



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 224 OF 2014

BETWEEN

MINNIE MBUE.....APPELLANT/RESPONDENT

AND

JAMII BORA BANK LIMITED.....RESPONDENT/APPLICANT

(Being an application for review of the Judgment of the Court of Appeal at Nairobi

(Musinga, Gatembu & Murgor, J.J.A.) dated 10th March, 2017 and/or seek

the grant of leave to appeal to the Supreme Court of Kenya

in

Civil Appeal No. 224 of 2014)

RULING OF THE COURT

1. On 10th March, 2017, this Court delivered a judgment in which the appellant's appeal was allowed, with the result that the Court found Jamii Bank Limited, the respondent in the appeal, liable to pay the appellant Kshs.38,666,666/= made up as hereunder:

(a) Balance of the appellant's salary for 44 months:

Kshs.800,000 x 44 = Kshs.35,200,000/=

(b) Gratuity at the rate of 25% of the gross salary for a period of 16 months

25/100x800,000 x 16 = Kshs.3,200,000/=

(c) Salary in lieu of leave for 10 days: Kshs.10/30 x 800,000

= Kshs. 266,666

KSHS.38,666,666

2. The appellant had initially filed a claim before the Employment and Labour Relations Court seeking a sum of Kshs.112,594,570 on account of terminal benefits after her 5 years fixed contract of employment was terminated by the respondent. The trial court awarded the appellant Kshs.15,466,666.70. The appellant was aggrieved by that award, hence her appeal to this Court.

3. The respondent/applicant has now brought an application seeking a review and/or setting aside of this Court's decisions on the ground that there are apparent mistakes on the face of the record which if not corrected will cause injustice.

4. According to the applicant, the Court: misconstrued the provisions of clause 19.6 of the contract of employment; failed to consider the evidence on record which shows the termination of the contract was in accordance with the provisions of the contract; failed to consider the evidence submitted to the trial court and its findings therein; failed to consider that under **section 49 of the Employment Act, 2007** the maximum compensation for unlawful termination of employment contract is 12 months salary; failed to evaluate the evidence and submissions by the applicant regarding interpretation of clause 19 of the contract; and that this Court occasioned a serious miscarriage of justice by depriving the applicant of its property.

5. The applicant's application was supported by an affidavit sworn by **James Murage**, its Head of Legal Services, which basically amplifies the aforesaid grounds.

6. The gravamen of this review application is this Court's award of Kshs.35,200,000 on account of the balance of the appellant's salary for a period of the unexpired term of the employment contract, 44 months, at Kshs.800,000 per month, making a total of Kshs.35,200,000.

7. The applicant urged that the maximum compensation that may be awarded for unlawful termination of a contract of employment is 12 months' salary, and therefore this Court had no jurisdiction to extend that period. It urged us to find that this is an error on the face of the record and proceed to review and set aside the impugned judgment.

8. **Mr. Gichuhi**, learned counsel for the applicant, cited **ALPHONCE MAGHANGA MWACHAYA v OPERATION 680 LIMITED [2013] eKLR**, a decision of the Employment and Labour Relations Court, where the claimant was on a fixed term contract but his contract of employment was terminated when he had 23 months to go. The claimant sought, *inter alia*, compensation for the unserved period of his contract. The court declined to grant that part of the claim, citing **section 49(1) and (3) of the Employment Act**, which sets out the remedies that a court can grant where it finds that the termination of employment was unjustified and unfair and **these are:**

(i) wages that an employee would have earned had he been given notice;

(ii) proportion of wages due as between the date of notice and dismissal;

(iii) maximum of 12 months' compensation

(iv) reinstatement

(v) re-engagement.

9. However, the court pointed out that the only exception would be where the contract of employment specifically provides for payment of salary for any unserved part of the contract.

10. **Mr. Gichuhi** further submitted that clause 19 of the contract of employment between the appellant and the respondent did not provide for nor contemplate termination of the contract by mutual consent; that in view of the mutual agreement by the parties that the employment relationship be ended, the same amounted to constructive termination of the contract and/or constructive resignation by the appellant, falling under clause 19.1 of the letter of appointment. He cited several authorities on the issue of constructive termination of contract of employment and the legal consequences thereof, among them, **MOSES KIPLAGAT CHANGWONY v TANA & ATHI RIVER DEVELOPMENT AUTHORITY [2013] eKLR** and **ANTHONY MKALA CHITAVI v MALINDI WATER & SEWERAGE COMPANY LIMITED [2013] eKLR**.

11. Responding to the application, **Mr. Oyatsi**, learned counsel for the appellant/respondent, started by raising a preliminary issue to the application, to the effect that an application for review must be against an order or specific finding, and the order sought to be reviewed has to be annexed to the application, which the applicant had failed to do. For that reason, the application is incompetent and is for striking out, counsel submitted.

12. Regarding the substantive issue raised in the review application, that the court erred in awarding the appellant/respondent terminal benefits in excess of 12 months' salary, contrary to the provisions of **section 49 of the Employment Act**, counsel submitted that where the contract of employment provides for payment of salary for an unserved part of the contract, a claimant would be entitled to compensation for the unserved part of the contract if the court finds that the contract of employment was unlawfully or unfairly terminated by an employer, and for that proposition he cited **ALPHONCE MAGHANGA MWACHANYA v OPERATION 680 LIMITED** (supra), where Radido, J. held:

“... the Employment Act, 2007 and the Industrial Court Act have not opened an avenue for this Court to grant damages equivalent to the unserved term of an employment contract. What the Employment Act

has done is to empower the court to award compensation up to a maximum of 12 months gross pay for unfair termination of contract, whether definite, fixed term or indefinite. The only exception would be where the contract of employment provides for payment of salary for unserved part of the contract. (Emphasis supplied).

13. Mr. Oyatsi submitted that the award to the appellant by this Court was based on the above exception, since the contract of employment specifically provided for payment of salary for the unserved part of the contract of employment if the applicant were to unlawfully terminate the contract of employment. He added that the payment as decreed by this Court in its judgment was not an award of damages under **section 49 of the Employment Act**, it was an enforcement of a consent entered into by the parties in the employment contract; and a court has no power to re-write a contract for parties, as held in **JIWAJI & OTHERS v JIWAJI & ANOTHER [1968] EA 547**.

For these reasons, counsel submitted, there is no apparent error in the judgment to warrant any correction by way of review by this Court.

14. We have considered the application, submissions by counsel and the cited authorities. That this Court has limited jurisdiction to review its own decisions is no longer a subject of any debate, there is a plethora of decisions that have so affirmed. In **BENJOH AMALGAMATED LIMITED v KENYA COMMERCIAL BANK LIMITED [2014] eKLR**, this Court held:

“61. It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice.”

15. Starting with the preliminary issue raised by Mr. Oyatsi, that the order sought to be reviewed has not been annexed to the application and therefore the application is incompetent and ought to be struck out, we do not agree with counsel. Mr. Gichuhi abandoned some of the prayers in the application and told the Court that the only part of the judgment that the applicant was not satisfied with and was pursuing its review is the order that the appellant be paid for the unserved part of the contract of employment. The entire judgment is in the court file before us and it would have been superfluous for the applicant’s counsel to annexe a copy of the same or part thereof to his client’s application. We shall therefore proceed to determine the application for review on its merits.

16. Since the determination of this application is premised on interpretation of clauses 19 and 20 of the letter of appointment dated March 25, 2010 that was executed by the parties herein, it is imperative that we reproduce the two clauses. They are as follows:

“19. Employment Termination

Your employment shall terminate upon occurrence of any of the following events:

19.1 Your resignation from employment for reasons acceptable to the Board.

19.2 A material breach of any material obligations under this Letter of Employment.

19.3 Committing such misconduct as set out under the Employment Act 2007 or such other succeeding or amending statute justifying summary dismissal.

19.4 Your inability, due to a physical or mental disability, for a period of 40 days, whether or not consecutive, during any 12 consecutive months to perform the services contemplated under this Contract.

19.5 In the event of the bank being placed under statutory management by the Central Bank of Kenya or other succeeding regulator or in the event of the bank being placed under liquidation by the Central Bank of Kenya or other succeeding regulator.

19.6 Service of three (3) months’ notice of termination by either party or payment of salary in lieu for the equivalent period thereof.

20. Effect of Termination

20.1 You shall be paid the balance of your contractual salary and benefits other than in the application of clauses 19.1 to 19.3 above.

20.2 You shall immediately deliver to the Employer all correspondence, documents and property belonging to the Employer, which may be in your possession or under your control.

20.3 You shall continue to be bound by all the provisions of this letter of appointment, which specifically provide or by their

nature are deemed to survive the termination or lapse of your employment.”

17. The termination letter dated 9th September, 2011 did not cite clause 19 or any sub-clause thereunder as the reason for termination of employment. Instead, the Bank’s Board Chairman informed the appellant that **“your employment with the bank is hereby terminated by mutual consent”**. We do not agree with the submission by Mr. Gichuhi that the aforesaid mode of termination of the appellant’s contract of employment amounted to constructive resignation by the appellant, which falls under Clause 19.1 of the letter of appointment.

18. Clause 20.1 states in no uncertain terms that: **“You shall be paid the balance of your contractual salary and benefits other than in the application of clauses**

19.1 to 19.3 above”. In its subsequent letter dated 9th September, 2011, the applicant wrote to the appellant as follows:

“RE: TERMINATION OF EMPLOYMENT

Following the resolution of the Board of Directors during the 140th meeting of 29th August 2011 that the bank pursued negotiated disengagement with you, and further to your subsequent meetings with the undersigned and in particular on Friday 2nd September 2011, on behalf of the Board, I have the pleasure of offering the following:

a) Termination under clause 19.6 of your Letter of Appointment

This clause provides that employment may be terminated by way of 3 month’s notice by either party, or in the alternative payment of 3 month’s salary in lieu of notice.

Accordingly, the bank shall pay the three months salary in lieu of notice upon acceptance of this offer.

b) Termination under clause 20.1 of your Letter of Appointment

This clause provides that upon termination of employment by the employer, the employer shall pay the salary due for the balance of the contract period. Accordingly, the Bank would be liable to pay your salary for the remaining 44 months, being the balance of your unspent contract period. This would amount to approximately Kshs.35.2 million. As you are aware, the Bank’s financial position cannot support such an outlay. After lengthy consultations, and in the interest of harmony and peaceful disengagement, the Bank proposes to pay 24 months’ salary in full and final settlement under this clause and in the following manner:

i) By 31 January 2012: 12 months’ salary

ii) By 31 January 2013; 12 months’ salary

iii) In both instances, interest shall accrue at the rate of 9% per annum with effect from 1 December 2011 until settlement.”

19. In the impugned judgment that we have been urged to review and/or set aside, the applicant argued that we erred in awarding the appellant damages for the remainder of the 44 months. We do not agree. The true intent and interpretation of the termination letter is clear from the above quoted letter.

20. The Court’s finding was not based on the provisions of section 49 of the **Employment Act 2007**. The Court stated:

“32. Having carefully perused the letter of appointment and the letter of termination of the appellant’s employment, we are of the considered view that as a consequence of termination of the appellant’s contract of employment, she is entitled to payment of the balance of her contractual salary and benefits in terms of clause 20.1 of the letter of employment.”

21. Where the letter of appointment expressly provides that in the event that the employer unlawfully terminates a fixed term of a contract of employment an employee shall be paid the balance of the contractual salary for the unexpired period of the contract, once the court establishes that the termination of employment at the instance of the employer was unlawful, it is duty bound to give effect to the agreed terms of employment; which is what the Court did in this matter.

22. Having said that, this is not a matter in which the Court’s limited jurisdiction to review its decisions was properly invoked. What the applicant has effectively sought to do is to re-argue its appeal, a second bite at the cherry, as it were, which is outside the province of the Court’s limited jurisdiction to review its decisions.

23. We do not therefore find any basis for reviewing this Court's judgment.

Consequently, the respondent's application for review is dismissed with costs to the appellant.

Dated and delivered at Nairobi this 20th day of December, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR