the proceedings by way of review. He further argued that the application was brought 75 days after judgment that thus it is untrue that it was without delay. He submitted that litigation must come to an end and that the Court has through its judgment ensured that both procedural and substantive justice are achieved.

20. I have examined the averments and submissions of the Parties herein. The Applicants contend that due to the fact that their submissions were not considered, this Court should review the judgement and set it aside.

21. Rule 33(1) of the Employment & Labour Relations Court (Rules) 2016 provide as follows: -

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".

22. The rule provides circumstances under which this Court can grant orders for review and this include circumstances as indicated. In the Applicant's position, review sought on the account of an error on record because the Court failed to consider their submissions which had been filed.

23. Indeed, the time of writing this judgement, the Respondent's submissions had not been filed. They were also not on record. That notwithstanding, this Court considered the evidence of the Respondents on record and also considered the law and facts in arriving at Court's determination. Failure to consider the submissions of the Respondents does not in my view prejudice the Respondents at all since all facts and the law in this case was considered.

24. There is therefore no valid reason for me to consider a review order as sought. I find the application has no merit and there same is dismissed accordingly.

25. Costs in the cause.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyagirita for Applicant/Respondent – Present

Kanyonge for Claimant – Present