**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 900 OF 2014**

***(Before Hon. Lady Justice Maureen Onyango)***

**BLUEBIRD AVIATION LIMITED.....CLAIMANT**

***VERSUS***

**MATHEW NJAU KIARIE.....1ST RESPONDENT**

**DAC AVIATION (EA) LIMITED.....2ND RESPONDENT**

**RULING**

Vide a Notice of Motion filed on 18th February 2019 the Applicant, DAC Aviation (E.A) Limited, seeks the following orders:

1. Spent

2. This Court be pleased to review the judgment and decree herein and vary the Declaratory Order No. (iii) of the judgment dated 20th December 2019 and Order No. (iv) with respect to costs due to the 2nd Respondent

3. The costs of this application be provided for.

The grounds in support of the application are that:

1. This Court on 20th December 2018 made a determination in favour of the Applicant, the 2nd Respondent in the Claim, that the bond and employment contract between the Claimant and the 1st Respondent, in the claim, only bound them and that it did not involve the Applicant thus the Claimant is entitled to reliefs as against the 1st Respondent.

2. The Court further issued a declaratory order against the Applicant that the unlawful termination was caused, induced and or contributed to by the Applicant in her taking up the 1st Respondent into her employment.

3. The Declaratory order is a direct contradiction of the findings by the Court of there being privity of contract and that the absence of any norm or usage in the aviation industry in Kenya that binds members to seek authority from their colleagues in the event of engaging employee from them. It is therefore an error apparent on the face of the Judgement delivered on 20th December 2018

4. As a consequence of the contradictory order and contrary to the established principles that costs follow the event, this Court did not make a clear determination on the issue of costs due and owing to the Applicant and that no reasons were given for the lack of a clear order yet it was unnecessarily dragged to Court.

5. This Court did not make a clear determination on the issue of costs due and owing to the Applicant and that the failure to award costs is an error on the face of the record.

6. The 2nd Respondent was never notified of the delivery of Judgment on 20th December 2018 despite an indication from that Court that a Notice of Judgment would be issued before delivery thereof.

The Application is supported by the affidavit of Clive Mshweshwe Mutiso, Counsel for the 2nd Respondent, sworn on 11th February 2019 in

which he reiterates the grounds on the face of the application.

In response to the application, the Respondent filed a Replying Affidavit sworn by Abdiwahid Biriq, Counsel for the Claimant on 27th February 2019. He deposes that the application is fatally defective and incompetent since the Applicant did not draw, extract and attach a decree to the application for review contrary to section 80 of the Civil Procedure Rules and Order 45 Rule 1 of the Civil Procedure Rules.

He further deposes that the Claimant/Respondent has since preferred an appeal against part of the Judgment and decree and that the appeal touches on the same issues that the 2nd Respondent raises in the application. He further deposes that in light of the Claimant's appeal, the orders for review will not serve a useful purpose if granted and that the applicant will have an opportunity and forum to raise the issues in the application when the mater comes up before the Court of Appeal.

The Applicant filed a further affidavit sworn by Counsel on 11th April 2019. He deposes that an omission to attach a copy of the Judgment to the application pursuant to Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 can be cured under Section 3 of the Employment and Labour Relations Court Act and Article 159 of the Constitution. He states that at the time the application for review was filed the Claimant had not filed an appeal against the Judgement and the fact that the Claimant has evinced an intention to appeal the said decision does not affect the Applicant's right to seek a review. He further states that there is no impediment or known law which bars an aggrieved party from applying for a review of the judgment on the grounds that another party wishes to appeal the same decision.

The Application was canvassed by way of oral submissions.

Counsel Mshweshwe for the Applicant/2nd Respondent submitted that this Court has its own rules and that the rules specifically address the question of review and there is no lacuna to be filled by the Civil Procedure Act or Rules. Counsel submitted that there is no requirement for a decree to be extracted and attached to the application. Counsel maintained that no notice of appeal had been filed at the time of filing the application and that the Notice of Appeal was filed on 25th February 2019. He argued that the Notice of Appeal was filed out of time.

Counsel argued that this Court should review the Judgment by striking out the 3rd paragraph to the 7th paragraph on page 13 of the judgment and substituting it with a paragraph that resonates with the ratio of the court at paragraph 2 of Page 12 of the Judgment that the Applicant was not a party to the contract between the Claimant and the 1st Respondent and cannot be held liable. He further urged the Court that it should also award costs of the suit in line with this Court's rules.

Counsel Musungu for the Claimant submitted that the question of an apparent error on the face of the record was laid down in the case of **Zablon Mokua v Solomon M. Choti & 3 Others [2016] eKLR**. He submitted that the Court ought not to be conflicted as to there being two interpretations of its orders. Counsel submitted that errors cannot be corrected by an application for review as the judge appreciated the concept of inducement as pleaded by the claimant and further discussed the issue of privity of contract. It was Counsel's submission that the said error can only be corrected by an appeal as it goes to the core of the claim and it was not a mere oversight and it is for that reason the Claimant preferred an appeal.

Counsel admitted that the appeal was filed out of time but argued that this court should consider that there is a possibility of an appeal being canvassed and that the applicant can file a cross-appeal on the issues raised. He urged the Court to dismiss the application.

