



REPUBLIC OF KENYA



KENYA LAW
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**Ekirapa v Kaunya & another (Cause 34 of 2021)
[2024] KEELRC 920 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 920 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 34 OF 2021**

**JW KELI, J
APRIL 25, 2024**

BETWEEN

MATHEW EKISA EKIRAPA CLAIMANT

AND

HON. OKU KAUNYA 1ST RESPONDENT

**PARLIAMENTARY SERVICE COMMISSION, TESO NORTH 2ND
RESPONDENT**

RULING

1. The ruling is on application by way of a Notice of Motion application by the 1st Respondent dated 28th February 2024 brought under the provisions of Section 80 of the *Civil Procedure Act*, Order 21, Rule 12, Order 22, Rule 51(2), Order 45 Rule 1, Order 51 Rule 1 of the *Civil Procedure Rules*, and Sections 3A and 3B of the *Civil Procedure Act*, seeking the orders:-
 - a. Spent.
 - b. Spent
 - c. Spent
 - d. The Court be pleased to review and set aside the judgment dated 13th October 2022.
 - e. The Decree dated 19th May 2023, Proclamation Notice dated 5th October 2023, and the Warrants of Attachment issued on 21st September 2023 be set aside.
 - f. The decretal sum be set off against payments already made and the balance thereafter be settled by way of monthly installments of Kshs. 20,000/- per month until payment in full.
 - g. Costs.



2. The Notice of Motion was premised on the grounds on the face of the application and the ground in the supporting affidavit of the 1st respondent sworn on 28th February 2024 as follows:-
- i. That judgment was delivered on 13th October 2022 against the 1st Respondent to pay the Claimant Kshs. 1,696,200/-for unfair termination and notice pay of Kshs. 141,350/- together with costs and interest. That the 1st Respondent's advocate, Gerald Omori Kinanga died around January 2022 and the majority of the proceedings did not come to the 1st Respondent's attention for him to participate and file a defence.
 - ii. He was served with a Proclamation Notice dated 5th October 2023, when he became of the Decree for settlement of Kshs. 2,290,908/- as the decretal sum, costs, and interest. At that point, he became aware of the Judgment against him and he instructed the firm of Omeri & Associates to stall the threat of execution.
 - iii. He states that he wishes the court to consider that he paid the Claimant a total of Kshs. 970,875 in gratuity and Kshs. 141,350 Notice pay.
 - iv. He prays that the court reviews its judgment owing to the facts which were not brought to the attention of the court at the time of trial, in part due to the challenge of the 1st Respondent's representation.
 - v. He states that he is prejudiced by the judgment and the threat of execution, which shall cause him substantial loss if allowed to proceed, as he had already paid almost half of the decretal sums before the judgment
 - vi. He states that his application is brought in good faith, with excusable and reasonable delays owing to the death of his first counsel and in the interests of justice.
- (All annexed documents marked as HOK pg.1 to 34)
3. The Application was opposed by the Claimant through his Replying Affidavit sworn on 11th March 2024 on the grounds that:-
- i. The 1st respondent's application is vexatious and an abuse of the court process aimed at denying the claimant the fruits of his judgement.
 - ii. The firm of Kimanga is a partnership, and the demise of Gerald Kimanga had nothing to do with the omissions of the applicant, as different advocates from the firm i.e. Ms. Lukesule and Miss Nabifo appeared in the matter.
 - iii. That the decretal sum indeed continues to attract interest until payment in full and the present application is an abuse of the court process as litigation must come to an end.
 - iv. The issue of Gratuity and Notice was canvassed by the counsel for the 2nd respondent through the affidavit of Michael Sialai CBC(MEE1).
 - v. That there is nothing new presented before the court to warrant the setting aside of a regular judgment obtained after proper service and a full hearing of the case.
 - vi. That the execution is against a lawful decree and the court should not condone a party determined to frustrate a regular and lawful decree through numerous applications to abuse the court process.
 - vii. That the court is a court of equity and it should frown upon a party who approaches it with dirty hands, as the applicant in his affidavit of 23rd October 2023, denied knowledge of the



suit or receipt of summons and the claim and yet in the present application he alleges that he had instructed the firm of Kimanga to represent him and on his passing in 2022, he was not informed of the progress of the case.

