



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 871 OF 2014

KITHURE M'MWENDWA NYAGA.....CLAIMANT

VERSUS

TEACHER SERVICE COMMISSION...RESPONDENT

RULING

Background

1. The application before the Court is the Claimant's Notice of Motion dated 23.11.2018 and it seeks basically for review and setting aside of my judgment delivered on 2.11.2018. The application is supported by the claimant's Affidavit sworn on 23.11.2018 and the grounds set out in the body of the motion.

2. In summary the claimant deposed that the judgment should be reviewed and set aside, because there is an error apparent on the face of the record and that there is a discovery of important evidence that the court did not consider during the passing of the impugned judgment.

That although the suit was time barred, he obtained leave to file the suit out of time. That, because the leave was general knowledge to all the parties, the limitation issue was not raised during the course of the proceedings and even at the submissions stage.

3. The respondent opposed the application on grounds that it lacks merits, is bad in law and fatally defective; it does not fall within the ambit of Rule 33 of the ELRC Procedure Rules and it amounts to an appeal before the same Court.

4. The application was disposed of by written submissions. The claimant submitted that the court has jurisdiction to determine the application herein by dint of section 16 of the ELRC Act and Rule 33(1) of the ELRC Procedure Rules. He further submitted that he obtained leave to file the suit out of time on 31.3.2014 and the same was not challenged on appeal. He therefore contended that this Court erred by dismissing the suit for being time barred.

5. The respondent submitted that the application is incompetent and the Court lacks jurisdiction to determine it because the application and prayers sought do not fall within the ambit of Rule 33 of the ELRC Procedure Rules. She contended that the Court is *functus officio* and cannot sit on appeal over its own judgment. That the application before the court seeks to challenge the substance and merits of the impugned judgment which should be a matter for an appeal. To fortify the foregoing, she relied on Eastern and Southern Africa Development Bank Vs African Greer Fields Ltd & Others [2002]2 EA quoted by Radido J. in Alex Toya Indasio Vs Mini Bakeries (Nrb) Ltd [2014]eKLR. She further relied on my decision in Boniface Mulandi Vs Ali Barbaours Care Restaurant [2017]eKLR.

Analysis and determination

6. There is no doubt that this Court has jurisdiction to review and set aside its own orders by dint of section 16 of the ELRC Act and Rule 33(1) of the ELRC Procedure Rules. There is also no dispute that on 2.11.2018 I dismissed the suit herein on ground that it was time barred and the Court lacked jurisdiction to determine its merits. The issue for determination is whether the applicant has met the threshold for review of judgments by this Court.

7. Under Rule 33(1) of the ELRC Procedure Rules, the Court can review its judgment if the applicants proves any of the grounds set out by the said rule. In this case, the applicant has deposed that the review is sought on the basis of an error apparent on the face of the record, and on discovery of an important evidence that was not considered when the impugned judgment was passed. The respondent has however, opposed the application contending that the application and the prayers sought are outside the ambits of the said Rule 33(1) of the ELRC Rules and it amounts to an appeal

Discovery of Important evidence

8. The applicant deposed under paragraph 10 of the supporting affidavit that the issue of limitation was not raised during the proceedings and submissions because it was general knowledge to all the parties that leave had been granted prior to the institution of the suit. It follows therefore that the alleged discovery of important evidence that was not considered when the judgment was passed is not a valid grounds for review herein.

9. The applicant having expressly admitted that he was aware of the leave order before filing suit he cannot purport to plead discovery of important evidence which was not considered when the judgement was passed. What the Rule 33(1) (a) of the ELRC Procedure Rules contemplates is discovery of a new and important matter or evidence that was not within the knowledge of the applicant even after exercise of due diligence. In this case, the claimant was not diligence to bring to the attention of the Court the fact that he had obtained the leave to file the suit out of time, and further prove that the leave was justified. He never did so and as such, the alleged discovery of important evidence fails.

Error apparent on the face of the record

10. The applicant has submitted that I made an error by dismissing the suit for being time barred when there was a leave order given by Ndolo J on 31.3.2014 and which order was never appealed against. The existence of the order was never brought to the attention of the Court before the impugned judgment was passed. It was also not pleaded in the statement of claim and it was never proved to be justified.

11. It is trite that the grant of leave before filing suit out of time does not bind the trial court. The leave order must be pleaded and the order attached to the statement of claim. Thereafter the leave must be proved at the trial and left to the Court to determine its validity. In this case, it took the vigilance of the Court to notice that the suit was indeed time barred and the court lacked jurisdiction to determine it on merits. The decision was founded on the pleading, facts and the law and if I made any error of judgment on merits, then the matter should have gone to appeal and not review.

12. I have seen from the Application that the leave was sought under Misc. Appl. 16 of 2014 and not in this file. I have also noted that since the judgment, the file for Misc. Appl. 16 of 2014 has been inserted in this file. That is irregular and a collusion between the applicant and the Registry staff to misrepresent that the Court ignored the said file during the judgement. That is very wrong and cannot change the fact that I thoroughly perused the Court record before writing the impugned judgment and there was no file for Misc. Application No. 16 of 2014 or mention of the leave, to file the suit of time or even the Misc. Appl. No. 16 of 2014. Therefore, find that there is no error apparent in the face of the record in the impugned judgment.

Conclusion and disposition

13. I have found that the applicant knew of the leave to file this suit out of time and failed to bring that to the attention of the Court through pleadings, evidence and submissions. I have further found that there is no error apparent on the face of the record in the impugned judgment because it was passed on the basis of the pleading, evidence, the law and the submissions filed by both parties. Flowing from the foregoing, it clear that the applicant has failed to prove any of the grounds for review of judgment set out under Rule 33(1) of the ELRC Procedure Rules.

Consequently, the Notice of Motion dated 23.11.2018 is dismissed with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of June, 2019.

ONESMUS N. MAKAU

JUDGE