REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO 389 OF 2017

JOSEPH M. LAZARUS.....CLAIMANT

VERSUS

H. YOUNG CO. E.A LIMITED....RESPONDENT

RULING

1. The motion before me is the Respondent/Applicant's Notice of Motion dated 6th December 2018 seeking a stay of execution, review and setting aside of the Judgment of this Court delivered on 14th November 2018. The court in its judgment found that the dismissal was unfair entitling the Claimant to obtain relief of one month's salary in lieu of notice as well as money unlawfully deducted from his salary. The Court awarded the Claimant 6 months' salary as compensation for the unlawful dismissal and ordered the Respondent to issue a certificate of service. The Respondent/Applicant asserts that there was an error apparent on the face of the record and the error is said to have occurred when the court failed to consider an investigation report that the Respondent/Applicant contends it filed and produced as evidence.

2. The Claimant is opposed to the grant of orders sought in the motion and he filed a replying affidavit in which he asserts that the Court's finding was not solely based on the conclusion that the Respondent failed to demonstrate that it had a valid reason to terminate his services but the fact that the Claimant was not accorded the safeguards of Section 41 of the Employment Act thereby rendering the termination unfair in terms of Section 45 of the Employment Act. The Claimant contends that the Respondent/Applicant's motion tilts more towards pointing at an alleged error of judgment which goes to the merits of the judgment and asserts that the appropriate remedy lies in an appeal to a higher court and not review.

3. The parties consented to dispense the application by way of written submissions. The Respondent/Applicant in its submissions argued that the Court in its judgment erred in law for failing to consider an investigation report dated 25th August proving that the Claimant had unlawfully siphoned fuel from the Respondent/Applicant's motor vehicle. The Respondent/Applicant maintained that it filed the investigation report in a supplementary list of documents on the 16th February 2018 and that this investigation report was produced in court by its witness on 31st May 2018. The Respondent/Applicant submitted that for the court to grant it stay, it has to satisfy the court of the conditions as provided for under Order 42 Rule 6 of the Civil Procedure Rules. The Respondent/Applicant submits that the court has to consider the following factors, substantial loss that may result to the applicant, whether the application has been made without unreasonable delay and that the applicant would abide such security as the court orders for the due performance of the decree. On the issue of substantial loss, the Respondent/Applicant submitted that if it is not granted stay of execution, it will suffer substantial loss as the Claimant had not shown that he is capable of refunding the decretal sum if the same is paid to him. It averred that the burden of proving that the Claimant has resources lies on him and he has not demonstrated how he would repay back in the event that the application for review is allowed. The Respondent/Applicant relied on the case of **Focin Motorcycle Co. Ltd *v* Ann Wambui Wangui & Another [2018] eKLR** and the case of **National Industrial Credit Bank Ltd *v* Aquina Francis Wasike & Another [2015] eKLR**. On the issue of security, the Respondent/Applicant submitted that it is ready and willing to provide security as will be directed by the court. On the issue of delay, the Respondent/Applicant submitted that it filed the application barely a month after judgment and maintained that the application has been brought to court timeously asserting that the few weeks delay was occasioned by the process of extracting the decree by the Claimant. The Respondent/Applicant submitted that the investigation report formed part of the documents it brought before court and the omission of the investigation report is self-evident and does not need to be elaborated. The Respondent/Applicant submitted that its application is merited and prayed that the same be allowed.

4. The Claimant/Respondent submitted that the Respondent/Applicant's application is incurably defective since it has been brought under Section 45 of the Civil Procedure rules which provision of the law is inapplicable to this court and that therefore the Respondent/Applicant cannot obtain any relief from this court. The Claimant submitted that an error on the face of the record does not require a long drawn process or argument as it was the case in the Respondent/Applicant's supporting affidavit. He cited the case of **Maurice Otieno Owiny *v* Mombasa Container Terminal Ltd & Another [2017] eKLR** in which the court stated that "an error apparent on the face of the record is one which speaks for itself and does not require legal or factual arguments to prove it". The Claimant submitted that the alleged exclusion of the report cannot be said to be an error apparent on the face of the record and that if it were to be contested, an appeal would be the appropriate forum to canvass the issue. He submitted that the judgment was not solely based on this court's finding that the Respondent did not furnish the court

with the investigation report, it also considered the fact that the Claimant was not accorded the safeguards of Section 41 of the Employment Act thus rendering the termination unfair in terms of Section 45 of the Employment Act. He therefore prayed for the court to dismiss the Respondent/Applicant's application with costs since the Respondent has not provided any basis for review of the Judgment.

5. The issue before the court is a review and key to the determination of the motion is whether the application has met the threshold for grant of review of judgment. Under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016, review of judgment can be sought within a reasonable time:

> *"33(1) (a) if there is discovery of a new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of that person at the time when the decree was passed or 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."*

In this case, the ground upon which the review is sought is that there is a mistake or error apparent on the face of the record, because the court allegedly omitted to consider the investigation report and that such omission constitutes sufficient reason to warrant review of the judgment. The question that follows then is what constitutes an error apparent on the face of the record. In the case of **Ryce Motors Limited *v* Jonathan Kiprono Ruto & Another [2016] eKLR**, the Court of Appeal (Karanja, Okwengu & G.B.M Kariuki JJ.A), while dealing with a similar issue cited and applied the case of **Nyamogo and Nyamogo Advocates *v* Kogo [2001] 1 E.A 173**. In **Nyamogo**, the Court of Appeal differently constituted in determining an error apparent on the face of the record observed thus:

> *"An error apparent on the face of the record cannot be defined precisely and 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 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."*

6. In the instant case, it is clear that the judgment of this court of 14th November 2018 does not disclose an error apparent on the face of the record. A close look of the court record shows that the Respondent's witness in her testimony referred to a statement of one Keneke. On cross- examination the witness stated that "as per the report the investigations had commenced on 21st August 2018". However, the investigations report was never produced in court as an exhibit. The court record clearly shows that no document was produced and/or marked as an exhibit by the Respondent's witness. Additionally, the judgment was not solely made on the court's finding that the Respondent did not furnish the court with the investigation report but that the Respondent violated Section 41 of the Employment Act. From the evidence adduced in Court, the Claimant was summarily dismissed on 22nd August 2017 and investigations allegedly commenced on 24th August two days after the Claimant had been dismissed prior to carrying out of investigations, with no reason and without a hearing. From the foregoing, it is crystal clear that I am not persuaded that the Respondent/Applicant has proved that there is an error apparent on the face of the record in the judgment of 14th November 2017 to warrant the grant of the review orders as sought. Consequently, the motion is dismissed with costs to the Claimant.

It is so ordered.

Dated and delivered at Nyeri this 11th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar