REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 552 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

ANNE MUTHONI MUTURI CLAIMANT

VERSUS

CONSOLIDATED BANK OF KENYA RESPONDENT

RULING

The application before Court for determination is the Claimant/Applicant's application filed by way of Notice of Motion on 5th April 2019 seeking orders that:

1. Spent

2. The Court be pleased to set aside and or review the judgment entered in the Cause herein written and or made by Marete J. on 17th December, 2018 and delivered by Onyango J. on 20th December 2018 upon such reasonable term(s) and or condition(s) (if any) that it may deem just and necessary.

3. The Court be pleased to make and or grant such other and or further Order(s) as it may in the interest of justice deem expedient and or necessary.

4. That the costs of this application be provided for.

The application is premised on grounds that:

1. The Claimant's advocate discovered from the Court records that the Judgement was delivered in 20th December 2018 in their absence. The matter had been erroneously listed as a hearing before Marete J. on 19th October 2018 instead of being listed before the trial judge for mention to confirm filing of written submissions . However, none of the parties and or their representatives were present when Marete J. extended time by 10 days for the Claimant to file written submissions.

2. It is clear that the mistakes and or errors apparent on the face of the court file regarding the proceedings on 19th October 2018 resulted in locking out the Applicant's advocates from participating in the proceedings and that the Applicant was not granted a just and fair hearing prior to delivery of Judgment.

3. The matter had been scheduled for mention on 10th October 2018 to confirm filing of written submissions but the said date was declared a public holiday. Thus the matter was set down for mention on 19th October 2018 but was not listed at all but upon perusal of the court file the claimant discovered that the file had been placed before Rika J. for mention on the said date.

4. There is no reference to the Claimant's evidence recorded by the Trial Judge on 7th May 2018 and that the Claimant's submissions were filed on 6th Sepetember 2018

5. The Deputy registrar in a letter dated 22nd October 2018 listed the Cause among those that were to be transferred to Kericho for writing of Judgement and that on 20th December 2018 Judgment was delivered in the presence of the Respondent's counsel and in the absence of the Applicant's counsel.

The application is supported by the Affidavit of Anne Muthoni Muturi, the Applicant, sworn on 5th April 2019 in which she reiterates the grounds set out on the face of the application.

The Respondent filed a Replying Affidavit sworn by Jacinta Lwanga, the Respondent's Head of Human Resources, on 29th April 2019. She deposes that the suit was scheduled for hearing on 10th October 2018 but the said date was declared a public holiday. She avers that the claimant failed to set the matter down for hearing and during the service week the matter was listed and the judge directed that parties file submissions

She avers that the Claimant having failed to file her submissions cannot claim to have been denied an opportunity to be heard as parties had conceded to filing of submissions. She further avers that where a party is disgruntled by a Judgement they have a window to appeal which the Claimant failed to pursue.

She avers that the application does not meet the threshold for granting a review and that the application should be dismissed with costs.

The applicant filed a supplementary affidavit on 29th May 2019. She avers that her witness statement was duly adopted as her evidence on 7th May 2018 when both parties closed their case. Further, the directions by the Court on 7th May 2018 was that parties were to file written submissions thus the matter ought not to have been listed by the Court *suo moto* for hearing.

She maintained that there are errors apparent on the fact of the court record involving substantial issues and or points of law which were clear.

The application was heard by way of written submissions.

Applicant's Submissions

The Applicant submitted that there are errors and mistakes on the Court file for reasons that the matter had been placed before Marete J. for hearing instead of for confirmation of filing of submissions. That the Registrar of the Court did not comply with the Order issued by Marete J. on 19th October 2018. In addition, the subject judgment mistakenly omitted to make reference to the Claimant's unchallenged evidence recorded on 7th May 2018.

She submitted that she is not seeking a backdoor appeal nor is she forum shopping but rather pursuing both procedural and substantive justice in the cause. She relied on the case of Barclays ***Bank of Kenya Ltd & Another v Gladys Muthoni & 20 others [2018] eKLR*** where the Court considered the issue of courts making substantive orders during mentions and cited the decision in ***Republic v Anti-Counterfeit Agency & 2 Others ex-parte Surgipham Limited [2014] eKLR***.

She submitted that the Judge ought not to have made substantive orders on the filing of submissions within 10 days in the absence of the parties. She submitted that the Courts are concerned with ensuring that justice was not only done but also seen to have been done.

Respondent's Submissions

The Respondent submitted that review can only be allowed under certain circumstances being the discovery of new and important evidence, mistake or apparent error on the face of the record and any other sufficient reason. It submitted that the Applicant has not proved the existence of grounds requiring the Court to review the Judgement.

It relied on Section 22 of the Sixth Schedule if the Constitution and the case of ***National union of Water and Sewerage Employees & 3 others v Nairobi Water and Sewerage Company Limited [2018] eKLR.*** In respect of this, it submitted that the Applicant has not denied that the Judge was duly appointed as a judge of this court and the matter was heard by a competent court.

It submitted that the service week seeks to expedite matters and that the Applicant cannot now fault the Court for trying to expedite matters for reason that judicial decision did not favour her.

Analysis and Determination

The Applicant herein seeks review of the judgment delivered on 20th

December 2018 for reason that in the absence of the parties the Court on 19th October 2018, granted the Claimant 10 days to file her submission and that the claimant was not notified by the Registrar of the Judgment date.

From the record, the parties closed their cases 7th May 2018 and the Court directed that the parties do file their written submissions within 21 days. The Court further directed that the matter be mentioned on 26th July 2018 to confirm filing of submissions.

On 26th July 2018, the Claimant's counsel sought extension of 14 days to file submissions and leave was so granted. It is then that the matter was scheduled for mention on 10th October 2018 which was declared a public holiday. The matter was then set for mention on 19th October 2018 when the file was placed before Rika J and thereafter Marete J.

The Applicant averred that the matter was not listed for mention and in support of this, she annexed a cause list in respect of Court 1 and not

all Employment and Labour Relation Courts sitting on that day being a service week. Nevertheless, even if the matter had not been listed Counsel had from July 2018 not filed his submissions until 6th September 2018. This despite seeking leave to file his submissions. Further, even if the same had been filed he ought to have pursued the matter and ensured that he confirmed to the Court that the submissions had been filed but were only missing from the Court file.

In addition, despite the matter not being listed as alleged Counsel only wrote to the Deputy Registrar on 23rd January 2019 a month after Judgment had been delivered, seeking that the matter be placed before the Judge for mention for failure of its listing on 19th October 2018. What counsel ought to have done was to peruse the Court file the very day or a later date.

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

> ***(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.***

From the foregoing, I do not find there to be an error on the face of the record which warrants review of the Judgment of Marete J. delivered on 20th December 2018. In ***Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243*** the Court of Appeal described an error on the face of the record as follows:

> *"In **Nyamogo & Nyamogo -vs- Kogo (2001) EA 174** this Court said that an error apparent on the face of the record cannot be defined precisely or 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 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 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 or wrong view is certainly no ground for a review although it may be for an appeal."*

I find that as rightly stated by the Respondent, this is a matter which the applicant ought to have filed an appeal and not a review as the Applicant has not established that the circumstances herein fit within the purview of Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016.

The application therefore fails and is accordingly dismissed.

There shall be no orders for costs

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE