



REPUBLIC OF KENYA



**Mbeka v Kenya Power & Lighting Company (Cause E008 of 2025)
[2025] KEELRC 2986 (KLR) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2986 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E008 OF 2025
JK GAKERI, J
OCTOBER 30, 2025**

BETWEEN

MOSES KOLA MBEKA CLAIMANT

AND

KENYA POWER & LIGHTING COMPANY RESPONDENT

RULING

1. Before the court for determination is the applicants Notice of Motion dated 2nd September 2025 filed under Certificate of Urgency seeking Orders that:
 1. Spent.
 2. Spent.
 3. This Honourable Court be pleased to review and vary the Judgment delivered on 31st July, 2025 on the question of payment of gratuity to the claimant/Respondent as he was on permanent and pensionable terms and was receiving employers pension contribution.
 4. This Honourable Court be pleased to grant any other Order that it may deem fit and just to grant.
 5. Costs of this application be in the cause.
2. The Notice of Motion was expressed under Section 1A, 1B, 3, 3A, 63(e) and 80 of the *Civil Procedure Act* and Order 45 Rule 1 and 2 and Order 51 Rule I of the Civil Procedure Rules and is based on the grounds set out on its face and the Supporting Affidavit of Humphrey Otuko.
3. The applicant's case is that although Judgment was entered in favour of the claimant, the court awarded gratuity yet the Collective Bargaining Agreement (CBA) was not availed in court and the CBA applicable at the time for 2017/2020 provided for gratuity for contract employees only as those



employed on permanent and pensionable terms were on the respondent's Pension Scheme and the claimant fell in that category.

4. That there was sufficient reason to have the judgment reviewed by dint of Order 45 Rule 1 and 2 of the Civil Procedure Rules, 2010 and the outcome would be material on execution of the judgment as the award of gratuity was in error.
5. That the court had jurisdiction and discretion to review its judgment.

Grounds of Opposition

6. In opposition to the notice of motion, the claimant/respondent argued that review was restricted to a demonstration of a clear error on the face of the record or new evidence unavailable at trial and none had been shown.
7. That the error relied on must be self-evident. That the respondent admitted that the CBA covered the claimant and could not repudiate the gratuity Clause. That Section 35 of the [Employment Act](#) did not bar gratuity at 31% of the annual salary for each year served.
8. The claimant/respondent sought dismissal of the application.

Applicant's Submissions

9. On jurisdiction to review a judgment, counsel relied on Order 45 Rule I of the Civil Procedure Rules and the decisions in *National Bank of Kenya Ltd V Ndungu Njau* [1977] eKLR and *Benjoh Amalgamated & another V Commercial Bank Ltd* [2014] eKLR to urge that the court erroneously awarded gratuity to the claimant despite being on permanent and pensionable terms.
10. Reliance was further placed on *Nyamongo & Nyamongo Advocates V Kogo* [2001] eKLR and *National Bank of Kenya Ltd V Ndungu Njau* (supra) to submit that there was an error apparent on the face of the record as under the CBA gratuity was only payable to employees on fixed term contract and the claimant was not and was thus not entitled to gratuity as held in *D. K. Njagi Marete V Teachers Service Commission* [2020] eKLR.
11. Counsel urged that it had demonstrated a case for stay of execution.

Claimant/Respondent's submissions

12. Counsel placed reliance on Order 45 of the Civil Procedure Rules, Section 35 of the [Employment Act](#), Collective Bargaining Agreements generally and the doctrine of estoppel to urge that a review could only succeed on very limited grounds and no new evidence had been availed.
13. Counsel urged that the claimant was entitled to gratuity as awarded citing *Peter W. Kariuki & 16 others V KARI* [2018] eKLR where the court declined an application for review as it was an attempt to re-agitate the matter to argue that no justification for review had been demonstrated as there was no error on the face of the record, no new evidence had been availed and the respondent was estopped from contradicting the Judgment.
14. On finality of judgment, the decisions in *Otieno Ragot & Co. Advocates V National Bank* [2020] eKLR and *Mutungu V Rubi Plastics* [2020] eKLR were cited on standards for review, *UASU V Moi University* [2025] on enforcement of CBAs and *Ngige V Wells Fargo* [2023] KEELRC 1963 (eKLR) on estoppel to submit that the applicant's Notice of Motion was devoid of merit and incompetent.



Analysis

15. It is common ground that by a Judgment delivered on 31st July, 2025, the court entered judgment in favour of the claimant in the following terms:
 1. Declaration that termination of employment was unfair.
 2. Equivalent of two (2) month's salary Kshs.172,810.00
 3. Gratuity as per the terms of the CBA.
 4. Interest at court rates from date hereof till payment in full.
16. The instant application was precipitated by the award of gratuity.
17. It is trite law that the court has jurisdiction to review its awards or judgments.
18. Section 16 of the Employment and Labour Relations Court provides:
19. The court shall have power to review its judgments, awards, Orders or decrees in accordance with the Rules.
20. Similarly, Rule 74 of the Employment and Labour Relations Court (Procedure) Rule, 2024 (herein after "Rules") 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 judgment or ruling—
 - a. if there is discovery of a new and important matter or evidence which, despite 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.
21. Generally, the applicant is relying on paragraphs (b) and (d) of the Rule.
22. While the applicant submitted that a case to justify review of the judgment delivered on 31st July, 2025 had been made, the claimant/Respondent's counsel submitted that the threshold of Rule 74 of the Rules had not been met.
23. The only issue for determination is whether the applicant's Notice of Motion dated 2nd September 2025 has merit.
24. It is true that the applicant had the right to appeal the court's judgment by dint of the provisions of Section 17 of the *Employment and Labour Relations Court Act* but opted not to and filed the instant application within reasonable time bearing in mind that the Judgment sought to be renewed was delivered one (1) month earlier. The duration is not contested, the grounds are relied upon.
25. Concerning what constitutes an error or mistake apparent on the face of the record, the Court of Appeal decision in *Muyodi V Industrial and Commercial Development Corporation & another* [2006] EA 243 explained the concept of error or mistake apparent on the face of the record in very lucid terms and other decisions such as *Paul Mwaniki V NHIF Board of Management* [2020] eKLR and



James Kiiru Mwangi V Gibson Kimani Mwangi & another [2021] eKLR emphasized that the mistake or error on the face of the record must be self-evident and does not require elaborate argumentation to demonstrate it.

26. For an error or mistake apparent on the face of the record to exist, the circumstances of the judgment or ruling must be such that there could not have been any other option, that is the court could not have proceeded in any other way.
27. Clearly, in circumstances in which the court could have taken a different view or an incorrect legal position are patently not errors or mistakes apparent on the face of the record.
28. The error or mistake must be discernible by a perusal of the record, without any analysis.
29. See Abasi Belinda V Fredrick Kagwamu & another [1963] EA 557, Solacher V Romantic Hotels Ltd & another [2022] KECA 771 (KLR).
30. The award of gratuity by the court was as per the terms of the Collective Bargaining Agreement (CBA) between the parties at the time, which the respondent/Applicant admitted and because neither party availed a copy of the CBA for perusal by the court as the judgment clearly stated, terms of the CBA are part of the employment contract between the parties, and CBA's typically provide for gratuity by dint of Section 59(5) of the *Labour Relations Act*. The court found it just to award gratuity to the claimant, provided the CBA provided for its payment and the claimant met the requisite criteria prescribed by the CBA, if any.
31. It is trite law gratuity is an amount paid to the employee gratuitously as it is neither pension or service or severance pay, but must have been a contractual term of the contract between the parties.
32. Did the court make a mistake or error apparent on the face of the record?
33. In the court's view, none has been demonstrated on account that payment of gratuity over and above pension is not unlawful. It is wholly dependent on what contracting parties had agreed and in this case no agreement was availed by any of the parties, thus the court's award was conditional upon the terms of the CBA. It was not and cannot be construed as to the claimant a general award of gratuity.
34. If payable, it ought to be paid according to the provisions of the CBA in force at the time and if the claimant did not fall within the four corners of the provisions of the CBA, no gratuity is payable.
35. A plain reading of the last paragraph of Part (V) entitled "gratuity" on page 12 of the judgment leaves no doubt as to the basis of the court's award.
36. It unambiguously states:

"Consequently, gratuity shall be addressed in accordance with the terms of the CBA".
37. The judgment was also explicit that the claimant did not avail a copy of the CBA for perusal by the court but the respondent having admitted that a CBA existed, validated the court's conditional award.
38. The issue of being permanent and pensionable or on fixed term contract did not arise at the hearing of the suit but is relevant in determining whether gratuity was payable under the terms of the operative CBA or not.
39. The court is at a loss by reference to a gratuity of 31% for every year served without reference to the particular clause of the operative CBA.
40. The award if any, must be in accordance with express provisions of the CBA in force at the time.



41. In the court's view, the applicant has not demonstrated that the court made a mistake or error apparent on the face of the record, but it is satisfied that there was sufficient reason to justify a review of the judgment delivered on 31st July, 2025.
42. Be that as it may, the court is also satisfied that the case for clarification of the judgment had been made out under Rule 74(1)(c) of the Employment and Labour Relations Court (Procedure) Rules, 2024.
43. A copy of the CBA for the period 2017/2020 dated 27th January, 2020 between the Respondent/Applicant and the Kenya Electrical Trades and Allied Workers Union had no general provision on payment of gratuity to staff.
44. However, under Appendix "C" on Terms of Service of Temporary/Contract employees of the applicant, gratuity was payable to those on three year contracts at 15% of the three years basic wage on successful completion of the contract.
45. The court was unable to decipher any other instance in which gratuity was payable.
46. The foregoing leads to the inescapable finding that if the claimant was not serving under a three (3) year employment contract in accord with the CBA he did not qualify for gratuity and none is payable to him.
47. In the upshot, the judgment delivered on 31st July, 2025 is Reviewed in terms of award (c) as follows:

Gratuity as per the operative CBA (2017/2020) provided that the claimant meets the criteria provided by the CBA.

48. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 30TH DAY OF OCTOBER, 2025.

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

