



**Aponda v Ola Energy Kenya Limited (Cause 2205 of 2015)
[2024] KEELRC 1240 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1240 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2205 OF 2015**

**L NDOLO, J
MAY 23, 2024**

BETWEEN

PAUL WAA APONDA CLAIMANT

AND

OLA ENERGY KENYA LIMITED RESPONDENT

RULING

1. By his Notice of Motion dated 31st October 2023, the Claimant seeks review of the orders made by Makau J in his judgment delivered on 20th September 2019, and the subsequent decree issued on 14th November 2019, to introduce the following amendments:
 - a. The one-month salary in lieu of notice to be amended from Kshs. 759,635 to Kshs. 1,085,193.85;
 - b. The twelve months' salary compensation to be amended from Kshs. 9,115,620 to Kshs 13,022,326.20;
 - c. The total amount to be amended from Kshs. 9,875,253 to Kshs. 14,107,520.
2. The Motion is supported by the Claimant's own affidavit and is based on the following grounds:
 - a. That Makau J delivered judgment on 20th September 2019, whereby he made a finding that the summary dismissal of the Claimant was unlawful and unfair and ordered, inter alia, that the Claimant be paid compensation based on his salary, but in computing the award, the Court erred by basing it on the net salary rather than the gross salary, while at the same time directing that the said amounts were to be subject to statutory deductions;
 - b. That it has since come to the Claimant's discovery that the error in using the actual amounts due as salary was by the Court;



- c. That on 20th May 2021, the Respondent furnished proof of payment of the decretal sum following the Claimant's demand dated 18th May 2021;
 - d. That the remittances had not taken into account tax and other statutory deductions due;
 - e. That starting from January 2022, the Claimant and the Respondent exchanged several correspondences relating to tax remittance in respect of the decretal sum but the Respondent denied responsibility for remittance of taxes and statutory deductions due on the salary award;
 - f. That it is thus necessary that the decree be amended to reflect the correct amounts that were due to the Claimant, based on his gross salary;
 - g. That it is in the interest of justice that the application is allowed.
3. The Respondent filed Grounds of Opposition dated 16th January 2024, stating that:
- a. There is no error apparent on the face of the record and no evidence has been adduced by the Claimant to support his allegations;
 - b. The Court is bound by the parties' pleadings. The Claimant pleaded at paragraph 76(1) of the Statement of Claim dated 10th December 2015, that his gross monthly salary was Kshs. 759,635. The Claimant is also bound by his pleadings;
 - c. There is unreasonable delay in filing this application, contrary to Order 45 Rule 1 of the [Civil Procedure Rules](#). The impugned judgment was delivered on 20th September 2019;
 - d. The prayers sought in the application are time barred in view of the express provisions of Section 90 of the [Employment Act](#);
 - e. The application is an abuse of the court process as it offends the express provisions of Order 45 Rule 1 of the [Civil Procedure Rules](#).
4. The power of this Court to review its own decisions is donated by Section 16 of the [Employment and Labour Relations Court Act](#) and Rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules](#).
5. Rule 33(1) of the [Procedure Rules](#) provides as follows:
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; or
 - b. on account of some mistake or error apparent on the face of the record; or
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.



6. The purpose of review on the ground of an error on the face of the record is not to allow the Court to have a second look at its own decision but to facilitate correction of obvious errors that are apparent on the record.
7. This position was affirmed in *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR where it was held that:

“A review may be granted whenever the court considers it is necessary to correct an apparent 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 a 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 law. Misconstruing a statute or other provision of law cannot be a ground for review.”
8. The Court of Appeal, in its decision in *Nyamogo and Nyamogo Advocates v Kogo* (2001) EA 173, delivered on this issue as follows:

“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 options, 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.”
9. The Claimant bases his plea for review on the salary factor adopted by the Court in tabulating his award. At paragraph 76(a) of his Statement of Claim dated 10th December 2015, the Claimant sought the following remedy:

‘One Month’s gross pay in lieu of notice based on Kshs. 759,635.10 per month (after deduction of requisite taxes) per month’.
10. It would appear that in tabulating the Claimant’s award, Makau J adopted the salary figure pleaded by the Claimant in the foregoing paragraph. I understand the Claimant’s complaint to be that my brother Judge misconstrued this pleading and thereby adopted the wrong salary figure.
11. When a party comes to court seeking relief, they take responsibility for stating their case clearly. In this case, the Claimant invites me to engage in a long drawn argument as to the meaning of his pleading at paragraph 76(a) of the Statement of Claim. This does not fall within the purview of review as provided in law.
12. Moreover, the Claimant did not give any credible reason for the delay in bringing his application for review. As held in *Panalpina (E.A) Ltd v Ngage* (1999) LLR 2370 (HCK) an application for review must be made without unreasonable delay. In this case, judgment was delivered on 20th September 2019 and the Claimant did not move the Court until 31st October 2023. The delay is inordinate and in the absence of a valid explanation, unreasonable.



13. For the foregoing reasons, the Claimant's application dated 31st October 2023 is declined with an order that each party will bear their own costs.
14. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF MAY 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Rombo for the Claimant

Mr. Kiche for the Respondent

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