



**Inyangu v KCB Bank (K) Limited (Cause E641 of 2021)  
[2024] KEELRC 2491 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2491 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E641 OF 2021  
NJ ABUODHA, J  
OCTOBER 11, 2024**

**BETWEEN**

**DAVID MUGASI INYANGU ..... CLAIMANT**

**AND**

**KCB BANK (K) LIMITED ..... RESPONDENT**

**RULING**

1. The Claimant/Applicant filed application dated 14<sup>th</sup> November, 2023 brought under Rule 33 of the *Employment and Labour (Procedure) Rules, 2016*, seeking for the following orders: -
  - a. That the Honourable court be pleased to vary its award for general damages in ELRCC/ E641/2021 of David Mugasia Inyangu v KCB Bank Kenya Limited (2022) from Kshs 500,000/= to Kshs 2,000,000/= in comparison to the award of his colleagues in ELRC/E618/2021 of Omondi Justus Rang'anga & 28 Others v KCB Bank Kenya Limited & Another (2022)
  - b. That the Honourable court be pleased to allow and approve for payment by the Respondent his tabulations for due overtime allowances of Kshs 296,475.67/=
  - c. That every person who is in charge of and is responsible to the Respondent for the conduct of its business do appear before the court and show cause why they should not be cited for contempt of court for failing to issue him a certificate of service as set out in the judgment orders and decree of 24<sup>th</sup> November, 2022 in ELRC/E641/2021.
  - d. That this Honourable court be pleased to find and hold that every person who is in charge of and is responsible to the Respondent for the conduct of its business is in contempt and has not obeyed the judgment order and decree of 24<sup>th</sup> November, 2022 by not issuing him a certificate of service.
  - e. That the Respondent should face full force of law and be punished for contempt of court.



- f. That the Honourable court be pleased to direct registry to amend the name of the Respondent from KBC Bank Kenya Limited to KCB Bank Kenya Limited on both the judgment and decree documents.
2. The application was supported by the grounds on the face of the Application and the Affidavit of David Mugasia Inyang'u one of the Claimant/Applicant herein sworn on 14<sup>th</sup> November,2023.
  3. The Claimant averred that during his service he worked alongside the 29 Claimants in cause No. ELRCC/E618/2021 of Omondi Justus Rang'anga & 28 Others v KCB Bank Kenya Limited & Another [2022]. That he suffered the same discrimination and underpayments as opposed to colleagues in permanent employment. That the appointment letters had same terms and conditions.
  4. The Claimant averred that all the colleagues and him reported their grievances to the Respondent through line Managers. That they escalated the complaint by lodging a class complaint to the labour office at the Nyayo House on 20<sup>th</sup> April,2021. That on 21<sup>st</sup> July,2021 they withdrew the complaint in order to sue.
  5. The Claimant averred that when his colleagues instituted case ELRCC E618/2021 on 19/7/2021 he did not join them because he had engaged a different advocate. That on 6<sup>th</sup> August,2021 he filed this cause in person because his advocate was not reachable but later he was informed he passed away.
  6. The Claimant further averred that he made an application on 31/3/2022 for the two matters to be consolidated at the hearing stage where the same was objected to by the Respondent. That on 24<sup>th</sup> November,2022 Lady Justice Mbaru delivered a judgment in his cause and awarded him general damages of Kshs 500,000/= That on 30<sup>th</sup> November,2021 Lady Justice Mbaru delivered judgment in cause ELRCC E618/2021 and awarded general damages of Kshs 2,000,000/= to each Claimant.
  7. The Claimant averred that having illustrated that his colleagues suffered same circumstances the court should vary his award of general damages to match that of colleagues. That on 19<sup>th</sup> January,2023 the Commissioner for Labour filed a report on tabulation of his underpayments of basic salary of Kshs 1,580,923.00/= which he objected to on 8<sup>th</sup> Febtuary,2023 because house allowance and overtime allowance were not included. That the court directed re-tabulation of total underpayments.
  8. The Claimant averred that the Commissioner for Labour did not tabulate his overtime allowance underpayments and other due allowances as directed by court. That from January,2018 to May 2021 he was paid total overtime allowance of Kshs 262,584/= calculated using monthly basic salary of Kshs 32,481/=. That overtime being directly proportional to basic salary which were higher than the above amounts as per Commissioner letter dated 19<sup>th</sup> January,2023 were applied total overtime should be Kshs 559,059.97 hence Kshs 296,457.67/= was due.
  9. The Claimant averred that he requested for certificate of service upon termination which the court ordered in its judgment but the Respondent has failed to obey the court and should face the force of law and be punished for contempt of court. That the clerical error of misspelling the name of the Respondent in the Judgment and decree of 24<sup>th</sup> November,2022 should be corrected.
  10. In response the Respondent filed Replying Affidavit sworn on 6<sup>th</sup> May,2024 by Lilian Sogo as Principal Legal Counsel Litigation who averred that the application as drafted was imprecise and unclear as to provisions of law invoked, the nature of application, the reliefs sought and grounds upon which reliefs were sought. That the application mixed contempt of court with review under section 16 of Employment and Labour Court Act and Rule 33 of the Employment and Labour Relations Procedure Rules.