- viii. That the applicant never proved any efforts to follow the progress of the suit and the court should frown upon a party who is ready to lie to the court to steal a match or gain an undue advantage over another in court proceedings and prays that the application be dismissed with costs.
4. The 1st Respondent filed a further affidavit dated 27th March 2024, asserting that his advocate was Mr. Kimanga, and he was a stranger to the advocates Ms. Lukesule and Miss Nabifo, and one Ms. Miranda who alleged he was missing, and the illness and demise of his advocate occasioned a lapse in his representation which he seeks to mitigate.
5. That he only became aware that judgment was entered in October 2023, upon being issued with a Proclamation Notice which was dropped at his office in Parliament.
6. He stated that he instructed the Parliamentary Service Commission to pay the Claimant notice and Gratuity vide his letters of 17th February 2020 and 26th February 2020 and seeks the court to reconsider the 12 months' compensation as he acted fairly in dismissing the Claimant and paid him his terminal dues, and the court to factor the amount already paid in reviewing the judgement.
7. He stated that the court did not award gratuity but pay in lieu of notice and that the Gratuity of Kshs. 834,520/- was paid to the Claimant on his instructions. He stated that the Claimant was paid a salary of Kshs. 141,350 for May which was payable through the letter of 17th February 2020 (pg.8) but the letter was retracted to avoid double payment. That the Claimant acknowledged receipt of the payment of May salary as notice pay.

Written Submissions

8. The court directed that the application be canvassed by way of written submissions. The parties complied. The Applicant's written submissions dated 27th March 2024 and were filed by P.I. Samba & Company Advocates on 5th April 2024. The Claimant's written submissions dated 4th April 2024 were filed by the Omondi Abande & Company Advocates on the 5th April 2024.

Determination

Issues for determination.

9. The Applicant/1st Respondent did not identify any issues for determination but submitted globally on his right to review before the court owing to the lapse in his representation and on the new material now before the court.
10. The Claimant addressed the following issues in his written submissions
 - a. Whether case can bring a fresh application seeking similar orders in an application for want of prosecution.
 - b. Whether the applicant was made a case for setting aside regular judgement.
 - c. Who should bear cost of the instant application.
11. The court having perused the pleadings by the parties and their submissions was of the considered opinion that the issues placed before the court by the parties for determination of the application is



Whether there is a mistake or error on the face of the record or any sufficient reason to justify review of the judgment herein.

Whether there is a mistake or error on the face of the record or any sufficient reason to justify review of the judgment herein.

12. The applicant submits that the *Employment and Labour Relations Court (Procedure) Rules, 2016* at Rule 33 grants a party a right to review. Rule 33 provides that-

“ 33. Review

- (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.
- (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.
- (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.
- (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
- (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
- (6) An order made for a review of a decree or order shall not be subject to further review.”

13. The applicant submits that he is entitled to review the judgment of the Court based on the new material placed before the Court as he has demonstrated that there were lapses in his legal representation and the fact that the terminal dues paid to the Claimant were not fully drawn to the attention of the Court. The Applicant submits that he acted fairly in instructing that the Claimant be paid his terminal dues of Kshs. 975,870. That he paid to the Claimant Kshs. 834, 520 as Gratuity, and the Notice Pay of Kshs.



141,350. He relied on the decisions in *JMK V MWM & another* (2015) eKLR, *Michael Opondo Were v Maths Trading Company Limited* (2016) eKLR.

14. The Claimant on his part submitted that the review orders are not available to the applicant, as the applicant's first application was dismissed for want of prosecution and the applicant cannot thus bring the same against him. The Claimant submits that the Court should act judiciously before setting aside a judgment to avoid injustice and hardship, accident, or excusable mistake. The Claimant submits that the Court's discretion should be exercised capriciously and not out of pity considering whether the applicant has a bonafide defense, whether any prejudice will be caused by the applicant, and whether the application had been brought without undue delay.
15. The Claimant submits that the applicant has no defense that is plausible as the Claimant confirms he received the Gratuity paid by the 2nd Respondent and it is false that the applicant made the payments. That the applicant's application will prejudice the Claimant who cannot enjoy the fruits of his judgment as the Applicant is hell bound to frustrate the same, and the application was made after one year and three months and no justification is there for the delay. The Claimant relied on the decisions in *Patel V East Africa Cargo Handling Services* (1974) E.A.75, *Shah V Mbogo & Anor* (1967) E.A 470, *John Ongeri Mariara & 2 others v Paul Matundura* (2004)2 E.A 163, *Ivita v Kyumbu* (1984) KLR 44 and *Jaber Mohsen Ali & Another v Priscillah Boit & Another* E& L No. 200 of 2012(2014) eKLR.
16. Under Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*: -
 - “ 33. Review
 - (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.....”
17. What the Court is called to consider is whether there is discovery of new and important matter or evidence which was not produced at the time the decree was passed or sufficient reason for the request for review. The substantive order sought being: - “f) The decretal sum be set off against payments already made and the balance thereafter be settled by way of monthly installments of Kshs. 20,000/- per month until payment in full.”
18. The review application is on Payment in lieu of notice of Kshs. 141,350/, the Claim of Gratuity and the maximum compensation awarded, the equivalent of 12 months' salary amounting to Kshs. 1,696,200/-.
19. The Judgement containing the award of the decretal sums was delivered on 13th October 2022 as follows: -

