



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1106 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 7th October, 2019)

SAMUEL THUO WAIGANJO

T/A WAIGANJO & ASSOCIATES.....CLAIMANT

VERSUS

SAMUEL NJOROGE KARIUKI.....RESPONDENT

RULING

1. The Application pending for determination before me is the Notice of Motion Application dated 22nd May, 2019 filed under Section 16 of the Employment and Labour Relations Court Act, 2011, Articles 33(1) (a) & (d), 33(2) and 38 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Articles 41(1), 48, 50(1), 50(2) (k) and 159 (2) (k) of the Constitution of Kenya, 2010.

2. The Application seeks the following Orders **THAT**:-

1. The matter be certified urgent.

2. The Court be pleased to grant leave to review its judgment delivered on 2nd October, 2018.

3. The Court be pleased to stay execution of the decree issued in this matter on 7th February, 2019 pending the determination of the review application.

3. This Application is premised on the grounds **THAT**:-

a) The Applicant's right to a fair trial was violated in the proceedings.

b) The Judgment against the Applicant was decided as an undefended on the basis of fraud as subsequent to his entry of appearance and response to the claim the Applicant did not receive further communication from the Claimant until April, 2019 when he received a bundle of documents consisting of; a taxation notice, bill of costs, decree and further communication from Malonza & Co. Advocates.

c) The failure to serve the Applicant is important evidence that necessitates the review of the Court's findings.

d) The Applicant has not filed an appeal against the decision of the Court.

e) Review proceedings provide an expedient process of resolving the claim and ancillary matters.

f) The Court has inherent powers to control its process.

4. The Application is supported by the Affidavit of **SAMUEL NJOROGE KARIUKI** sworn on 22nd May, 2019, in which he reiterates the averments made in the Notice of Motion Application.

5. The Claimant filed its Grounds of Opposition in opposition to the instant Application dated 31st May, 2019 raising the following grounds:-

1. The Application is incompetent and incurably defective hence should be struck- out/dismissed.

2. There is no material substance in the application to warrant review of the Judgment.

3. The Application does not meet conditions precedent for review.

6. The Application was fixed for hearing on 17th June, 2019 when parties agreed to dispose off the same by way of written submissions.

Submissions by the Parties

7. It is the Respondent/Applicant's submission that it has met the threshold for granting review orders sought as set out under Rule 33 (1) (a) and 33 (1) (d) of the Employment and Labour Relations Court (Procedure) Rules, 2016 as well as the provisions as set out in Order 45 of the Civil Procedure Rules, 2010. For emphasis the Respondent/Applicant cited the decisions of **Republic Vs Public Procurement Review Board & 2 Others (2018) eKLR.**

8. It is further submitted that the instant Application has been brought within reasonable time the Counsel having entered appearance on 9th April, 2019. To fortify its argument the Respondent/Applicant relied on the Court's decision in the case of **James Kanyiita Nderitu Vs Attorney General & Another (2019) eKLR.**

9. The Respondent/Applicant contended that the Affidavits on record filed in this matter sworn on 3rd February, 2017, 10th October, 2017 and 19th March, 2019 contained facts that are not true as a result of which the Respondent has been denied his rights under Articles 41 (1) and 50(1) of the Constitution of Kenya, 2010 to properly defend himself. The Applicant on that basis further contends that this facts are new and falls under the preview of Rule 33 (1) (a) of the Court Rules thereby urging this Court to find as such and allow the instant Application.

10. In Conclusion the Applicant urged this Honourable Court to allow its application as prayed.

Claimant's Submission

11. The Claimant submitted that there is no sufficient reason given by the Applicant herein to warrant review of the Court's Judgment. It is further submitted that the Respondent/Applicant had an opportunity to defend his case but chose not to do so. The Claimant contended that as a cardinal rule a party is expected to be vigilant, stating that the Applicant in this case was not vigilant.

12. The Claimant further submitted that the Applicant was duly served through both postal and physical address and acknowledges service as evidenced by the Affidavits of service on record in this matter.

13. It is therefore the Claimant's submission that the Respondent's instant application is an afterthought and that the same ought to be dismissed the Respondent having been accorded a fair trial urging that it is only aimed at denying him from enjoying the fruits of the Judgment in his favour. To fortify this argument the Claimant cited and relied on the Authority of **Allen Vs Sir Alfred McAlpine & Sons Limited** where Lord Denning stated:-

"The delay of Justice is a denial of justice....All through the years men have protested at the law's delay and counted it as grievous hard to bear."

14. The Claimant further submitted that the Applicant has not met the threshold set for review of the Court's Judgment and therefore urged this Honourable Court to dismiss the instant Application with costs.

15. I have examined the averments of both Parties. The Applicant seeks orders for review from this Court in relation to this Court's judgement delivered on 2nd October 2018. The Court has power to review its judgement or orders under Rule 33(1) in the following instances:-

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.

16. In relation to the instant application, the Applicants have not indicated under which limb this Court's judgement requires review. They have also not explained which aspect of the judgement requires review. In this Court's view, the application as filed lacked merit and is therefore dismissed accordingly.

Dated and delivered in open Court this 7th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omwanza Nyamweya holding brief Michuki for Applicant

Miss Musa for Respondent – Present