Chang'awa v Gertrude's Children Hospital (Cause 2203 of 2016)
[2023] KEELRC 414 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 414 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2203 OF 2016

JK GAKERI, J

FEBRUARY 16, 2023

BETWEEN

JEROME CHANG'AWA ..... CLAIMANT

AND

GERTRUDE'S CHILDREN HOSPITAL ..... RESPONDENT

RULING

1. This is the determination of the Notice of Motion dated 20th July, 2022 filed under Certificate of Urgency by the Respondent seeking orders That:
    1. Spent.
    2. Pending the hearing of this application inter partes, the court be pleased to issue a stay of execution of the decree arising from the Judgement delivered on 6th July, 2022 and all consequential orders thereto in the first instance.
    3. The court be pleased to review its orders arising from the Judgement delivered on the 6th July, 2022 owing to an error on the face of the record.
    4. The costs of this application be in the cause.
    5. This court be pleased to issue such other or further orders that it may deem fit and just to grant.
2. The application is premised on the grounds set out on its face and the Supporting Affidavit of Kenneth Afande sworn on 20th July, 2022.
3. The affiant deposes that the Claimant/Respondent was employed by the Respondent on 27th February, 1992 under a written contract whose terms were amended by the Collective Bargaining Agreement (CBA) for the period 1st August, 2015 to 31st July, 2017.

4. The affiant states that in accordance with Clause 23 of the CBA, the Applicant did not pay the Claimant because the substantive reason for termination of employment amounted to gross misconduct and warranted dismissal.

5. That page 35 of the CBA, stipulated that salary would be consolidated and thus inclusive of housing allowance.

6. That the CBA was not considered as part of evidence. That the CBA was the instrument of engagement and not the payslip which gave the erroneous impression that the Claimant was not being paid housing allowance.

7. That even if no housing allowance was paid to the Claimant, which is denied, the injury was continuous and as such fell within the provisions of section 90 of the *Employment Act*, 2007 in respect to Limitations.

8. The affiant states that there is an error on the face of the record as the judgement was diametrically opposed to the best evidence on record i.e documentary evidence.

9. That the stay of execution sought would not occasion irreparable damage or prejudice to the Claimant as the court had jurisdiction to award damages in lieu.

10. It is further deposed that the application was filed without inordinate delay and justice dictated that the orders sought be granted.

Claimant's response

11. The Claimant responded by way of a Replying Affidavit of the Claimant dated 29th August, 2022.

12. On the allegation of consolidated salary, the Claimant deposes that the CBA relied upon by the Applicant had no indication of the salary the Claimant earned.

13. That the only evidence of the Claimant's salary was the payslip and the Applicant provided no documentary evidence to challenge the payslip.

14. That if the Claimant's salary was indeed consolidated, the payslip would have an indication to that effect as opposed to using the term "Basic Salary" as the only entry and no housing allowance under allowances.

15. That the reference to consolidated salary on page 35 of the CBA was inconclusive as there was no clause in the CBA on house allowance or that salary would be consolidated.

16. That the Respondent did not provide a reliable written agreement setting out the terms of the contract including termination and notice.

17. The affiant states that notice pay was rightfully awarded.

18. Finally, the deponent states that the principle of continuous injury under Section 90 of the *Employment Act* was in applicable in the instant case as the Claimant/Respondent's employment was terminated on 4th May, 2016 and filed the suit on 28th October, 2016.

Applicant's submissions

19. The Federation of Kenya, on behalf of the Applicant submitted that when the Claimant/Respondent joined the Union, his conditions of service were governed by the CBA effective 1st August, 2015 to 31st July, 2017 whose page 35 stated that salary would be consolidated. That the model letter set out the

terms of service applicable to all employees including the Claimant. That the CBA became the primary document.

20. The decisions in *Charity Wambui Muriuki vM/s Total Security Surveillance Ltd* (2017) eKLR, *Stephen O. Edewa vLavington Security Guards* (2019) eKLR and *Grain Pro Kenya Inc. Ltd vAndrew Waithaka Kiragu* (2019) were relied upon to urge that consolidated salary included basic salary and all allowances and the employment contract was the primary contractual document.

21. It was submitted because the issue of housing allowance was not properly canvassed in court, the court made an error.

Respondent's submissions

22. According to Respondent/Claimant, the only issue for determination was whether the Application for review should be allowed.

23. Reliance was made on the provisions of Order 45 of the *Civil Procedure Rules*, 2010 to isolate the ground relied upon by the Applicant i.e. mistake/error apparent on the face of the record.

24. It was urged that unless a mistake or error was self-evident, it could not be treated as one apparent on the face of the record. That the Applicant was seeking a detailed examination of the CBA to ascertain whether gross pay was consolidated contrary to Order 45 as it required moving out of the record to ascertain the basis of the judgement.

25. That the court was being called upon to examine the CBA to ascertain that salary was consolidated.

26. That the CBA made no reference to the Claimant's salary and the payslip was the only indication of his salary.

27. It was urged that Clause 11 of the CBA catalogued the allowance due to employees. The Respondent wondered why housing allowance was not included if it was intended to be part of the CBA. Relatedly, it was not itemised as part of the payslip.

