



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1564 OF 2013

BEDFORD MICHENI BUNDI.....CLAIMANT

VERSUS

GULF ENERGY TRANSPORT LIMITED..... RESPONDENT

RULING

Introduction

1. The Application before me is the claimant's Notice of Motion dated 18.9.2018. It is brought under section 12 and 20 of the ELRC Act, Rule 33 (3) and 28 of the ELRC Rules, Section 35 of LR Act, Article 41 and 50 of the constitution of Kenya and all other enabling provisions of the law. It seeks for reviews, and/or variation and/or setting aside of the court order dated 17.10.2016 by which this suit was dismissed for want of prosecution. The motion is perused on the grounds set out of the body of the motion and the supporting affidavit sworn by the claimant on 17.9.2018. The first of the application is that there is an apparent error on the force of the record that justify the grant of the review sought.

2. The application is opposed by the respondent through the Notice of Preliminary Objection, Grounds of Opposition and Replying Affidavit sworn by Mr. Mzahim Ali on 1.10.2018. The gist of the objection is that the application has been made after an inordinate delay and after preferring an appeal, the application is frivolous and an abuse of the court process and it should be dismissed with costs.

3. The matter came up for hearing when the court directed the parties to dispose of the application by written submissions and treat the P.O as part of the respondents grounds of opposition to the motion.

Analysis and Determination

4. I have carefully considered the motion, the rival Affidavits and submissions filed. There is no dispute that the respondent applied for the suit to be dismissed for want of prosecution by her Notice of motion dated 4.8.2016. There is further no dispute that on 1.9.2016, the court ***suo moto*** declined to hear the motion and directed the claimant to fix the suit for hearing within the year. The said direction was subject to condition that the claimant pays the respondent costs of Kshs.20,000 before the hearing of suit. The court further directed that if the claimant failed to take steps towards fixing a hearing date within 14 days, the respondent was at liberty to revive her said application for dismissal of the suit.

5. Finally, there is no dispute that on 19.9.2016 the respondent revived the said motion by fixing it for hearing on 17.10.2016 when Mbaru J. allowed it by dismissing the suit with costs for failure to comply with the directions made by the Court on 1.9.2016. The issue for determination is whether the application herein meets the threshold for granting a review order.

Threshold for review

6. The threshold for granting review is provided by Rule 33(1) of the ELRC Rules, thus:

“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 an appeal is allowed, may with 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 reasons.”

7. In a nutshell, the foregoing rule allows the court to review its order if:

(a) The order has not been appealed against.

(b) The application is made without inordinate delay.

(c) Any or all the grounds set out in Rule 33(1) (a) (b) (c) and (d) above is proved.

Appeal

8. In this case, the claimant filed a Notice of appeal against the impugned order on 25.10.2016 but after proceedings were typed, he failed to file the Record of appeal and it lapsed automatically. In my view, bringing the present motion after the lapse of the appeal rendered the application incompetent.

In ordinate delay

9. The application was made two years after the impugned order was rendered. No sufficient justification was demonstrated for the delay. In my view, the delay was unreasonable by all standard and it is an abuse of the court process. The foregoing view is fortified by **Stephen Gathua Kimani Vs Nancy Wanjira Waringo t/a Province Auctioneers [2016] eKLR** where Mativo J. held that a delay of one year before making application for review is unreasonable.

10. In view of the foregoing find that the application is incompetent and made after an unreasonable delay, I eschew going to the merits of the application. Consequently, I dismiss the Notice of Motion dated 18.9.2018 with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019

ONESMUS N. MAKAU

JUDGE