



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndungu v Segera Limited (Cause E008 of 2022)  
[2024] KEELRC 66 (KLR) (26 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 66 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E008 OF 2022  
ON MAKAU, J  
JANUARY 26, 2024**

**BETWEEN**

**JAMES WAHOME NDUNGU ..... CLAIMANT**

**AND**

**SEGERA LIMITED ..... RESPONDENT**

**RULING**

1. On 26<sup>th</sup> May 2023 I rendered judgment herein declaring the claimant’s dismissal unfair and awarded him Kshs.552420 as compensatory damages. The Claimant was aggrieved and brought Notice of motion dated 29<sup>th</sup> June 2023 under sections 1A, 1B, 3A, 80 of the Civil Procedure Act, order 9 rule 9 and order 45 rules 1,2, and 3 of the Civil Procedure Rules, and Rule 33 of the Employment and Labour Relations Court Rules, 2016 (the Court Rules). The Application seeks the following orders, that:
  - a. Leave be granted to the firm of Onyony & Company Advocates to come on record on behalf of the Claimant/Applicant in place of Magua & Mbatha Advocates.
  - b. This Honourable Court reviews its judgement delivered on 26<sup>th</sup> May 2023 and make a finding on the claims for overtime worked and rest days which were erroneously left out.
  - c. The costs of this Application be provided for.
2. The Application is supported by the claimant’s affidavit sworn on the 29<sup>th</sup> June 2023. In brief, the Applicant’s case is that while entering the said judgement in his favour, the court left undetermined, his claim under paragraph 27 of the Memorandum of Claim, being overtime worked of Kshs. 4,347,000/= and twenty-four rest days of Kshs. 294,624/=.
3. He deposed that he had produced evidence in form of emails, WhatsApp messages, bank payment advises in his further lists of documents dated 19<sup>th</sup> May 2022 and 23<sup>rd</sup> June 2022 in support of his claim for overtime contrary to clause 4 of his appointment letter dated 4<sup>th</sup> October 2017. He claimed that his



assertions were further supported by the arithmetic calculations in the Claim, witness statement and the submissions but that the Respondent never adduced any evidence to rebut his claim.

4. He deposed that the Court failed to make a finding on merit or otherwise on the claim for overtime and rest days, and relied on the case of *National Bank of Kenya v Ndungu Njau* [1997] eKLR where the Court held that review to correct an error or omission on the part of the Court can be granted. He argued that an order for in this case review would be in the interest of justice since it would settle all the issues raised in the claim. He further argued that the same would cause no prejudice to the Respondent.
5. The Respondent opposed the Application vide Replying Affidavit sworn by its Human Resource Manager, Jorom Ombati Mangera, on 31<sup>st</sup> July 2023. He deposed that the Respondent had already paid the decretal sum together with costs and thus the application was an afterthought as the matter was already settled. In his view, the Claimant was out to unjustly enrich himself as he was not entitled to overtime payment since he was in management. He added that the Claimant did not provide material to support of the claim for overtime and hence the same lacked merit. In that regard, he prayed that the application be dismissed with cost.
6. The parties agreed to canvass the Application by way of written submissions but only the Claimant filed his submissions dated 8<sup>th</sup> August 2023.

#### **Claimant's submissions**

7. The Claimant submitted that Rule 33 of the *ELRC Procedure Rules* and Order 45 Rule 1 of the *Civil Procedure Rules* provide for grounds of review by this Court if a party is not appealing against the impugned decision. He further submitted that he made the Application without unreasonable delay as the Judgement was entered on 26<sup>th</sup> May 2023 and the Application was dated 29<sup>th</sup> June 2023.
8. He argued that the Court made determination on the validity of procedures followed, discrimination and the reliefs he was entitled to but erroneously failed to determine the issue on overtime and rest days despite the fact that he had produced evidence in support. He relied on the case of *Martin Muleshe Shiroko v Wanjohi Consulting Engineers Limited* [2016] eKLR where the Court held that a Court can review its order if there is an error apparent on face of record and which need not prove by production of further evidence.
9. The Claimant argued that he raised the complaint regarding his pending annual leave days in the email dated 30<sup>th</sup> January 2019 to the Chief Finance Officer, Mr. Sohan and in his grievance on uncommunicated policy change. He contended that the same was not rebutted by the Respondent by way of production of a muster roll or clock-in print outs to prove that he utilized the days.
10. In addition, he submitted that the Respondent's email of 4<sup>th</sup> August 2019 proved that he was not taking his weekly off days as stipulated under section 27 (2) of the *Act*, and was working beyond contractual timelines. He further that he worked beyond the stipulated 48 hours stipulated under Clause 4 of his contract. To demonstrate that he worked overtime, he referred to the email of 11<sup>th</sup> March 2021 and WhatsApp conversations of 27<sup>th</sup> January 2021. Therefore, he prayed that the application be allowed and be awarded costs on the higher scale.

#### **Issues for analysis and determination**

11. I have considered the Application, Affidavits and the claimant's submission therein and the issue that arises for determination is whether the Application meets the legal threshold for review of a judgment by trial court.
12. Rule 33 of the *Court Rules* provided for grounds of review by this Court as follows:



33.

- (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.

### **Unreasonable delay**

13. The respondent contended that the application was filed after inordinate delay since it was brought after payment of the decreed sum plus taxed costs in full. However, the claimant insists that there was no undue delay since the application was made in just over a month after the impugned judgment was delivered. Having considered the circumstances of the case, I agree with the respondent that the application has been brought after an unreasonable delay. The claimant waited for the settlement of the decree and costs and then came back to court to ask for more. If indeed he was dissatisfied with the decree of the court, he should have challenged the same first. In my considered view, the application is a classic case of afterthought but I still consider its merits.

### **Merits**

14. Although the applicant did not state the ground upon which the application is brought, I believe he is saying that there is a mistake or an error apparent on the face of record in the impugned judgment.
15. The thrust of the application is that the claimant made a case for compensation for overtime and rest days but the same was not considered by this Court. The Respondent on the other hand argued that the Claimant was greedy and looked to unjustly enrich himself since being a management staff he was not entitled to such reliefs.
16. I have perused the impugned judgment and confirmed that the court did not make a determination on the claim for overtime and rest days worked. The failure by the court to determine the said claims in the judgment is a mistake or error apparent on the face of the record. Therefore, I find merits in the application that the court should review the judgment and determine the claims on merits.
17. In the case of *National Bank of Kenya v Ndungu Njau* [1997] eKLR the court expressed itself as follows concerning an error or omission apparent on the face of record:

“A review may be granted whenever the court considers that it is necessary to correct an error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached



an erroneous conclusion of the law. Misconstruing a statute or other provision of the law cannot be a ground for review.”

18. Again, in the *Nyamogo and Nyamogo v Kogo* [2001] EA 174 the Court of Appeal held that:

“An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

19. The error or omission in the impugned judgment is obvious. It stares you on the face. It announces itself clearly. You do not need a lot of effort to see it. Consequently, I must hold that save for the late filing, of the application meets the legal threshold for review and I will proceed to determine the claim for overtime and rest days worked.

20. Section 27 (2) of the *Employment Act* states that:

- “(1) An employer shall regulate the working hours of each employee in accordance with the provisions of this *Act* and any other written law.
- (2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.”

21. Further the Claimant’s Appointment letter dated 4<sup>th</sup> October 2017 provides in clause 5 as follows:

“Any overtime worked must be first approved by management.”

22. The burden of proof is upon the claimant to prove by evidence that he worked extra time and that he is entitled to compensation for the same. To begin with the claimant pleaded in paragraph 27 of his Claim that he worked 3.5 hours extra hours per day, 24 days a month for 45 months. He calculated his overtime compensation at Kshs.4,347,000 using an hourly rate at Kshs. 1,150. The question that arises is whether the claimant has produced any prove of authorisation to work extra time as required under clause 5 of his Letter Appointment. The answer is in the negative.

23. My curiosity was drawn to the fact that the claimant claims overtime for almost four years worked from October 2017, yet in an email dated 11<sup>th</sup> March 2021, the complaint of workload raised was only in relation to the period from the year 2020. It follows that from 2017 to 2019 there was no such complaint.

24. Another observation is that the claim as pleaded assumes that the claimant never took any leave during the 45 months of service. If that was the case, he would have prayed for accrued leave. He has not done so, because obviously he took leave as and when it fell due.



25. The above observations lead me to a finding of fact that the claim for overtime lacks material particulars and it is exaggerated. It includes days when he was away on leave. A claim for overtime work is a special-damages claim which must specifically pleaded and proved. Whereas the respondent did not adduce evidence to disprove the claim for overtime, it is obvious that the claimant cannot benefit from that default. The burden is upon him to prove his case on a balance of probabilities.
26. The Claimant further prayed for compensation 24 rest days not taken and assessed it at Kshs.294,624 charging each day double the normal daily wages. However, there is no cogent proof before this Court to prove that the number of days were indeed genuine and not plucked from the sky.
27. The Respondent produced the Claimant's payslip for June 2021 which indicates that the Claimant was compensated Kshs. 116,622/= in respect of off days. The claimant never disputed that fact. He also never factored it in his pleadings, evidence or submissions. The burden was upon the claimant to plead his claim specifically and adduce evidence to support the claim. He cannot prove his claim through default of the respondent to adduce evidence to disprove the claim. Consequently, I also hold that the claim for rest days not taken must fail for lack of material particulars and supporting evidence.

### **Conclusion**

28. I have found that the applicant has established that there is a mistake or an error apparent on the face of the record and as such the application meets the legal threshold for review. I have then evaluated the pleadings, evidence and submissions and found that the claimant did not prove his claims for overtime and rest days on a balance of probabilities. He failed to plead material particulars of the two claims and further failed to adduce evidence to substantiate the same. Consequently, I decline the request to vary the impugned judgment and proceed to dismissed the application with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 26<sup>TH</sup> DAY OF JANUARY, 2024.**

**ONESMUS N. MAKAU**

**JUDGE**

### **ORDER**

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

