



**Mutisya v Cortec Systems & Solutions (Petition 93 of 2020)
[2024] KEELRC 13312 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13312 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 93 OF 2020
CN BAARI, J
NOVEMBER 28, 2024**

BETWEEN

NANCY MBITHE MUTISYA PETITIONER

AND

CORTEC SYSTEMS & SOLUTIONS RESPONDENT

RULING

1. By a Notice of Motion dated 29th June, 2021, brought pursuant to Article 50(1) of *the Constitution* of Kenya 2010, Order 45, Order 10 Rule 11, Order 12 Rules 7 & Order 51 Rule 1 of the Civil Procedure Rules, Sections 3A, 63 and 80 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, the Applicant herein, Cortec Systems & Solutions seeks the following orders:-
 - i. Spent
 - ii. Spent
 - iii. This Honourable Court be pleased to set aside, vary and/or review the Judgment issued on the, 17th June, 2021.
 - iv. Costs of this Application be awarded to the Respondent/ Applicant.
2. The application is supported by the grounds on the face of the Motion and the affidavit of Agnes J. Kipsuto sworn on 29th June, 2021. The crux of the motion being that there is clear error apparent on the face of the record in that the Hon. Judge awarded the Petitioner 3 months' salary from 9th December, 2019 - 9th March, 2020 on the basis that the Petitioner was working, yet her last day in the service of the Respondent was 9th December, 2019.
3. The Applicant further avers that awarding the Petitioner/Respondent salary up to 9th March, 2020, will amount to unjustly enriching her, that being a period when no services were rendered to the Respondent.



4. The Applicant further avers that the Hon. Judge awarded the Petitioner 3 months in lieu of notice despite the Respondent having paid the Petitioner 3 months in lieu of notice. That the court in awarding a further 3 months in lieu of notice, and salary from 9th December, 2019 – 9th March, 2020 in its final judgment, did not take into consideration the initial amounts, thereby necessitating the orders for review.
5. The Applicant argues that despite the fact that the Hon. Judge found that there was a real redundancy situation leading to the declaration that the Petitioner's position was no longer available, he went ahead and awarded the Petitioner maximum compensation for 12 months, and that in view of the Respondent's economic situation, the court should award a more fair and reasonable award instead of the maximum compensation to the Petitioner.
6. It is the Applicant's argument that the impugned Judgment was rendered without affording the Respondent/ Applicant an opportunity to be heard and nor was it given the chance to call its witness and/ or interrogate the Petitioner's claim herein.
7. That it is only fair, just and proper that the Judgment be set aside, and reviewed together with all consequential orders.
8. The Respondent/Petitioner opposed the motion vide a replying affidavit sworn on 5th August, 2021. The Petitioner argues that the application herein is a scheme by the Respondent/Applicant to deny her the fruits of her Judgment which was validly entered in her favour on the 17th June, 2021.
9. The Petitioner argues that in the impugned Judgment, the Learned Judge emphatically noted at paragraphs 24, 25 and 26 that the Respondent did not comply with strict and mandatory statutory requirements as set out in Sections 40 and 45 of the *Employment Act*.
10. It is the Petitioner's assertion that the Respondent/Applicant has not demonstrated sufficient cause as to why the valid Judgment of the Learned Judge should be disturbed. She argues further that the Applicant has not tendered new and important matter or evidence that warrant setting aside and/or reviewing the Judgment.
11. The Petitioner states that the Respondent's redundancy declaration was malicious and done in bad faith, as no consultations were done between the Respondent, the Labour Officer and herself to avert the redundancy or to seek alternatives. It is her position that the awards given by the Learned Judge are fair to mitigate the drastic effects of the impugned redundancy decision.
12. That it is in the interest of justice that the orders sought are denied and the Applicant be ordered to satisfy the decree and judgment of this Honourable Court dated and delivered on 17th June, 2021.
13. Parties canvassed the application by way of written submissions, and which submissions have been duly considered.

Analysis and Determination

14. I have carefully appraised the application, the grounds and affidavit in support, the replying affidavit in opposition and the rival submissions.
15. Section 16 of the *Employment and Labour Relations Court Act* and Rule 74(1) of the Employment and Labour Relations Court (Procedure) Rules, 2024, empowers this court to review its judgments, awards, orders or decrees.



16. By the foregoing provisions, review of Judgment, award, order or decree is allowed where 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; on account of some mistake or error apparent on the face of the record; if the Judgment or Ruling requires clarification or for any other sufficient reason.
17. An application for review is not a right of a party, but an equitable remedy which calls for a basis to be laid by the Applicant to the satisfaction of the court. A request for review is likewise not an appeal or a chance for the Applicant to re-argue his/her case.
18. The motion herein, is premised on there being an error apparent on the face of the record, with the argument that the Hon. Judge awarded the Petitioner 3 months' salary from 9th December, 2019 - 9th March, 2020 on the basis that the Petitioner was working, yet her last day in the service of the Respondent was 9th December, 2019.
19. The Applicant further argues that despite the fact that the Hon. Judge found that there was a real redundancy situation leading to the declaration that the Petitioner's position was no longer available, he went ahead to award the Petitioner maximum compensation, and that in view of the Respondent's economic situation, the court should award a more fair and reasonable award instead of the maximum compensation awarded to the Petitioner.
20. The Applicant further argues that the impugned Judgment was rendered without affording the Respondent/ Applicant an opportunity to be heard, and nor was it given a chance to call its witness and/or interrogate the Petitioner's claim.
21. In the case of National Bank of Kenya Ltd vs Ndungu Njau (1997) eKLR the court had this to say on review:-

“A review may be granted whenever the court considers that 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.....”
22. From a glance at the grounds of the instant motion, it is clear that the Applicant has not shown that there exists an error apparent on the face of the impugned judgment as alleged, and what the Applicant seeks instead, is a merit review of the trial court's judgment.
23. Indeed, as correctly submitted by the Petitioner/Respondent, all the issues raised by the Applicant can only be remedied by way of an appeal and not a review motion such as the one before this court. To alter the decision by the trial judge, will no doubt amount to this court sitting on appeal on a decision made by a court of concurrent jurisdiction.
24. In the upshot, the court finds the application devoid of merit and is for dismissal. It is dismissed with costs to the Petitioner/Respondent.
25. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2024.

C. N. BAARI

JUDGE

Appearance :



Mr. Mokuu present for the Petitioner

N/A for the Respondent/Applicant

Ms. Esther – C/A