11. The Respondent averred that the court did not have jurisdiction to amend/vary the judgment delivered on 24<sup>th</sup> November,2022 as it is functus officio unless the conditions set under Rule 33 are met. That the Applicant did not bring the application under any of the exceptions in Rule 33 to enable the court to vary/amend its own judgment. That the court should not amend its judgment on general damages from Kshs 500,000/= to Kshs 2,000,000/= because the Applicant was not a party to that suit.
12. The Respondent further averred that if the Applicant was aggrieved he should Appeal to the Court of Appeal. That the ruling delivered on 27<sup>th</sup> February,2023 was clear that overtime was not awarded to the Claimant and could not be assessed. That if the Applicant was aggrieved he ought to seek redress at the court of Appeal. That Judgement was delivered on 24<sup>th</sup> November,2022 and this application filed on 16<sup>th</sup> November,2023 a year later. That litigation must come to an end.
13. The Respondent averred that as for contempt of court due to failure to issue certificate of service the Respondent stated that the Claimant had already been issued with certificate of service and the same is within his possession. That the allegation that the Respondent is in contempt of court was vexatious and made in bad faith.
14. The Claimant filed a further affidavit sworn on 6<sup>th</sup> June,2024 and challenged the filling of the Respondent's Replying Affidavit and submissions as being not lodged. That the same should be struck out for being presented to court through back door. This issue has since being resolved.
15. The Claimant averred that the court did not award overtime of Kshs 25,932.64 for each day worked. That the ruling of 27<sup>th</sup> February,2023 did not contain an order to amend part 4(b) of the Judgment order that is, it did not state that overtime underpayments should not be included in total underpayments. That on 8<sup>th</sup> February,2023 the Labour Officer told the court that the tabulations contained in the letter dated 19<sup>th</sup> January, 2023 of Kshs 1,580,923/= was for basic pay. That the court gave the officer seven days to file revised underpayments but the officer did not.
16. The Claimant averred that the ruling order of 27<sup>th</sup> February,2023 and the decree of 24<sup>th</sup> November,2022 approved underpayments of Ksh 1,580,923 as submitted by the Labour Officer in line with part 5 of the judgment orders of 24<sup>th</sup> November,2022. That house allowance of Kshs 471,740/= was not awarded as part of total underpayments. That Hon. Daisy Mutai (DR) issued a letter dated 30<sup>th</sup> August,2023 stating that the court did not have a record of revised tabulation (of 13<sup>th</sup> February,2023) of due underpayments by the Labour Officer. A position upheld by Hon. Aziza Ajwang (DR).
17. The Claimant averred that the averment by the Respondent that he collected certificate of service did not have any proof given. That the Respondent's averments that he had not filed a copy of the orders to be reviewed were not true as they were attached in his supporting affidavit.
18. The Application was dispensed with by written submissions.

### **Determination**

19. The Claimant requests this court to vary its judgment on general damages awarded to him of Kshs 500,000/= to Kshs 2,000,000/= as awarded to his colleagues in ELRCC/E618/2021 Omondi Justus Rang'anga & 28 Others v KCB Bank Kenya Limited & Another. That his judgment was delivered on 24<sup>th</sup> November,2022 and that of his colleagues delivered on 30<sup>th</sup> November,2022 both by Hon. Lady Justice Mbaru. This , according to the applicant was a new information which was not within his knowledge when the court delivered its judgment and that his colleagues just like him suffered the same discrimination and underpayments. Further that his colleagues and he, suffered the same



- circumstances. They had lodged a class complaint to Labour Office and they only parted ways when they filed their case to Court where he filed his separate from the rest.
20. The court notes that the Claimant unsuccessfully attempted to have his case consolidated with that of his colleagues but the Respondent objected. He now asks the Court to review its judgment to match that of his colleagues. The Respondent on the other had has opposed the move arguing that the Claimant if aggrieved ought to have appealed to Court of appeal as he was not a party to his colleagues' suit.
  21. In the Ruling of the Court delivered on 27<sup>th</sup> February,2023 the Claimant claimed overtime allowance of Kshs 296,475.67/= as the due overtime. That he was paid overtime allowance of Kshs 262,584.30/= instead of Kshs 559,059.97 as per the Commissioner of Labour Nairobi tabulation.
  22. The Court has power to review or set aside its judgments as per Section 16 of the [Employment and Labour Relations Court Act](#) which gives the Court power to review its judgements, awards, orders or decrees in accordance with the Rules.
  23. Rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) provides for review as follows: -
    - (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.
  24. The Applicant raises issue of the judgment to his colleagues who were awarded general damages as discovery of new evidence and argues that he suffered similar circumstances as his colleagues and ought to be awarded similarly. The court however notes that an award of general damages is discretionary and can only be challenged on appeal. Omission to award damages in particular matter and awarding the same in another is a question the evidence presented and the Court's view thereon. It may well be that a judge can misapprehend the facts and evidence and arrive at a totally different conclusion with another case yet on the same facts but that cannot amount to a ground for review under rule 33. It is a proper case for appeal to a higher court. In this case, the Court of Appeal.
  25. The court notes that the Claimant suffered the same circumstances as the colleagues in ELRC E618 of 2021, they raised their complaint to the Respondent Line Managers and also to Labour officer from where they withdrew the claim and filed suits in court. The court notes that the Claimant parted ways with the rest of colleagues at the filing of suit stage but tried to consolidate the matter which was opposed by the Respondent.
  26. It is important to note that since the Claimants suffered the same circumstances and it is the same Judge who delivered the two judgments there ought to have been some uniformity however I cannot sit on appeal over a decision of colleague of concurrent jurisdiction and if my advise may be sought, I recommend that the applicant considers filing an appeal against the judgment instead of seeking a review of the same.



**Whether the Respondent was in contempt of court.**

27. The Claimant alleges that the Respondent was in contempt of court for failure to issue him with a certificate of service as per the judgment of the court delivered on the 24<sup>th</sup> November, 2022. The Respondent on the other hand alleged that it already issued the same to the Claimant and he was in possession of the certificate of service. The Claimant on the other hand alleged that there was no evidence of him being given the certificate of service. The court is of the view that at the time the Respondent attached the certificate of service in its Replying Affidavit the same was ready for collection and the Claimant could collect the same from the Respondent if at all he had not collected it. The Claimant's allegations that there was no proof that he received the certificate notwithstanding does not change the fact that the same was ready.
28. Contempt of Court is a serious allegation and ought to be proved to almost beyond reasonable doubt. The Court has reviewed and considered the allegations of contempt and is not satisfied that they meet the required threshold for contempt of court.
29. In conclusion the application for review will be dismissed but with no order as to costs considering the circumstances of the application and the innocent nature of the orders sought.
33. It is so ordered.

**DATED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024**

**DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER, 2024**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