28. It was submitted that since the contents of the CBA were within the knowledge of the Applicant, it should have controverted the amount at the trial as opposed to doing so after judgement. It did not avail a written agreement on the terms and conditions of service of the Claimant.

29. The Respondent submitted that house allowance was rightfully awarded.

30. It was further submitted that the Applicant had not specifically identified the particular error on the face of the record.

31. Finally, the Respondent urged that the doctrine of continuous injury was inapplicable as the suit was filed within 12 months of termination of employment.

Determination

32. I have considered the application, Respondent's response and rival submissions. The salient issue for determination is whether the application for review and stay of execution is merited. The second issue is whether the doctrine of continuous injury applies to this case.

33. It is trite that review of judgments and other orders of this court is governed by legislation, specifically Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016.

    Rule 33 provides as follow;

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 judgement 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 judgement or ruling requires clarification; or

    d. For any other sufficient reason

34. The Applicant relies of Rule 33 (1)(b) of the Rules that there was an error apparent on the face of the record.

35. In its judgement delivered on 6th July, 2022, the court awarded the Claimant/Respondent Kshs.3,579,897.60 as housing allowance having found that the Respondent had not demonstrated that it was paying the Claimant a consolidated salary as evidenced by the payslip on record provided by the Claimant/Respondent.

36. The court was not persuaded that the use of the phrase "consolidated salary" in the sample of Appointment letter on page 47 of the Claimant/Respondent's bundle of documents meant that the Claimant's salary was inclusive of house allowance under the CBA for the period 1st August 2015 to 31st July, 2017.

37. The concept of error on the face of the record was fittingly elucidated by the Court of Appeal in *Muyodi vIndustrial & Commercial Development Corporation & another* (2006) eKLR as follows;

> " In *Nyamongo & Nyamongo v Kogo* (2001) EA 174, this court said that an error apparent on the face of the record cannot be defined precisely or 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 real distinction between a mere erroneous decision and an error apparent on the face of 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 long drawn process of reasoning or on points where there may conceivably be two options 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, or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us".

38. Similar sentiments were expressed in *Chandrakhant Joshibhai Patel v R* (2004) TRL 2018 where the court stated that

> " . . .must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by along drawn process of reading on points on which may be conceivably be two options."

39. I will now proceed to determine whether the Applicant herein has demonstrated that there is an error on the face of the record in the context of the principles elucidated by the courts.

40. It is common ground that the Claimant/Respondent was employed by the Respondent/Applicant on 26th February, 1992 as a cleaner and rose to become a Pharmacy Supplies Officer at a salary of Kshs.82,868/= per month.

41. It is equally not in dispute that his employment was terminated by letter dated 19th April, 2016 for reasons the court found justifiable but found the termination unfair for want of procedural propriety.

42. Regrettably, the Respondent did not avail a copy of the Claimant's employment letter, promotion or salary enhancement notice.

43. The letter of Appointment it provided is the sample letter of Appointment in the CBA between the parties which had neither the Claimant's name nor his position or salary. More significantly, the sample had no authentication or date.

44. Similarly, it is not in contest that the Respondent/Applicant and KUDHEIHA entered into a Collective Bargaining Agreement (CBA) for a period of 2 years from 1st August, 2015 to 31st July, 2017, executed by the parties on 10th September, 2015.

45. The pith and substance of the Applicant's case is that the terms of engagement of the Respondent/Claimant were the CBA above and the same provided that salary was consolidated and thus inclusive of housing allowance as affirmed in numerous decisions of this court and the Court of Appeal cited by the Applicant to reinforce its submissions.

46. The Applicant urges that page 35 of the CBA stipulates that salary would be consolidated.

47. As adverted to herein above, page 35 of the CBA is a sample Letter of Appointment and the relevant clause 3 stated as follows;

> " Further to the recent interview that you had with us, we are pleased to offer you employment in the position of (Title) in the (Department). This letter sets out the general terms of service applicable to this position.
>
> 3. Salary
>
> a. The consolidated salary for the engagement will be (salary) gross per month, payable monthly in arrears, net of any taxes and other statutory deductions"

48. It is unclear whether the new format or formulation of the Letter of Appointment applied to those employed after operationalization of the CBA or to all staff including those employed many years before the CBA, such as the Claimant and it was effective for 2 years only.

49. Instructively, Scheme 'B' of the CBA entitled "Occupational Grading and Entry Levels for New Staff Per Category" prescribes the starting salaries for various positions in Job Groups A, B, C, D1, D2, E1 and E2 and neither captured the Claimant's job group or position nor salary.

50. Relatedly, under Schedule "A", all employees were to receive a wage increment of Kshs.8,000/= and Kshs.9,000/= in the first and second year of the agreement respectively.

51. Puzzlingly, other than the use of the phrase 'consolidated salary' on page 35 of the CBA, no substantive clause of the CBA makes reference to the salary or wage being consolidated. A few illustrations suffice.