“Compensation

44. The Court having found unfair and unlawful termination award the Claimant compensation under Section 49(I)(3) of the *Employment Act*. The Court



considered the determined period of employment being the term of service the 1st Respondent of 5 years and remaining period of service, the uncouth manner of ejecting the claimant from office, the unjustified compulsory leave, the lack of fault of the claimant and considered that maximum compensation was justified. The Court awards maximum compensation equivalent of 12 months gross salary of 141,350 per month. Total award Ksh.1,696,200/-. The Claimant is awarded compensation at total sum of Kshs.1,696,200/-.

“Claim for Gratuity

45. On claim for gratuity the same was paid and evidence produced in Court. The Claimant submits that this was less the amount of the gratuity he expected to be paid. The Claimant has not demonstrated the error in the computation of his gratuity by the 2nd Respondent. The gratuity was subject to statutory deduction which are not captured in the claim. That may explain the variance. The Court finds no evidence before It to question the gratuity as paid by the Parliamentary Service Commission. The Claimant is free to pursue the claim with the 2nd Respondent who has already been struck off the case. The Court disallows the claim.

Payment in lieu of Notice

46. The same is due the Court having found unfair termination as per contract of 1 month salary and is awarded for sum of Kshs. 141,350/-”.

20. As relates to the maximum 12 months’ compensation and Notice Pay, the Applicant submits that he acted fairly in dismissing the Claimant and that the Court should reduce the maximum compensation. He argued that since the Court had dismissed the Claimant’s claim for Gratuity, he had already paid the Claimant a gratuity of Kshs. 970,875 and Kshs. 141,350 as Notice pay and the same amounts ought to have been deducted from the decretal sum awarded by the Court of Kshs.1,696,200 for unfair termination and Notice pay of Kshs. 141,350/-.
21. The Claimant states that the payment of Gratuity and Notice was already determined by the Court based on the evidence of the 2nd Respondent (MEE1).
22. The claim for Gratuity and damages for unfair termination was determined by the Court. The Court found that, as relates to Gratuity, the Claimant had been paid gratuity by the 2nd Respondent, and the Gratuity paid had not been disputed by the Claimant, and if he had any grievances, he could raise the same with the 2nd Respondent.
23. The Applicant states that the Court declined to grant the Claimant a prayer for Gratuity and thus the amounts paid ought to be used to offset the compensation for unfair termination. This position is misdirected, as the Court confirmed that Gratuity had been paid to the Claimant by the 2nd Respondent. The Court did not find the Claimant was not entitled to gratuity, and thus gratuity was upheld as per the 2nd Respondent’s evidence.
24. The Court granted maximum compensation for unfair termination as a different item from the determination distinct from the Claim for Gratuity, based on the evidence presented before it, and the Court arrived at the decision given above. The Court further justified the award. No new evidence has been presented by the Applicant before the Court to convince the Court to review its finding on the unfair termination and the compensation of Kshs. 1,696,200/- and the Court’s holding therefore stands.



25. As relates to Notice pay, the Court granted Notice pay to the Claimant of Kshs. 141,350/-. The Applicant produced a Payment Voucher of 28th November 2019(HOS-Pg.7) indicating that the Claimant was paid the Notice Pay for the month of May, which the Claimant had acknowledged receipt.
26. The Applicant states that, through his letter of 17th February 2020, he authorized the claimant to be paid his monthly salary in lieu of notice and Gratuity, but subsequently on 26th February 2020, he authorized that the Claimant be paid his Gratuity only as the Claimant had already been paid his Notice pay to avoid a double payment.
27. The Court looked at the Claimant's response as regards the claim that he had been paid the Notice pay. The Claimant at Paragraph 9 of his Replying affidavit sworn on the 11th March 2024 stated that "That I Know of my own knowledge that the issue of gratuity and Notice was well canvassed by the counsel for the Parliamentary Service Commission Mr. Angaya and even presented facts in affidavit (Annexed and produced as MEE 1 is a copy of the affidavit of Michael Sialai CBC)". The Court on reviewing the Affidavit referred to by the Claimant from the Parliamentary Service Commission, the affidavit was sworn by Michael Sialai on 18th January 2022 to effect that:-
 - '4 That on 10th June 2020, the Parliamentary Service Commission paid a sum of Kshs. 566,164/- to the claimant's bank account as shown by the statement of account appearing in the Claimant's supplementary List of Documents filed by the Claimant on 3rd June 2021. That the said amounts paid to the claimant comprise of the Claimant's gratuity and other dues owing to the claimant after his employment was lawfully terminated by his employer.
 - 6 (Annexed herewith and Marked MS 1 is a copy of the said Letter indicating as much).
 7. That by another letter dated 26th February 2020, the 1st Respondent requested the 2nd Respondent to process service gratuity for the Claimant. (Annexed herewith and marked MS 2 is a copy of the said letter indicating as much).
 8. That I confirm that the payment made to the claimant as reflecting on his bank account statement as produced in Court is his service gratuity together with all dues owing to him and therefore his claim herein cannot stand..."
28. The Affidavit by the 2nd Respondent did not indicate that the Claimant had been paid his Notice pay. Indeed, the letter of 26th February 2002, only authorized the pay for Gratuity, which the 2nd respondent confirmed that they had processed. There was no mention of Notice paid by the 2nd Respondent but only "other dues".
29. The Applicant produced a copy of payment voucher for leave and Gratuity and PAYE for Teso North (HOS- pg.10 & 11), the Breakdown & Tabulation of the Gratuity paid to the Claimant (HOS pg.12 & 13) to show that the amount that had been paid by the 2nd Respondent to the Claimant was only gratuity.
30. The Claimant although having had the opportunity to controvert the evidence by the Applicant that he had been paid salary in lieu of Notice, he avoided the issue in his response and only stated that the 2nd Respondent had addressed the issue of gratuity and Notice Pay. The Claimant did not deny that he had been paid the Notice Pay, the same having being paid on 28th November 2019 after the filing of his claim on 23rd September 2019.
31. A party given an opportunity to controvert an allegation/evidence is entitled to present their position, failing which the allegations are confirmed as true. The Claimant did not refute that he was paid



Notice pay. The Notice pay was awarded to the Claimant for Kshs. 141,350/- by this Court on the understanding that the same was never paid to the Claimant. The applicant has produced evidence that the Claimant was paid the Notice in lieu of Notice and the Claimant has not refuted that assertion and/ or objected to the evidence produced. The Court finds that the applicant proved on a balance of probability that the Pay In lieu of Notice was paid to the Claimant and the same is declined in the claim dated 23rd September 2019.

32. The foregoing analysis points only to one thing that the application herein meets the legal threshold for review under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016, that there was sufficient reason informed by the new evidence which the Applicant could not produce at the time when the judgement and decree was delivered for satisfactory reasons for which review is granted.
33. The Claimant obtained a Decree dated 19th May 2023, a Proclamation Notice dated 5th October 2023, and the Warrants of Attachment issued on 21st September 2023 to execute against 1st respondent for the decretal sum, costs, and interest.
34. The Court having found merit to review its judgment on the issue of notice pay, finds that the decree of 19th May 2023 and the Warrants of attachment and proclamation notice issued thereto are rife for review considering that the decretal sum used to calculate the decretal sum factored in the Notice pay which has been declined. The execution cannot proceed on the wrong decretal sum and the same ought to be recalculated, together with costs and interest from the date of Judgement of 13th October 2022.

Conclusion And Final Orders

35. For the reasons stated above, the Court allows the application partially and makes the following determinations and Orders: -
 - i. The Notice of Motion dated 28th February 2024, meets the threshold for an order of review.
 - ii. The Decree dated 19th May 2023 together with the Proclamation Notice dated 5th October 2023 and the Warrants of Attachment issued thereto on 21st September 2023 are set aside.
 - iii. The Judgement of 13th October 2022 is reviewed as follows: -
 - i. Award of Compensation for unfair and Unlawful termination equivalent of 12 months total sum awarded for Kshs. 1,696,200/-
 - ii. Certificate of Service to issue by the 1st respondent pursuant to the provisions of Section 51 of the *Employment Act*.
 - iii. Interest at Court rates from judgment date.
 - iv. Costs to the Claimant to be paid by the 1st respondent.
36. The court to temper justice with mercy makes no order as to costs in this application.
37. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF APRIL 2024.

J.W. KELI
JUDGE

In The Presence Of:-



Court Assistant: Brenda Wesonga

1st Respondent/Applicant:- Absent

Claimant/ Respondent: Omondi

