



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 5 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF: CHAPTER FOUR OF THE BILL OF RIGHTS
FO THE CONSTITUTION OF THE SOVEREIGN REPUBLIC OF KENYA**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY
JURISDICTION AND THE PROTECTION OF THE FUNDAMENTAL RIGHTS
FO THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2006**

AND

**IN THE MATTER OF: ARTICLES 1, 2, 3, 19, 20, 21, 22, 23,
24, 25, 27, 28, 29, 35, 41, 47, 50 OF THE CONSTITUTION
OF THE SOVEREIGN REPUBLIC OF KENYA 2010**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOM UNDER THE CONSTITUTION OF KENYA TO WIT
CONTRARY TO ARTICLES 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 35, 41, 47 AND 50
OF THE CONSTITUTION OF THE SOVEREIGN REPUBLIC OF KENYA 2010**

AND

**IN THE MATTER OF: TERMINATION OF EMPLOYMENT AND DISMISSAL
OF JOSHUA OCHIENG OCHIEL BY KENYA REVENUE AUTHORITY**

BETWEEN

JOSHUA OCHIENG OCHIEL.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

The Application before the Court for determination is dated 23rd August, 2017 brought under Order 45 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders:

1. That the application filed herein be certified urgent and be placed before the Honourable Court for further directions.
2. That the Honourable Court be pleased to review its Orders/Judgment made on the 26th May, 2017, aside the same and entering judgment for the applicant/claimant as prayed for in the amended plaint.
3. That costs be awarded to the Applicant.

The Application is premised on the grounds:

1. That there are mistakes and errors apparent on the face of the record whose consideration afresh and properly would dramatically change the judgment.
2. That there are also sufficient reasons and grounds to believe that the Honourable Court did not access the party's submissions in this matter thereby leading the Court to make his own finding.
3. That other than the foregoing there is every possibility that due to a number of documents filed in the case, confusion arose which misled the Honourable Court into entering wrong decision either by not seeing the documents or confusing the same.
4. That the applicant has noted the confusion and has explained fully in the affidavit.

The application is supported by the Petitioner's affidavit wherein he states that a number of facts that the Judge relied on were wrong and that the Court misunderstood the facts.

The application is opposed and the Respondent has filed a Replying Affidavit sworn by one David Ontweka wherein he states that the Application does not meet the threshold for Review of Orders as set out in Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

That the issues raised by the Applicant were addressed by the Trial judge and the application is an attempt to introduce new evidence. That the errors complained of can only be dealt in an appeal and as such the application should be dismissed.

Submissions

The Petitioner's Counsel in his submissions reiterates the grounds on the motion and the facts as set out in the supporting affidavit. The Respondent's Counsel on the other hand submits that the application does not meet the threshold of an application for review and as such the same should be dismissed with costs.

The parties highlighted their submissions in Court. Counsel for the Applicant, Mr Owino submitted that there were two institutions called Tear Fund Limited; one was fraudulently formed by an employee and the other one is genuine. That throughout the proceedings there was no clarification that there were 2 Tear Funds and the judgment does not distinguish between the 2 entities.

That the genuine Tear Fund applied for VAT refund and the only issue that arose is that Mboya, a former employee of Tear Fund changed the account into which the refund was sent. That the Applicant was put through disciplinary proceedings for the reason that he called the fraudulent company in order to be provided with documents required for payment of funds which documents had been stolen.

That the Court has jurisdiction under section 16 of the Employment and Labour Relations Court Act to grant the Orders sought. He prays that the application to be allowed.

Counsel for the Respondent, Mr. Ontweka submitted that the grounds forming the basis of the application are matters that should form part of the appeal. That the documents in question were before Court but were not considered and as such the applicant seeks to reopen matters that were already before the Court. He submits that to grant the Orders sought is tantamount to sitting on appeal in a judgment of a Court of concurrent jurisdiction. Counsel urged the Court to dismiss the application with costs.

Determination

The grounds for review as set out in Rule 33 of the Employment and Labour Relations Court (Procedure) Rules and they are restricted to the following:

- a) 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.

Issues for determination

1. Whether there was an error on the face of the record
2. Whether there is sufficient reason to warrant the orders sought.

An error on the face of the record

The applicant submits that there are errors on the face of the record which this Court should consider. In the case of *National Bank of Kenya Ltd vs Ndungu Njau (1996) KLR 469* Kwach R.O, Akiwumi A. M & Pall G. S, JJA stated:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

I have perused the judgment and note that at paragraphs 42 and 43 thereof the court states as follows –

“42. The respondent has established on a balance of probability that documents proved to have been provided internally to the petitioner, following his persistent request for the same, were subsequently used by persons who were not employees of the respondent to lodge a fraudulent claim in the name of TEAR FUND LIMITED, a lawfully registered NGO in USA and Kenya using documents stolen from the TEAR FUND LIMITED and from the respondent.

43. The link between the petitioner and the fraudsters was carefully established by RW1 and the conduct by the petitioner explained by RW2 and RW3 well corroborated the role the petitioner played in enabling the success of the fraudulent claim of VAT refund.”

It is clear from the said paragraphs that the court appreciated all the facts of the case and the evidence, specifically that there were two separate accounts known as TEAR FUND LIMITED, one genuine and the other a fraud, and further took into account the role of the applicant in facilitating the fraudulent withdrawals of funds that were the reasons for his dismissal.

In any event, the lack of appreciation of facts or evidence by a trial court does not amount to an error on the face of the record and is not a ground of review but rather, a ground of appeal as submitted by Counsel for the respondent.

Any other sufficient reason

In *Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 100 of 1993)* the Court of Appeal stated;

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

From the grounds set out in the Notice of Motion and in the Affidavit in support of the application, the applicant has not satisfied the requirements for review on the grounds of “**any other sufficient reason**” to warrant interference with the judgment. The Application seems to be an attempt to overturn the judgment by an appeal disguised as a review.

It is important to distinguish grounds of appeal and grounds for review. The grounds relied upon in this application qualify to be grounds of appeal as opposed to grounds for review. In the case of *National Bank of Kenya Ltd vs Ndungu Njau (1996) KLR 469* the court held:-

“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”

For the foregoing reasons, I find no merit in the application for review with the result that the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE