Mutua v Load Trailers (E.A) Ltd (Civil Appeal E285 of 2021) [2024] KEHC 6048 (KLR) (Civ) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6048 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E285 OF 2021

JN NJAGI, J

MAY 24, 2024

BETWEEN

TITUS KAWERU MUTUA .... APPELLANT

AND

LOAD TRAILERS (E.A) LTD .... RESPONDENT

RULING

1. This court on the 15th July 2023 dismissed the appellant`s appeal and has now filed a review Notice of Motion application dated 28th July 2023 seeking for orders:
    1. That the order made by this court on 15th July 2023 dismissing the appeal be reviewed and set aside and the lower court`s suit, Nairobi CMCC No. 1131 of 2018 be reinstated.
    2. That the costs of this application be in the cause.
2. The application is based on the grounds that the Chief Justice issued Practice Directions of 24th April 2023 (annexed to the application) on all WIBA matters pending in courts that they be prosecuted to their logical conclusion. That the lower court suit Nairobi CMCC No. 1131 of 2018 ought to be reinstated, heard and determined to its conclusion by the lower court in view of the Chief Justice`s said directions. That the matter was filed in court on 21/2/2018 and falls under pending Work Injury Claims. That the respondent does not stand to suffer any prejudice since it will be heard on its defence.
3. The application was opposed by the respondent on the ground that the review is based on the ground that the applicant`s suit falls under the purview of the matters referred to in Paragraph 84 and 85 of the Supreme Court Petition No.4 of 2019. However, that the matters referred to in the aforesaid paragraphs are matters that were filed in the lower court before the WIBA was operationalized in the year 2007. That the appellant`s suit was filed in 2018 and therefore cannot fall under the category of

matters that would be concluded at the lower court where the appellant had filed suit. That the lower court had no jurisdiction to preside over the appellant`s suit.

4. The respondent contended that the applicant has not shown that there is an apparent error on the face of the record, or discovery of new evidence or any other sufficient reason that would warrant a review of this court`s decision. That this court has already pronounced itself through its judgment rendered on 15th June 2023 on the Supreme Court decision that the appellant has made the basis of his application. That the Kenya Gazette excerpt that the appellant has annexed to the application makes reference to suits that were filed before the commencement of the WIBA and not after the WIBA was operationalized as is with the case with the Appellant`s suit. The respondent urged the court to dismiss the application with costs.

Submissions

5. The application was canvassed by way of written submissions.

Appellant`s Submissions

6. The appellant submitted that this court has inherent power to review its orders. That the suit herein was filed in 2018 way after commencement of WIBA Act but before the Supreme Court`s decision. That as per paragraph 7(a) of the Chief Justice`s Practice Directions dated 24th April 2023, the suit ought to proceed before the magistrate`s court. That the appellant`s suit does not fall under paragraph 6(a) of the Practice Directions that provides directions on matters filed before the commencement of WIBA.

7. The appellant submitted that the application has met the threshold under Order 45 Rule 1(1) of the Civil Procedure Rules as he has demonstrated reasons warranting review of the court`s orders.

Respondent`s Submissions

8. The respondent submitted that the appellant has not demonstrated any reason that would warrant a review of the judgment under Order 45 Rule 1 of the Civil Procedure Rules, 2010.. That there is no apparent error on the face of the record nor has there been discovery of new evidence to necessitate a review. That this court has rendered itself that matters that were filed after WIBA came into operation should be heard by the Director of Occupational Health and Safety. That the court took note that the appellant`s case was filed after WIBA became operational.

9. It was submitted an error on the face of the record refers to an evident error which does not require extraneous matter to show its incorrectness and that it is an error so manifest and clear that no court would permit such an error to remain on the record.

Analysis and determination

10. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the respective counsels for the parties. It is first important to note that Section 80 of the *Civil Procedure Act*,2010 confers this court with unfettered discretion to review its orders. The section provides as follows:

 Any person who considers himself aggrieved: -

 a. By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgement to Court which passed the decree or made the Order and the Court may make such order thereto.

11. However, Order 45 rule 1 of the Civil Procedure Rules, 2010 provides that the court can only review its orders if the following grounds exist: -

a. There must be discovery of a new and important matter of evidence which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

b. There was a mistake or error apparent on the face of the record;

c. There were other sufficient reasons; and

d. The application must have been made without undue delay.

12. An applicant under Order 45 must prove the above ingredients before the court can exercise its unfettered discretion to grant the orders. In Asset Recovery v Charity Wangui Gethi and 3 Others (2020) eKLR, the Court of Appeal had this to say: -

> " In an application for review, as envisaged under Order 45 of the Civil Procedure Rules, the grounds which ought to be established are conclusive. An applicant must establish: that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or made; that there has been a mistake or error apparent on the face of the record or: any "other sufficient reason". The ground "other sufficient reason" has been held to be consonant with the first two grounds: See Kuria v Shah [1990] KLR. Additionally, the applicant must exhibit that he acted expeditiously."

13. This court on the 15th June 2023 dismissed the appellant`s appeal by holding that it is the Director of Occupational Health and Safety who has exclusive jurisdiction to hear work related injury claims. In the said appeal, the appellant was relying on the Chief Justices Practice Directions dated 15th September 2020. This court interpreted those practice Directions to mean that magistrate`s courts could hear and determine work injury claims that were pending in court and were filed before he WIBA was operationalized in the year 2007. The court consequently held that the lower court had no jurisdiction over the appellant`s claim which was filed in 2018, many years after WIBA was operationalized.

14. In the instant review application, the appellant is relying on another Practice Directions issued by the Hon. The Chief Justice on 24th April 2023 to the effect that:

> All claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at the Employment and Laboru Relations Courts or the Magistrates' courts shall proceed until conclusion before the said courts.

15. It is not clear in the application under what paragraph of Order 45 rule 1 the application is based on – whether on discovery of new and important matter of evidence, mistake or error apparent on the face of the record or sufficient cause. It would appear that the appellant is relying on discovery of new and important matter of evidence as the application is based on Practice Directions dated 24th April 2023 which he had not produced in court when the appeal was heard.

16. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR, High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018, Mativo J.(as he then was), discerned the following to be applicable in an application for review: -

    i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

    ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

    iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

    iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

    v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

    vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

    vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

    viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

    ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

    x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

17. Of importance here is the observation that in a review application, the court must confine its adjudication with reference to material which was available at the time of initial decision. In this application the appellant is making reliance on Practice Directions which were not before the court when the court made its determination. He has not given an explanation why he had not placed the Practice Directions before the court during the hearing of the appeal.

18. In a review application, an applicant is supposed to show how the court erred in its exercise of discretion and is not meant to be an appeal. In the case of Mohamed Fugicha v Methodist Church in Kenya (Through its registered trustees) & 3 others [2020] eKLR it was held that:

> The process of review was not intended to give the party an opportunity to appeal, and where review it is sought, the party has to demonstrate to the satisfaction of the Court, how if at all, it erred in the exercise of its discretion.

19. More so, a review cannot be based on fresh arguments or correction of an erroneous view taken earlier in a judgment or order. In Republic v Advocates Disciplinary Tribunal (supra) the court cited the Indian case of Ajit Kumar Rath – Versus – State of Orisa, 9 Supreme Court Cases 596 at Page 608 where The Supreme Court had this to say on the scope of review: -

> "The power can be exercised on application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier; that is to say the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" .....means a reason sufficiently analogous to those specified in the rule..."

20. In the instant application the appellant is introducing fresh arguments on Practice Directions which were not before the court when the appeal was heard and determined. In my view the appellant should have filed an appeal if he was not satisfied with the judgment than resorting to a review.

21. The upshot is that I find no merit in the application. Consequently, the application is dismissed with costs to the Respondent.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MARSABIT THIS 24TH MAY 2024

J. N. NJAGI

JUDGE

In the presence of:

Miss Chelangat for Appellant

Mr Aranda for Respondent

Court Assistant – Jarso

30 days Right Appeal.