REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 153 OF 2018

JOSEPH KIPKEMBOI TANUI.....PETITIONER/APPLICANT

VERSUS

CHIEF DEFENCE FORCES.....1ST RESPONDENT

KENYA DEFENCE FORCES COUNCIL.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The Petitioner/Applicant filed a Notice of Motion dated 15th January 2020 seeking for Orders that:

a. The Honourable Court be pleased to review a portion of its judgment of 8th November, 2019 in which it declined to grant the Petitioner prayers 78.1(i), (iv), (v) and 78.2(iii) as captured in the Petitioner's Petition dated 28th December, 2018; and those prayers be granted as prayed, being:

(i) Declaration that the removal of the Petitioner from the Kenya Defence Forces was tainted with illegality, irregularity, unfairness and contrary to the principles of natural justice and hence invalid, null and void;

(ii) A declaration that the termination of the Petitioner's commission was in violation or' legitimate expectation;

(iii) A declaration that the termination of the Petitioner's contract of service was otherwise unlawful and unconstitutional;

(iv) An Order that in the alternative to the prayer for reinstatement, the Petitioner be paid full remuneration and benefits inclusive of pension from 23rd February, 2018 to the date of retirement being 26th November, 2022; 57 months X Kshs. 224,022/- = Kshs. 12,769,254/= together with interests from the date of the termination of employment until payment in full.

b. The Honourable be pleased to set aside and/or review its decisions at paragraph 53 of the said judgment to the effect that the Base Commander never acted unreasonably by attributing losses on the Petitioner because he failed to exercise diligence in his work;

c. The Honourable Court be pleased to review and set aside its finding in paragraph 53 of the judgment that found that the Petitioner did not discharge the burden of proving that he was away during the period when the Respondents lost fuel;

d. The Honourable Court do issue such orders and give such directions as it may deem fit and just in the circumstances.

e. The costs of this Application be borne by the Respondents.

2. The Application is premised on the grounds set out on the body of the motion and the applicant's supporting affidavit. In brief the applicant contends that, vide a judgment and decree passed on 08/11/2019, the Honourable Court dismissed the Petitioner's prayer for reinstatement and the alternative prayer for payment of the Petitioner's remuneration and benefits from the date of his termination to retirement; that the Court inadvertently failed to consider the uncontroverted evidence produced by the Petitioner that he was away when the

subject fuel was lost; that specifically he was away on a UN's mission in South Sudan from 26/07/2016 to 31/10/2016 and also away on leave in February and July 2017; that in the circumstances of the case there is thus an error apparent on the face of record and sufficient reasons to grant the order for review as under **Rule 33 (b) and (d) of the ELRC Procedure Rules**; that it is in the interest of justice that the Court grants the orders sought; and that the Respondents will not be prejudiced.

3. The Respondents opposed the Application vide a Replying Affidavit by Major Frankline Oyese Omuse on 17.2.2020. In brief, the respondents case is that Applicant has not established any plausible grounds for the review and being dissatisfied with the findings of court, he ought to challenge the same by appeal; that the Application herein is premised on wrong provision of the law; that the applicant has not demonstrated any error apparent on the face of the record; that an error on the part of the Court must be obvious to the naked eye and self-evident; that the matters in dispute were fully canvassed before this Court during the hearing and the Learned Judge considered all the evidence produced by the Petitioner; that the Petitioner/Applicant has filed Notice of appeal to impugn the same parts of the Judgment he now seeks to be reviewed; that the purpose of review is not to challenge the findings of the Court and as such by entertaining the Application, the court would be sitting on an appeal of its own Judgment; that the application was brought after an unreasonable delay and it is frivolous, vexatious, malicious, an abuse of this Court's process and should not be allowed as prayed.

4. The Application was disposed of by written submissions.

Petitioner/ Applicant's Submissions

5. The Petitioner/ Applicant submits that this Court is clothed with powers to review its judgments as provided under **Section 16 of the Employment and Labour Relations Court Act**, **Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016** and **Order 45(1) of the Civil Procedure Rules 2010**. For emphasis, he relied on **Tabitha Njeri Kinuthia v Said Swahili Said & another [2019] eKLR** where Korir J quoted the case of ***M.S. Ahlawat v State of Haryana, Writ Petition (cr.) 353 of 1997*** where the Indian Supreme Court stated that to perpetuate an error is no virtues but to correct it is a compulsion of judicial conscience.

