



**Onderi v Mini Bakeries (Nairobi) Limited (Cause E716 of 2021)
[2024] KEELRC 1708 (KLR) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1708 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E716 OF 2021**

JK GAKERI, J

JULY 8, 2024

BETWEEN

DENNIS OMBUI ONDERI CLAIMANT

AND

MINI BAKERIES (NAIROBI) LIMITED RESPONDENT

RULING

1. Before the court for determination is the Claimant/Applicant's Notice of Motion dated 18th March, 2024 seeking orders that:-

The Court be pleased to clarify and or correct the judgment delivered on 6th December, 2023 more specifically on the issue of payment in lieu of notice.

2. The Notice of Motion is expressed under Rules 33 and 34 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and is based on the grounds set out on its face and the Supporting Affidavit of Mr. Peter Gicheha Kamau Advocate, sworn on 18th March, 2024.
3. The affiant deposes that under paragraph 167 of the Judgment delivered on 6th December, 2023, the court awarded;

“ All prayers admitted by the Respondent as per its termination letter.”

4. That among the prayers admitted is payment in lieu of notice.
5. The affiant further deposes that under paragraph 156 of the judgment, the prayer for pay in lieu of notice was declined hence the apparent contradiction and the parties are unable to agree whether pay in lieu of notice is payable or not.



6. The affiant deposes that his position is that the final orders prevail in accordance with the Respondent's admission/promise as opposed to the finding.

Response

7. In its Replying Affidavit by Laura Lanoi Advocate on 16th April, 2024, the Respondent's case is that paragraph 156 of the judgment ought to prevail as opposed to the final orders as the issue of pay in lieu of notice had already been dispensed with and the Respondent is ready, able and willing to comply with the directions of the court as regards settlement of the decretal sum.
8. That it was in the interest of justice that the judgment be clarified and corrected.

Claimant/Applicant's submissions

9. Counsel for the Claimant urges that Clause 5(iii) of the Claimant's letter of appointment dated 8th November, 2007 provided for three (3) months written notice or pay in lieu of notice in cases of termination by either party irrespective of mode of termination.
10. Counsel submits that the Claimant is entitled to three (3) months' salary in lieu of notice contrary to the 2 months promised by the Respondent.
11. Reliance was made on the sentiments of the court in *Roslyn Khadenyi Madere v Naisula Holdings Ltd T/A Naisula School & another* (2022) eKLR and *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (2001) eKLR to urge that a court of law cannot rewrite a contract between parties.
12. That if the finding in paragraph 156 of the judgment is allowed to stand, it has the effect of rewriting the contract between the parties.
13. That the final orders under Paragraph 167 of the judgment is in accordance with the contract between the parties.
14. Counsel urges the court to find that the Claimant was entitled to three (3) months' salary.

Analysis and determination

15. The singular issue for determination is whether the Claimant/Applicant's Notice of Motion dated 18th March, 2024 is merited.
16. It is common ground that this court has jurisdiction to clarify its judgments and/or rulings or orders at the instance of a party.
17. More specifically, 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 judgement or ruling –
 - a. . .
 - b. . .
 - c. If the judgment or ruling requires clarification; or
 - d. For any other sufficient reason.



18. In the instance case, the applicant is seeking a clarification of the judgment delivered on 6th December, 2023 and thus falls within the purview of the court in the exercise of its review jurisdiction.
19. Although the power of a court to review its judgment or rulings is statutory, its scope is circumscribed by the provisions granting the review jurisdiction as exemplified by Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016.
20. The foregoing is fortified by the sentiments of the court in *Pancrast Swan v Kenya Breweries Ltd* (2014) eKLR, where the Court expressed itself as follows;

“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of the Civil Procedure. Thus, reassessing evidence and pointing out defects in the order of the court is not proper.”
21. The bone of contention in the instant suit is whether paragraph 156 or paragraph 167(c) of the judgment should prevail on matters germane to pay in lieu of notice.
22. While the Claimant/Applicant urges that the final orders should prevail, the Respondent on the other hand urges that the finding in paragraph 156 ought to prevail.
23. Paragraph 156 of the judgment at page 36 states as follows;

“As regards pay in lieu of notice, having found that the Respondent had a valid and fair reason to terminate the Claimant’s employment, the claim for pay in lieu of notice is unsustainable and is declined.
24. This finding was informed by the fact that the Respondent had a substantive justification to terminate the Claimant’s employment and being one of the reliefs, the court found it unmerited.
25. However, paragraph 167(c) of the judgment states as follows;

“In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows; . . .

(c) All prayers admitted by the Respondent as per its letter of termination . . .”
26. Are the two paragraphs or positions contradictory? The court is not so persuaded on account that under paragraph 156 of the judgment, the court made a finding based on the evidence before it and under paragraph 167(c) of the judgment, the court relied on the Respondent’s letter of termination to the Claimant which was emphatic that while appreciating the recommendation of the disciplinary committee, the Respondent reduced it to a termination and promised to pay the Claimant 2 months’ notice among other payments.
27. Since the Respondent had undertaken to pay the Claimant two (2) months’ salary, the court found it fair to award the same, the finding in paragraph 156 notwithstanding as the two (2) months’ salary had been admitted by the Respondent in writing.
28. Thus, while the court’s findings was grounded on the evidence relied upon by the Claimant, principally the Letter of Appointment, the final order is grounded on the Respondent’s promise which the court considered binding and fair in the circumstances.



29. In the end, the final orders as they relate to pay in lieu of notice is that the Claimant is entitled to two (2) months' salary in lieu of notice.

30. Parties shall bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF JULY 2024.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