In response, Counsel Mshweshwe cited case of the **Zablon Mokua** [supra] where the court relying on ***Nyamogo & Nyamogo v Kogo (2001) EA 174*** held that there can never be an exhaustive definition of an error apparent on the face of the record. He submitted that to hold that the 2nd Respondent was not liable and issue an order against the 2nd Respondent is an error that stares one in the face. He further submitted that a judgment must be congruent and a party cannot be said not to be liable and then be held liable. He maintained that this Court's jurisdiction for review is not subordinate to the Court of Appeal. He urged the Court to find that the application is merited.

**Determination**

Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:

> **"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.**
>
> **…**

**(3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed."**

Rule 33 refers to the review of a decree or order, not a judgment or ruling. It is therefore imperative that a decree or order is extracted before a party files an application for review as it is the decree or order that the application is anchored upon. The filing of a copy of the judgment cannot cure such an omission nor would Article 159(2).

The foregoing notwithstanding, the Respondent urges that the application should be dismissed for reason that an appeal has since been lodged against the Judgment delivered on 20th December 2018. The Notice of Appeal was filed on 25th February 2019 while the instant application was filed on 18th February 2019. Pursuant to Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016, a party may only seek review where an appeal has not been preferred. An appeal is preferred once a party files a notice of appeal.

The parties herein agree that the notice of appeal was filed out of time.

From the record it was filed 7 days after the instant application. The notice of appeal having been filed out of time as admitted by the claimant, there is no valid appeal on record. I thus find that the filing of the notice of appeal is not a valid ground to decline the application for review, as there is no valid notice of appeal on record. This is especially so as no application has been made to admit the notice of appeal out of time nor was leave sought to file the same out of time.

Going to the substance of the application, Rule 33 of this Court's Procedure Rules is explicit on the grounds for review. These are: discovery of new evidence, mistake or error apparent on the face of the record, or that there is need for clarification. The rules also provide for review on "*any other sufficient reason*".

I must first clarify that the judgment against which this application has been filed was written by my brother Marete J. who has since left the station and for reasons that I wish not to delve into herein, is not available to determine this application. I thus rely on my understanding of the judgment, which I delivered on behalf of my brother Marete J.

Having clarified that, I have read and carefully considered the prayers sought in the application and the grounds in support of the prayers. It is not clear under which of the grounds set out in Rule 33(1) the applicant wishes or intended to rely on. In the grounds and the affidavit in support of the application, Counsel for the applicant refers to conflict or contradiction between the finding and the order. A conflict cannot be an error on the face of the record.

In his judgement, Marete J held:

> *"I agree with the 2nd Respondent on the twin issues of privity of contract and the absence of evidence of any norm or usage in the aviation industry in Kenya that binds members to seek authority from their colleagues in the event of engaging employees from them. I find as such.*
>
> *From the foregoing analysis of the respective cases of the parties, it is clear that the bond and employment contract between the Claimant and the 1st respondent only bound them. It did not involve the 2nd Respondent. The Claimant is therefore entitled to relief as against the 1st respondent alone, and this answers the 3rd issue for determination.*
>
> *I am therefore inclined to allow the claim as against the 1st respondent and order relief as follows:*
>
> *(iii) A declaration be and is hereby issued that the unlawful termination were caused, induced and or contributed to by the 2nd Respondent in her taking up the 1st Respondent into her employment…*
>
> *(iv) That the 1st Respondent be and is hereby ordered to meet and party Kshs.104,739.30 being three (3) months' salary in lieu of notice to the Claimant."*

I find that the Judge in his judgment was of the view that the 2nd Respondent had no role in the termination of employment by the 1st respondent due to the fact that it had no privity of contract thus his finding that ***"The Claimant is therefore entitled to relief as against the 1st respondent alone"***.

I however find no contradiction in the judgment. As was appreciated by the Judge, the Applicant set out several issues for determination as follows –

> *1. Did the 2nd Respondent, by offering the 1st Respondent employment, knowingly and intentionally induce the 1st Respondent to breach his contract with the Claimant?*
>
> *2. Is there any charter, norm and/or usage in the aviation industry that required the 2nd Respondent to seek clearance from the Claimant before employing the 1st Respondent?*
>
> *3. Is the Claimant stopped by its own past conduct from claiming any rights arising from the alleged and/or any charter, norm and/or usage in the aviation industry that required the 2nd Respondent to seek clearance from the Claimant's business by unlawful means?*

*4. Did the 2nd Respondent, by offering the 1st Respondent employment through a competitive application process, interfere with the Claimant's business by unlawful means?*

*5. Is the Claimant's claim against the 2nd Respondent*

The court only agreed with the applicant on the issues of privity of contract and absence of any norm or usage binding actors in aviation industry in Kenya to seek authority from colleagues before engaging employees from then, and that the bond did not involve the applicant. In my view, this is why the court ordered the 1st respondent to pay the claimant three months' salary in lieu of notice and to refund to the claimant USD 30,000 for breach of the contract of service and training bond respectively. The 1st respondent was also condemned to pay claimant's costs.

The court however did find and declared the applicant guilty of inducing a breach of contract by the 1st claimant by taking the first claimant into her employment. It is because of this finding that no order was made for costs in favour of the applicant.

Having found no conflict in the judgment, I find no merit in the application for review with the result that the same is dismissed with no

orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2019**

**MAUREEN ONYANGO**

**JUDGE**