6. The petitioner further submitted that he has met the threshold for review as set out under Rule 33 of the ELRC Procedure Rules 2016 by demonstrating that there is error apparent on the face of the record and that there is another sufficient reason to warrant the review sought. He contended that the error in issue herein is contained in paragraph 53 of the impugned judgment which is that the court failed to consider his uncontroverted evidence that he was away when the alleged loss of fuel occurred, and proceeded to make a finding that he did not discharge the burden of proving that he was not on duty at the material time. He relied on the case of **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243** as cited by Onguto J in **Wanjiru Gikonvo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR**, where the Court of Appeal observed as follows:

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

7. He contended that the error committed by this Court is one that stares one in the face and does not require the intervention of an appellate court and that a notice of appeal is merely an intention to appeal but does not constitute the appeal itself. He cites the case of ***Chandrakhant Joshibhai Patel -v- R [2004] TLR, 218***, as quoted with approval in **Kenya Union of Hair and Beauty Salon Workers Union *v* Metal Crowns Limited [2020] eKLR** where it was held that an error stated to be apparent on the face of the record:

> ***"...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."***

8. The Petitioner/Applicant submits that the grounds cited in the Application fall under 'any other sufficient reason' because the Respondents being state entities, the court would be promoting public interest and enhancing public confidence in the rule of law and the system of justice if it reviews the impugned decree. He cites the case of **Wananchi Group Limited vs. Communications Commission of Kenya & Others [2013] eKLR** where the court cited with approval the case of ***Anders Bruel T/A Queen Cross Aviation vs. Kenya Civil Aviation Authority & Another [2013] eKLR*** where it was held that even in the absence of express statutory powers of review the court may review its decision when sufficient reason is shown.

9. He submitted that the application was brought two months after the judgment and as such it was not made after unreasonable delay. He contended that the applicable statutory provisions prescribing review do not prescribe any timelines within which to bring an application for review. He relied on **Utalii Transport Company Ltd & 3 Others –vs- NIC Bank Ltd & Another [2014] eKLR**.

10. As regards the Notice of Appeal filed, the Applicant submitted that his intention to appeal the said decision does not affect his right to seek a review and he relies on the Court of Appeal decision in **Apungu Arthur Kibira vs. Independent Electoral & Boundaries Commission & 2 Others [2018] eKLR**. He further submits that the Respondents have also not demonstrated what prejudice they will suffer when the prayers/orders sought herein are granted despite his having filed a notice of appeal prior to filing the application herein. Therefore, he prayed for the application to be allowed with costs.

Respondents' Submissions

11. The Respondents submitted that in so far as section 63(e) of the Civil Procedure Act and section 146(4) of the Evidence Act are concerned, the application is brought under the wrong provision of the law and the court is *functus officio*. They cite the case of **Nyamira F.C.S vs The Chief Land Registrar & Another [2005] eKLR** where the court held that the main suit has to be alive for there to be an interlocutory order. They contended further that Order 45 rule 1 of the Civil Procedure Rules is inapplicable as there is an equivalent

provision in Rule 33 of the ELRC (Procedure) Rules, 2016 providing for review before this Court. Consequently, they contended that all the orders sought must fail since the application is brought under the wrong provisions of the law.

12. In addition, the Respondents submitted that the Applicant is faulting the Court for failing to accept his alleged *alibi* when fuel losses were incurred as the ground for review. However, in their view the said ground is not a ground for review but appeal since that would be an error of judgment. For emphasis they cite the decision in **National Bank of Kenya vs Ndungu Njau Civil Appeal No. 2111 of 1996** and ***Nyamongo & Nyamongo***.

13. They further argued that the application herein is not suitable for review as it raises contestable matters of law and fact, which both parties held divergent views over during the main suit. They contended that the alibi evidence was contested during the hearing and was properly rejected by the court in its judgment. They referred the Court to the Respondents' ***exhibit 5*** wherein the Petitioner's service record showed he was within Kenya and had not been sent to any mission abroad.

14. They further submitted that the court will be forced to re-open the entire suit and re-examine the evidence so as to determine the issues raised in the instant application. They relied on the case of **Evan Bwire vs Andrew Nginda Civil Appeal No. 103 of 2000 (Kisumu) [2000] LLR 8340** where the court held that an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh. That further in the case of **Grace Akinyi v Gladys Kemunto Obiri & Another [2016] eKLR**, the court held that, by the fact that the learned Judge did not consider crucial evidence is not a ground for review but a ground for appeal.