52. First, Clause 7 entitled wages was emphatic that;

> " Each employee shall be entitled to be paid a wage at the appropriate job rate provided it is not less than that shown in the Job Groups and Wages Schedule in this Agreement. The Hospital shall be at liberty to pay higher wage rates than those agreed with the union in this agreement.

53. Second, Clause 11 on 'Allowances' identifies only three allowances payable to employees, namely; On-call allowance, Responsibility and Acting Allowance. Leave allowance is addressed and fixed separately.

54. Finally, Clause 20 on "Housing" addresses the provision of hospital housing to employees if available and makes no reference to instances where Hospital housing was not available.

55. In sum, the CBA made no reference to the consolidation of salary in the substantive clauses and only did so in the sample letter of appointment whose commencement date was 1st August, 2015.

56. Significantly, however, Clause 2 (a) of the CBA provides that;

> " This Memorandum of Agreement shall supersede all existing terms and conditions of service and shall apply to all employees (permanent, contract, casual or locum) covered by this Agreement throughout the Hospital . . ."

57. The payslip on record reveals that the Claimant was a member of KUDHEIHA and was therefore covered by the CBA from 1st August, 2015.

58. It requires no belabouring that the payslip is not a contractual document as submitted by the Applicant and case law is emphatic on its role (See *Grain Pro Inc. Ltd vAndrew Waithaka Kiragu* (*Supra*), where the Court of Appeal held that the letter of appointment was the primary contractual document in an employment relationship.

59. Relatedly, it is trite law that the terms of CBA are incorporated into the terms of employment of employees covered by the CBA.

60. A pertinent question for determination is whether the Applicant has demonstrated the specific error on the face of the record as demarcated by the Court of Appeal in *Muyodi v Industrial and Commercial Development Corporation and another* (*Supra*).

61. In that case, the court was clear that the phrase error apparent on the face of the record had no precise definition and largely depends on the facts of the case.

62. But more fundamentally, an error apparent on the record only exists where an error on a substantial point of law is obvious and there cannot be any other option.

63. According to the Applicant, the instrument of engagement was the Appointment Letter dated 27th February, 1992, a copy of which it did not provide whose terms were modified by the CBA in 2015 as at page 35 of the CBA, the phrase "consolidated salary" was used.

64. In the Court of Appeal decision cited above, the court emphasized that there cannot be an error apparent on the face of the record if its establishment required a long drawn process of reading or where there are two options.

65. In the instant case, the Applicant did not point out the specific error in the judgement but appears to be explaining the context.

66. In the circumstances, the court is in agreement with the Respondent's counsel's submission that the error herein is not self-evident or obvious and requires the court to examine the entire CBA including the schedules searching for the phrase 'consolidated salary'.

67. The court is satisfied that if the parties to the CBA envisioned making house allowance part of the Respondent's salary, it could have done so through either clause 7 on Wages, Clause 11 on Allowances or Clause 20 on Housing as opposed to embedding it as paragraph 3 of the Sample Letter of Appointment on page 35 of the CBA. Similarly, the Respondent did not adduce evidence to demonstrate that it notified the Claimant that henceforth his salary would be considered consolidated.

68. For the foregoing reasons, it is the finding of the court that the Applicant has not placed sufficient evidence before the court to demonstrate that the application dated 20th July is merited.

69. As to whether the Principle of continuous injury applies to the instant case, the starting point are the provisions of Section 90 of the *Employment Act*, 2007 that;

> Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap 22), no civil action or proceedings based or arising our of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months after the cessation thereof.

70. The second part of Section 90 of the *Act* embodies the principle of continuing injury. In *Johnson Kazungu vKenya Marine & Fisheries Research Institute* (2021) eKLR, the court stated as follows;

> " Nowhere in Section 90 of the *Act* is it stated (and as submitted for the Respondent) that in event of a continuing injury, the 12 months of limitation are an extension to a time of three years from the date the continuing injury commenced."

71. According to the *Black's Law Dictionary*, continuing injury is defined as;

> " An injury that is still in the process of being committed. An example is the constant smoke or noise of a factory."

72. In *G4S Security Services (K) Ltd v Joseph Kamau & 468 others* (2018) eKLR the Court of Appeal elaborated the principle of continuing injury as follows;

> " Regarding a 'continuing injury', the provision to section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. . . The learned Judge did not determine when the continuing injury ceased for purposes of computing the twelve months period. In the absence of a defined period, the learned Judge erred

in concluding that the claims had no limitation of time. Further, upon the Claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred."

73. The court is guided by the foregoing sentiments.

74. Although, the Applicant's Supporting Affidavit made reference to the non-payment of house allowance (which was denied), a continuing injury implicating the provisions of section 90 of the *Employment Act*, it did not submit on it. The Respondent on the other hand submitted that the principle of continuous injury though applicable to the instant case had no adverse effect on the Claimant's claim for house allowance as his employment was terminated on 4th May, 2016 and filed the suit on 28th October, 2016 within the 12 months limitation period.

75. The court is in agreement with the Respondent's submission.

76. In the end, the court is satisfied that the application herein is bereft of merit and is accordingly dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF FEBRUARY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE