IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 4 OF 2019

BETWEEN

GILBERT MOKAYA OMBUKI..APPELLANT

AND

KENYA PORTS AUTHORITY..RESPONDENT

(Being an appeal from the Ruling of the Employment & Labour Relations Court

at Mombasa (L. Ndolo, J.) delivered on 20th September, 2018

in

ELRC C. No. 933 of 2015)

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JUDGMENT OF THE COURT

1. Litigation in respect of this matter began before the Senior Resident Magistrates' court at Mombasa where the appellant, a former employee of the respondent, filed Civil Suit No. 1245 of 2006 seeking a declaration that his dismissal from employment was irregular and unlawful. He sought reinstatement to his employment. He was not successful. His suit was dismissed by that court on 4th February 2009.

2. He appealed that decision to the Employment and Labour Relations Court (ELRC) Mombasa. In a judgment delivered on 23rd September 2016, the ELRC (***O. Makau, J.**,)* allowed the appeal. The court agreed with the appellant that his dismissal was not done in accordance with the procedure provided in the respondent's staff regulations. The court however declined the appellant's prayer for an order of reinstatement to employment. Instead, the court ordered the respondent "*to calculate and pay the appellant dues available to him under his contract of employment*."

3. On 13th June 2018, the appellant presented an application before the ELRC under Sections 3, 3A, 28 and 34 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules in which he sought directions for purposes of execution of the decree and an interpretation of the reliefs granted in the judgment delivered on 23rd September 2016.

4. In a ruling delivered on 20th September 2018 (the subject of this appeal), the ELRC (***L. Ndolo, J***.,) rejected that application. It held that the appellant was in effect asking the court to grant him prayers that had not been granted in the judgment and that the court could not sit on appeal over its own decision.

5. Aggrieved by that decision, the appellant complains that the Judge was wrong in failing to give interpretation to the judgement and in failing to give directions on how the execution of the judgement was to be done; that the application before the Judge was not an appeal contrary to the finding by the Judge; that the Judge should have interpreted the provisions of the Employment Act in relation to the judgement; and that the matters he raised in his application required clarification.

6. Before us, the appellant, who appeared in person, relied on his written submissions which he highlighted. He urged: that following delivery of the judgement on 23rd September 2016, he wrote to the respondent demanding Kshs.6,288,145.00, (subsequently reduced to Kshs.5,959,040.00) which according to him was the amount to which he was entitled based on the judgement; that in computing that amount, he was guided by the provisions of the Employment Act, 2007; and that in the response to his demand, the respondent disputed that amount and asserted that the amount payable is Kshs.387,105.00.

7. The appellant submitted that it was on the basis of those divergent positions as to what is payable that he sought interpretation of the judgement and drew the attention of the court to the provisions of the Employment Act; and that the application was not intended to open the matter for fresh consideration but to give directions of the execution of the judgement in light of the disagreement. The judge was therefore wrong in rejecting the application, the appellant argued.

8. He accordingly urged us to allow the appeal, vacate the ruling and hold that the appellant has established his claim for Kshs.5,959,040.00 as forwarded to the respondent for settlement. In support of his submissions, the appellant relied on the Industrial Court case of ***Ezekiel Nyangoya Okemwa vs. Kenya Marine and Fisheries Institute [2016] eKLR*** to demonstrate the reliefs available where dismissal of an employee is declared unfair and unlawful.

9. Opposing the appeal, learned counsel ***Mr. Amos Cheruiyot*** holding brief for ***Mr. Kyandih*** for the respondent also relied on written submissions which he highlighted. He argued the ELRC did not have jurisdiction over the appellant's application; that having regard to the decision of the Supreme Court in ***Raila Amolo Odinga vs. IEBC & another [2017] eKLR***, the conditions upon which an application to re-open or review a judgment can be entertained were not fulfilled; that having regard also to Section 34 of the Civil Procedure Act, the appellant's application of 13th June 2018 "*was improperly before the court as it amounted to a separate suit as it was filed before a different court and not the one that issued the judgment*" and was rightly dismissed. It was submitted that the appellant had the option of appealing the judgment.

10. Furthermore, counsel argued, the appellant had in his application sought to introduce new prayers and evidence that ought to have been pleaded. Reference was made to the decision of this Court in ***Caltex Oil (Kenya) Ltd vs. Rono Limited [2016] eKLR*** for the proposition that a party wishing the court to determine or grant a prayer must plead it. Counsel concluded by urging that the application before the ELRC was an appeal that was disguised as an application for interpretation.

11. We have considered the appeal. The basis upon which the ELRC dismissed the appellant's application is that by his application, the appellant was in effect seeking prayers that had not been granted in the judgment and that the application was tantamount to an appeal against the court's own decision. The question is whether the Judge was right in so concluding.

12. As already noted, the ELRC in allowing the appellant's appeal from the decision of the Magistrates' court that had dismissed his claim declared that his dismissal from employment was irregular and unfair. The court then directed the respondent "*to calculate and pay the appellant dues available to him under his contract of employment*." That is the only relief that the ELRC granted. However, according to the appellant that relief translated to Kshs.5,959,040.00 made up as follows:

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Remainder of contractual period upon wrongful dismissal (156 months)	*5,137,080*
Unfair termination (12 months salary)	*395,160*
Salary in lieu of notice 3 months salary	*98,790*
Leave allowance (last year of service upon termination)	*32,930*
Half salary for period under interdiction (6 months)	*98,790*
Bill taxed at	*196,365*
TOTAL	***5,959,040”***

13. On the other hand, according to the respondent, the *“dues”* owing to the appellant *“as per his contract of employment”* amount to Kshs.387,105.00 made up as follows:

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i) Leave allowance (upon termination at 26/04/2005)	*Kes 18,000.00*
ii) Salary in lieu of notice at the rate of Kes 32,930 for three months	*Kes 98,790.00*
Half salary withheld during interdiction	*Kes 73,950.00*
Costs of the suit which are taxed	*Kes 196,365.00*
TOTAL	***Kes.387,105.00”***

14. Although there may be some computational differences, based on the foregoing, both parties are *ad idem* that in principle, salary *in lieu* of notice, leave allowance and half salary for the period under interdiction are payable under the contract of employment.

15. The contention is essentially on two items which the appellant claimed namely, an amount of Kshs.5,137,080.00 which he claimed as “*remainder of contractual period upon wrongful dismissal (156 months)*” and an amount of Kshs.395,160.00 that he claimed as “*unfair termination (12 months salary)*”. It is patently clear from the judgment of the ELRC given on 23rd September 2016 that no such reliefs were granted by the court. The appellant was by his application seeking to gain more than had been granted in the judgment.

16. The award of remedies for wrongful dismissal and wrongful termination under Sections 49 and 50 of the Employment Act involve exercise of judicial discretion. See for instance ***Kenfreight (EA) Ltd vs. Benson K. Nguti [2016] eKLR***. Such remedies cannot be assumed to be *“dues available to* [the appellant] *under his contract of employment”*. They would have to be specifically granted by the court. They cannot be inferred. We are therefore fully in agreement with the learned Judge that:

> **“*These are not matters for clarification. What the applicant seeks are prayers that were not granted by the court in its judgement on 23rd September 2016. The court cannot sit on appeal over its own decisions. If the applicant is dissatisfied with the reliefs granted by my brother Judge, he can only pursue a second appeal in the court of Appeal*.”** [Emphasis added]

17. This appeal is devoid of merit. It is accordingly dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Mombasa this 19th 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