



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. 107 OF 2003

MOSES KIPNGETICH CHERUIYOT.....PLAINTIFF

VERSUS

TEACHERS SERVICE COMMISSION.....DEFENDANT

RULING

1. The Applicant (Plaintiff) has brought the application dated 20th November 2013 under the provisions of Order 45 2(1), (2) and (3) of the Civil Procedure Rules 2010. He seeks, *inter alia*, the following orders-
 - (a) ***that this Honourable Court do review the judgment delivered on 26th November 2010 to include general damages and interest to the Decree Holder/ Applicant;***
 - (b) ***that the decree issued earlier be amended accordingly; and***
 - (c) ***that the costs of this application be in the cause.***
2. The application was supported by the Affidavit of the Applicant sworn on 20th November 2013. It was premised on the grounds that the Applicant filed this suit against the Respondent (Defendant) for compensation following the unlawful termination of his employment. In a judgment delivered on 26th November 2010, the Applicant's suit was allowed, and he was awarded unpaid salary, terminal benefits, special damages for the notice period, costs of the suit and interest.
3. In the present application, the Applicant alleges that the court erred in failing to award him general damages, which had also been sought in the Plaint. It was his position that having proved that he was wrongfully dismissed by the Respondent, he ought to have been awarded general damages. He contended that this is only an error apparent on the face of the record, which this court may properly correct in exercise of its powers to review its judgment.
4. The Hon. Attorney General filed Grounds of Opposition dated 17th June 2014 in response to the application. The Respondent alleged that the application is bad in law, lacks merit and is otherwise an abuse of the court process, that no plausible reason has been given to warrant the orders sought, that the application violates the mandatory provisions of Order 45 (1) of the Civil Procedure Rules and that the Applicant is guilty of unreasonable delay.
5. Counsel submitted before this court on 3rd July 2014, reiterating the contents of their pleadings and I need not restate them. Suffices to say that I have duly considered their rival submissions, the

authorities relied on and the pleadings. The sole issue for determination in this application is whether the Applicant has proffered sufficient grounds to warrant the review of the judgment of this court delivered on 26th November 2010.

6. The court exercises the power to review its judgment pursuant to the provisions of Order 45 Rule 1 of the Civil Procedure Rules which provides-

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the 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 the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

7. The Applicant has premised his application on an alleged error apparent on the face of the record, failure to award general damages. He believed that these damages should have been awarded automatically after it was found that the Respondent unlawfully terminated his employment.
8. It is apparent that the cause of action herein occurred prior to the enactment of the Employment Act, Cap 226, Laws of Kenya. Therefore, the position applicable in regard to whether an employee is entitled to general damages for unlawful termination is that of the common law, that general damages are not recoverable under a contract of employment. This is because, as stated by the Court of Appeal in **KENYA AIRWAYS CORPORATION LIMITED VS AUMA & 5 OTHERS [2007] 2 KLR 24**, the employee has no absolute right to remain under the employment of the employer and this contract may be terminated under the terms of the contract. The court stated-

“We would also think that it was unreasonable for the respondents to believe that it was their entitlement and right to be employed by the Appellant during their whole working life. The expectation has no basis in law as employment relationship is contractual and thus terminable under the terms of the contract.”

9. Therefore, an unlawful dismissal is one which is not terminated as per the terms of the contract. This is the position taken by the Court of Appeal in **SHIMBA TOURIST SERVICES LIMITED VS WILSON MISE KIGAN CRIMINAL APPEAL [1997] eKLR**. It stated-

“The law on the point in issue (i.e general damages for wrongful dismissal) is well settled. In a claim by an employee against his employer for damages for wrongful dismissal, such damages are limited to the amount the employer would have been obliged to pay if he had brought the contract to an end in accordance with the terms by giving either proper notice or salary in lieu thereof. General damages are not recoverable.”

10. Similarly, in **KENYA OILFIELD SERVICES LIMIED VS PETER NJOROGE CIVIL APPEAL NO. 124 OF 1985 [U/R]** it was held-

“The measure of damages for unlawful dismissal is the amount which the employee would have earned during the period of notice if the employment was terminable by notice or from the period of dismissal up to the time the contract would have ended if the employment was on a fixed terms basis.”

11. The award of damages is computed on the basis of the period for which a notice of termination should have been given under the contract or if no provision is made for notice, a time deemed to be reasonable by the court for notice.

12. In the instant case, the court awarded the Applicant Kshs. 18,085/= for the period of notice that should reasonably have been given by the Respondent. In computing this sum, the court took into account the terms under Clause 4 of the Applicant's appointment letter which provided for three months' notice termination period or payment of one month's salary in lieu of notice and that it was proved that the Applicant earned a monthly salary of Kshs. 18,085/=.
13. It is clear from the authorities cited, that the Applicant was not entitled to any other damages other than the sum awarded of Kshs. 18,085/= for termination without due notice. Hence, although not specifically stated in the judgment, this court had in its mind the principles for award of damages to the Applicant in failing to award the general damages sought. Having not been expressly awarded, the same ought to have been deemed as disallowed.
14. Nonetheless, for clarity purposes, I find that there is no error on the face of this court's judgment. Failure to award the claim for general damages was deliberate as it has no basis in law. Accordingly, the Applicant's claim for review of the judgment is disallowed.
15. Before concluding, I wish to address the issue raised by the parties of whether this application was filed promptly. The said Order 45 Rule (1) mandates a party seeking review of judgment to move the court without unreasonable delay. What constitutes unreasonable delay is a question to be determined by the court on the circumstances of the case before it. The judgment sought to be reviewed was delivered on 26th November 2010. However this application seeking to review it was only filed on 21st November 2013.
16. I find that the that the period of three years constitutes an inordinately long period and is inexcusable in light of the fact that no satisfactory reason has been given for the delay. The medical evidence attached to the supporting affidavit only show that the Applicant was taken ill late in the year 2013, and does not explain his inaction for the prior two and a half years. I would have dismissed the application on this ground alone.
17. The upshot of the above is that the application dated 20th November 2013 is dismissed in its entirety with costs.
18. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 24th day of October 2014

M. J. ANYARA EMUKULE

JUDGE