15. The Respondents submit that the Petitioner/Applicant is abusing the court process by filing both an intended appeal and review. They have relied the cases of **Serephen Nyasani Menge v Rispah Onsase [2018] eKLR** and **Suleiman Sumra & another v Said Mohamed Said [2018] eKLR** where the court held that a party can only choose whether to appeal or seek review and there is no liberty for one to seek both simultaneously, contemporaneously or in a consecutive manner over the same point.

Applicant's rejoinder

16. In his Supplementary Submissions, the Applicant prays to administer substantive justice as envisaged under **Article 159(2)(d) of the Constitution** and **Sections 1A, B of the Civil Procedure Act.** He submitted that the mere quoting of section 63(e) of the Civil Procedure Act does not invalidate the application. He relied on the case of **Edward Muchiri Ituma vs. Beatrice Wangigi & 9 Others [2019] eKLR** in which the Court observed that where a party comes under a wrong provision, it is in the interest of justice that the court determines the dispute and disregard procedural lapses.

17. The Petitioner/Applicant further submits that it is trite law that an appeal is instituted in the Court of Appeal when a Memorandum of Appeal is drawn, incorporated in the record of appeal and duly filed in the Court of Appeal registry but in this case no memorandum of Appeal has been filed. He contended that the notice of appeal was filed by Counsel as a matter of course before he gave instructions to apply for review and clarified that he has since withdrawn the notice of appeal because his intention is not to appeal.

Issues for determination and analysis

18. Issues for determination are:

a) Whether the application is incompetent for being brought under the wrong provisions of law.

b) Whether the Applicant has met the legal threshold for review of the impugned Judgment.

Whether the application is incompetent

19. The Respondents and the Petitioners have both cited case law to the effect that a Court would not dismiss an application solely on account of invocation of wrong provision of the law on which the application is grounded. The Respondents cited the case of **Gitau v Muriuki [1986] KLR 211** where the Court held that:

> ***"…as long as a party's invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the court will not dismiss an application solely on account of a provision of the law on which the application is grounded."***

20. I concur full with the above precedent and proceed to determine the application on merits.

Whether the applicant has met the legal threshold for review.

21. The legal threshold for granting review by this Court is set out under **Rule 33 of the Employment and Labour Relations Court (Procedure) Rules** which provides that: -

> ***"33. (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. This Honourable Court 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 observed by the Court of Appeal in Shanzu Investment Ltd vs. the Commissioner of Lands, Civil Appeal No. 100 of 1993 [1993] eKLR which held that where the judgment is varied under the discretion of court it must be done on terms that are just.

23. The instant application is grounded on an alleged error apparent on the face of the record specifically in paragraph 53 of the impugned judgment. According to the applicant, the Court did not consider his evidence that he was away when the subject fuel was lost. According to him the said evidence was not controverted by the respondents in their affidavit evidence. It is not true that I did not consider the alleged evidence. I carefully considered all the evidence tendered by the applicant including copies of his Passport and proceeded to make my finding that he did not discharge the burden of proving that he was away throughout the entire period when the fuel was lost. If in his view the court made a wrong decision of facts and/or the law, the correct jurisdiction to invoke is appeal to a higher court and not review before the trial court.

24. It is now trite law that an appeal lies for an error of judgment while an error apparent on the face of the record is the subject for review. The issue of error apparent on the face of the record as a ground for review has been analysed and determined severally by the court. In the case of Jude Riziki Kariuki v Tharaka Nithi County Government & another [2019] eKLR the Court cited the Court of Appeal's decision in Nyamogo and Nyamogo Advocates v Kogo [2001] EA 173 on thus:

> ***"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."***

25. Having found that the error upon which review is sought is not an error apparent on the face of the record as distinguished in the foregoing binding precedent, I proceed to hold that the applicant has not met the legal threshold for reviewing the impugned judgment. The alleged error relates to a determination by the Court based on the evidence before it and if any "review" is entertained I will be sitting on appeal over my own judgment against then law or I will be re-opening the entire suit to re-examine the evidence to determine the issues raised afresh contrary to the doctrine of *functus officio*.

26. In view of the finding that the applicant has not established any of the grounds for review set out under Rule 33 of the ELRC Procedure Rules, 2016, the application is dismissed with no order as to costs.

Dated and delivered at Nairobi this 17th December, 2020.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE