



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1511 OF 2012

BONIFACE NZAU MUIA.....CLAIMANT

VERSUS

SHENGLI ENGINEERING CONSTRUCTION COMPANY.....1ST RESPONDENT

CANNON ASSURANCE COMPANY LIMITED2ND RESPONDENT

RULING

The 2nd respondent filed application and Notice of Motion dated 3rd September, 2020 seeking for orders that;

1. Spent.

2. This court be pleased to review against the 2nd respondent/applicant, the judgement and decree of Hon. Lady Justice Hellen Wasilwa delivered on 8th October, 2018 and consequently decree issued on 17th January, 2019 awarding the claimant Ksh.1, 500,000/= as compensation for pain and suffering, Ksh.1, 000,000/= as loss of future earnings, plus costs of the cause and interest and court rates w.e.f the date of the judgement.

3. This court be pleased to reviews, vary, set aside and or vacate the ruling and consequential orders of 17th December, 2019 dismissing the 2nd respondent/applicant application dated 8th March, 2019 and more particularly review, vary, set aside and or vacate the order declining the prayer for stay of execution of judgement and decree of this court dated 8th October, 2018 and 17th January, 2019 respectively.

4. An interim conservatory order does issue stopping and/or halting and/or staying the enforcement of this court's judgement of 8th October, 2018 and consequential [orders] issued on 17th January, 2019 against the 2nd respondent pending inter-parties hearing and determination of the instant application.

5. THAT IN THE ALTERNTIVE, an order does issue stopping and/or halting and/or staying the enforcement of this court's judgement of 8th October, 2018 and consequential issued on 17th January, 2019 pending inter-parties hearing and determination of instant application.

The application is supported by the annexed affidavit of Daniel Mumo Mutisya and on the grounds that judgement herein was delivered on 8th October, 2018 against the respondents upon which there was application dated 8th March, 2019 seeking stay of execution of the judgement and subsequent decree dated 17th January, 2019 and which application was dismissed on 17th December, 2019.

Upon a new counsel taking over this matter there was discovery of new and important matters which the respondent was not able or in a position to know and worse still, such evidence could not have been produced prior or at the time judgement was delivered. There is a mistake, an apparent error on the face of the judgement and hence application for review.

The court failed to consider the respondent's defence and submissions stating that there was no privity of contract between the 2nd respondent and the claimant. The 1st and 2nd respondent's contract was one for provision of insurance covers and or policies and not one of employment between the 1st respondent's employees.

There are sufficient and compelling reasons warranting the immediate review of the judgement delivered on 8th October, 2018 including

subsequent orders against the 2nd respondent. The reading of the judgement at paragraphs 13, 14, 15, 16 and 17 is not clear as to which respondent was found liable for the work injury that the claimant suffered.

The delay in filing the application is as a result of series changes of advocates representing the 2nd respondent in this matter which caused confusion and the mistake of counsel should not be visited against an innocent client.

The 2nd respondent was a mere insurer with the 1st respondent which evidence was produced in court and it should not have been included as a party to the cause in the first instance since it had no express or implied employment relationship with the claimant.

The 2nd respondent stands to suffer prejudice, loss and damage if the claimant proceeds to execute against it and would lead to its suspension by the Insurance Regulatory Authority.

In his affidavit Mr Mutisya avers that he is an advocate in conduct of the matter for the 2nd respondent and upon judgement herein there has been discovery of new and important matters which was not possible to know at the time judgment was delivered and hence application for review. The court failed to consider the respondent's defence and submissions stating that there was no privity of contract between the 2nd respondent and the claimant whereas the 1st and 2nd respondent's contract was one for provision of insurance covers and policies and not one of employment between the 1st respondent and its employees.

Mr Mutisya also avers that the 2nd respondent was a mere insurer and which evidence was submitted in court.

There is an apparent error and mistake on the record which requires a review, a variation and or setting aside of the judgement herein.

In reply, the claimant filed his Replying Affidavit and avers that the application is in abuse of court process and meant to deny him the fruits of judgement delivered on 8th October, 2018 and now a period of over 2 years ago. The application is made in an effort to delay and frustrate the case which was filed in the year 2012.

The 2nd respondent was represented in these proceedings up to the time the case and judgement was rendered. No application was filed to remove the 2nd respondent from these proceedings.

There is no reasonable explanation as to the delay in filing the instant application to warrant a review and for these reasons the application should be dismissed with costs.

Both parties filed written submissions.

Determination

The court has analysed the application, the affidavits and written submissions.

It is common cause that the court delivered judgement herein against the *respondent* on 8th October, 2018. There was application dated 8th March, 2019 by the *respondents* seeking for stay of execution of the judgement and decree and to extend time within which to file Notice of Appeal to the Court of Appeal against the judgement of the court.

The application dated 8th March, 2019 was dismissed on 17th December, 2019.

The instant application is seeking for review, vary, set aside and vacation of the ruling and orders of 17th December, 2019 dismissing application dated 8th March, 2019 and also seeking for *reviews, vary, set aside and or vacate the order declining the prayer for stay of execution of judgement and decree of this court dated 8th October, 2017 and 17th January, 2019 respectively.*

An application for review of the orders of this court is regulated under the provisions of Rule 33 (1) (d), 17 and 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

Under Rule 33 of the Court Rules where there exists sufficient cause may review its orders in the following terms;

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.

A review can therefore be allowed upon discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; on account of some mistake or error apparent on the face of the record, or for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay. See

Republic versus Public Procurement Administrative Review Board & 2 others [2018] eKLR.

In the case of **Republic versus Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad [2019] eKLR** the court held as follows;

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-evident and should not require an elaborate argument to be established. It will not be 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.

However, a review of court orders cannot go in tandem with application for stay of execution following the filing of a Notice of Appeal or on the grounds that an application seeking stay of execution of the judgement and decree thereof has been dismissed.

In the case of **Gerald Kithu Muchanje versus Catherine Muthoni Ngare & another [2020] eKLR** the Court of appeal held that;

The applicant was aggrieved by the judgment of the trial court. Under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same *cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of Martha Wambui v Irene Wanjiru Mwangi & Another (2015) eKLR, the court stated that*

From the above provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...

In the case of **Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR** the court held that;

- the remedy of review is open only when the applicant having a right of appeal has not already preferred an appeal or when no appeal is allowed by law from the order or decree pronounced by the court. ...

The 2nd respondent is seeking for a review of the court judgement delivered on 8th October, 2018 and the decree thereof issued on 8th January, 2019 on the grounds that upon delivery of judgement the 2nd respondent has appointed new advocates who have discovered new and important matters which they were not able or in a position to know of or be able to produce at the time judgement was delivered. That there is an apparent mistake and error on the face of the record as the court failed to address which respondent is liable for the work injury that the claimant suffered.

The application is supported by the affidavit of counsel for the 2nd respondent. At paragraph 5 of his affidavit he avers that there is discovery of new and important matters which was not available at the time of judgement. As counsel for the 2nd respondent, such matter discovered is not outlined.

At paragraph 6 Counsel avers that there is error on the face of the record. The error(s) are not outlined save at paragraph 9 he avers that paragraph 13, 14, 15, 16 and 17 the court failed to state which *respondent* was liable for the work injury that the claimant suffered.

The court reading of the judgement and the entire proceedings, the respondents enjoyed single representation until post judgement where new advocates were appointed by consent.

It is not the change of advocates which creates good cause to necessitate a review of judgement or court orders. Rule 33 of the Court Rules read with Rule 17 and 28 demands that a review must be addressed within the required principles.

Even where the court were to allow a review and variation of the judgement and decree which is not the case here, such would revert parties to the position subsisting as of 8th October, 2018 on the delivery of judgement and 17th January, 2019 on the date of the decree. Such has since been addressed when the *respondents* opted to file application seeking stay of execution of the decree of the court given on 8th October, 2018 and issued on 17th January, 2019 and also seeking extension of time within which to file Notice of Appeal and vide application dated 8th March, 2019.

With the dismissal of the application of application dated 8th March, 2019 on 17th December, 2019 to move the court as the 2nd respondent has done is in abuse of court process. This is inviting the court to revert back to a position already addressed and change of advocates cannot circumvent the obvious dismissal of the instant application as the court has rendered itself herein and declined stay of execution of its orders and it is now over two years since judgement was delivered.

Accordingly, application dated 3rd September, 2020 is found in abuse of court process and is hereby dismissed with costs to the claimant.

DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER, 2020.

M. MBARU

JUDGE