



**Mong'are v National Government Constituencies Development Fund Board
(Cause 66 of 2018) [2023] KEELRC 301 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 301 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 66 OF 2018
DN NDERITU, J
FEBRUARY 2, 2023**

BETWEEN

RELFE TOM MONG'ARE CLAIMANT

AND

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND
BOARD RESPONDENT**

RULING

I. Introduction

1. In an amended memorandum of claim dated 5th August, 2019 the Claimant prayed for judgment against the Respondent as follows -
 - a. A declaration that the Claimant's dismissal from employment was unfair and unlawful hence null and void and thus an order do issue for reinstatement to his employment without loss of benefits.
 - b. An order of payment of loss of remuneration calculated at the rate of the Claimant's remuneration per month from the month of August, 2015 as per the tabulation in paragraph 10 herein above till the date of reinstatement and or full payment.
 - c. Compensation and damages for wrongful dismissal together with punitive and exemplary damages for the same.
 - d. Costs of the claim together with interest at Court rates.
 - e. Any other relief that this Honourable Court may deem fit and just to grant.



2. In a judgment delivered on 12th May, 2022 the Court (O. Makau J) awarded the Claimant the following –Withheld half salary Kshs.1,318,170Salary for November, 2016 Kshs. 188,310Gratuity Kshs. 508,856.94TotalKshs.2,015,336.94
3. In a Notice of Motion dated 14th October, 2022 (the application) the Respondent seeks the following orders –
 1. This Application be and is hereby certified urgent.
 2. The Honourable Court be pleased to review portion of its judgment of 12th May, 2022 in which it granted the Claimant prayer 10(viii) as captured in the amended statement of claim dated 31st July, 2019; being an award of service gratuity for 3 years in the tune of Kshs.508,856.94/=.
 3. The Honourable Court be pleased to set aside and/or review its decision at paragraph 71 of the said judgment to the effect that the Claimant is entitled to service gratuity for 3 years in the sum of Kshs.508,856.94/=.
 4. The Honourable courts do issue such orders and gives such directions as it may deem fit and just in the circumstances.
 5. The costs of this Application be borne by the Claimant
4. The application is brought under Sections 1A and 1B of the *Civil Procedure Act*, Section 16 of the *Employment and Labour Relations Court Act*, Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016, and all other enabling provisions of the law. The application is based on the grounds on the face of it and it is supported by the affidavit of Simon Ndweka, the Respondent’s corporation secretary, sworn on 14th October, 2022 with several annexures thereto.
5. When the application came up in court for hearing on 7th November, 2022 Mr. Aring’a, learned Counsel for the Respondent (the Applicant) informed the court that the Claimant’s Counsel had been served and that no response had been filed and prayed that the application be allowed; the court reserved the ruling for 15th December, 2022.
6. However, and without leave of court, the Claimant filed a replying affidavit sworn by himself on 14th November, 2022 and his Counsel filed written submissions dated 22nd November, 2022.
7. This court is dismayed by the conduct of Counsel for both sides in unilaterally and without leave of court deciding to file documents without even seeking a mention of the matter to seek leave of court to file such documents. Such misconduct is not only unprofessional but also dishonest and this court condemns the same and sends a warning that such misconduct shall not be tolerated in future and the court shall treat such documents with the contempt that they deserve.
8. However, for now, since the said replying affidavit and the written submissions were received and paid for at the court registry, this court shall take them into consideration in writing this ruling but with a stan warning to Counsel that in future this court shall not consider documents or pleadings filed irregularly and unprocedurally.

II. Submissions By Applicant’s Counsel

9. Counsel submits that after the matter had been heard and concluded, and even a decree drawn and issued, it came to the knowledge of the Applicant that while the trial court had awarded the Claimant



a sum of Kshs.508,856.94/= in gratuity for the three years that he had served, the said sum had already been paid to the Claimant.

10. Counsel submits that the evidence and confirmation of the above payment in gratuity came to the knowledge of the Applicant after the cause had been concluded and judgment delivered. Counsel submits that the Applicant was not able to discover and or avail the evidence of the said payment during the limited time of the trial.
11. Counsel submits that if the award of gratuity is allowed to stand the same shall amount to double payment and unjust enrichment to the Claimant.
12. Counsel has identified two issues for determination by this court to be firstly, whether the Applicant has met the threshold for review of the impugned part of the judgment and secondly, whether the right to apply for review has been defeated by the Applicant's filing of a notice of appeal against the said judgment.
13. Counsel has cited Section 16 of the *Employment and Labour Relations Court Act* and Rule 33 of the Employment and Labour Relations (Procedure) Rules in support of the argument that this court has powers and the discretion to allow and issue an order of review on account of an error or mistake apparent on the face of record, discovery of new and important matter or evidence, clarification of any issue, or for any other sufficient reason.
14. Counsel further submits that sufficient reason as a basis for review is intended to avoid miscarriage of justice and he has cited *Sergii Gergel V Arfa Afra Ltd T/a Imax Africa Ltd (2020) eKLR* and *Wananchi Group Limited V Communications Commission of Kenya & Others (2013) eKLR* among other decisions in support of this argument.
15. Counsel submits that in view of the clear and unambiguous new evidence now available, that the Claimant had already been paid his gratuity, there are sufficient reasons and grounds for setting aside the award on gratuity.
16. Counsel further submits that the application has been brought without delay. He argues that the judgment in this cause was delivered on 12th May, 2022 and the application was filed on 17th October, 2022. Counsel submits that vide a letter dated 29th July, 2022 which has been attached to the supporting affidavit, Counsel for the Claimant was requested to confirm that indeed gratuity had already been paid but the reply was sent after about a month hence causing further delay in filing of this application for determination of the issue by court.
17. Counsel has cited various authorities in delineating on what may constitute unreasonable or inordinate delay. He has cited *Kenya Power & Lighting Co Ltd V London Distillers (K) Ltd (2014) eKLR* among other decisions on this point.
18. On the issue of whether the notice of appeal filed by the Applicant bars the Applicant from seeking review, Counsel has argued that a notice of appeal is of itself not an appeal but only an expression of intention to file an appeal, which intention may be actioned or not. Counsel has cited *Apungu Arthur Kibira V Independent Electoral & Boundaries Commission & 2 Others (2018) eKLR* and *Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others (2014) eKLR*, inter alia, in support of the position taken by the Applicant that a notice of appeal is not an appeal but only an expression of a wish or an intention to appeal.
19. Counsel has submitted that in any event the notice of appeal filed by the Applicant has since been withdrawn as per a copy filed with the submissions but dated 24th October, 2022.



20. It is on the basis of the foregoing that the Applicant pleads that the application be allowed with costs.

III. Submissions By Claimant's Counsel

21. Counsel for the Claimant filed submissions on 15th November, 2022 wherein he has identified the issue for determination as whether the judgment herein should be reviewed as prayed for by the Applicant.
22. Counsel has submitted that the Applicant has already filed an appeal vide a notice appeal that has been exhibited by the Applicant. Counsel argues that the notice of appeal amounts to an appeal and hence the application offends the provisions of Section 80 of the *Civil Procedure Act* and Order 45(1)(b) of the Civil Procedure Rules.
23. Counsel has cited Serephen Nyasani Menge V Rispah Onsase (2018) eKLR in support of the argument that a party cannot file an appeal and at the same time apply for review over the same subject matter.
24. On discovery of new or important matter or evidence Counsel has relied on Republic V Advocates Disciplinary Tribunal Ex parte Apollo Mboya (2019) eKLR in advancing the argument that discovery of new evidence or matter is not enough for a party to obtain review orders. He argues that an applicant has to demonstrate that such evidence or matter was not within its knowledge and could not have been obtained after exercising due diligence. Counsel argues that the Applicant has not demonstrated that it deserves orders sought for review of the judgment.
25. Counsel submits that the Applicant is seeking to make a new case and raise new defence to the claim which it failed to avail during the trial. Counsel argues that the move by the Applicant in seeking for review is in abuse of court process and amounts to conducting a cause through trial and error. He concludes that it is a cardinal rule that litigation must come to a logical conclusion and that the Applicant should not be allowed to further delay the conclusion of this cause.
26. On delay in filing of this application for review, Counsel submits that the delay of about six months in filing the application after the judgment was delivered has not been explained by the Applicant and that is inexcusable. Counsel has cited Executive Committee Chelimo Plot Owners Welfare Group & 288 Others V Lang'at Joel & Others (2018) eKLR in support of his submission on this issue of unexplained delay.
27. Counsel has submitted that this court is being asked to revisit a matter in which it is *funtus officio* after the judgment was delivered on 12th May, 2022. He submits that the Applicant is pitching a new case which it failed to avail as defence during the trial and that this court should not countenance such alleged abuse of court process. Counsel has cited Menginya Salim Murgani V Kenya Revenue Authority (2014) eKLR and Peterson Ndung'u & 5 Others V Kenya Power & Lighting Co. Ltd (2018) eKLR in support of this argument.
28. In conclusion, Counsel argues that the Applicant has approached the court with unclean hands as it has not even settled the uncontested awards and that if the orders sought are granted that will prejudice the Claimant as this matter has been pending in court since 2018. The Claimant prays that the application be dismissed with costs.

IV. Determination

29. The foremost duty of this court is to be fair and just to all those who approach it in accordance with *the Constitution* and other laws. Section 3(1) of the *Employment and Labour Relations Court Act* provides that the principal objective of the Act is “to enable the court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act”.



30. The above provision finds authenticity in Article 159 of *the Constitution*. The duty and obligation of a civil court is also emphasized in the provisions of Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act*.
31. The foregoing provisions of the law override the need for undue adherence to technical legalisms and procedures. At the end of each ruling or judgment this court has a duty and indeed an obligation to look back and reflect on whether justice has been done.
32. One of the orders that this court can grant under Section 12(3)(viii) of the *Employment and Labour Relations Court Act* is “any other appropriate relief as the court may deem fit to grant”. Further, Rule 33 of the Employment and Labour Relations Court (Procedure) Rules gives this court powers to grant orders of review in merited cases. The foregoing provisions that give this court powers to review an order or judgment are worded and fashioned in the same language as is found in Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.
33. Without splitting hairs, Rule 33(1) of the Employment and Labour Relations Court (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 the 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.
34. The grounds cited above on which an application for review may be made are exclusive and not cumulative. Any one of the grounds or a combination of a number of them, as the case may be, may form a good basis for issuance of an order for review. However, it is clear that an application for review of an order or judgment may only be made where such an order or judgment is appealable but no appeal has been filed, or where there is no provision of an appeal against such order or judgment. The long and short of it is that an applicant cannot enjoy both an appeal and review simultaneously.
35. In consideration of all the materials placed before this court and the submissions by counsel for both parties, there is only one main issue that commends itself to this court for determination – Does the application for review by the Applicant meet the threshold for the orders sought to be granted?
36. There is still a debate out there on whether the entire *Civil Procedure Act* and the Rules thereunder apply to this court (ELRC) but as stated above the principal objective for this court is to ensure that justice prevails to all and sundry that come before it. However, on the issue of review of orders and judgments there are clear provisions on the same as captured in Rule 33 of the Employment and Labour Relations Court (Procedure) Rules as reproduced above. This court shall hence apply those provisions as the applicable law in this case. In any event, as alluded to elsewhere above in this ruling, the above Rule 33 is fashioned along the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.



37. The other condition in seeking for review is that the application shall be filed within reasonable time. This of course means that there should be no unreasonable delay in filing the application. The necessary implication is that any undue delay in filing an application for review ought to be explained.
38. The application for review by the Applicant is hinged on one main ground that there is discovery of new and important matter or evidence which, after exercise of due diligence, was not within the knowledge of the Applicant and hence could not be produced during the hearing. The alleged important matter and or evidence is that the Claimant had already been paid his gratuity for the contract served in the sum of Kshs.508,856.94/= and that any further payment on the same shall amount to double payment and unjust enrichment on the part of the Claimant.
39. The Applicant has availed evidence of payment of gratuity in the total sum of Kshs.694,822/= and payment vouchers therefor. While the Claimant has denied the said payment in paragraph 4 of his replying affidavit this court notes that the said denial is merely a statement without any explanation offered or evidence adduced to counter the evidence availed by the Applicant. This court makes the finding and conclusion that indeed the Claimant was paid and received the said sum in gratuity and he has deliberately failed to acknowledge that fact in bad faith.
40. However, there is no good explanation as to why the evidence on payment was not adduced during the hearing. But would that leave this court helpless and hopeless as to allow the Claimant enjoy double payment and hence unjustly enrich himself? The unequivocal answer to this rhetorical question is no and the reason therefor shall become clearer in the succeeding paragraphs of this ruling.
41. The other important aspect for consideration is whether there was an appeal pending as at the time when the application was filed. This court takes the view that a notice of appeal is merely an expression of an intention or a wish to file an appeal. A notice does not constitute an appeal as the notice cannot stand alone in the hearing of an appeal. It is a first procedural step in filing of an appeal, which appeal the intending party may file or not. The intending Appellant has to file a memorandum of appeal, a record of appeal, and set in motion the process of having the appeal admitted at which point the court has to satisfy itself that the appeal is properly filed before settling the same for hearing. No matter how long a notice of appeal hangs around there is no way an intending appellant may argue that he has filed an appeal.
42. This court therefore agrees with the decisions in *Noradhco Kenya Limited V Loria Michele* (1998) eKLR and *Nicholas Kiptoo Arap Korir Salat V IEBC* (Supra), among others, that the filing of a notice of appeal is not of itself tantamount to filing of an appeal. In other words, a party who has filed a notice of appeal, unless the same is followed up with filing of the record of appeal and all other requisite pleadings, cannot claim to have filed an appeal.
43. In any event, though filed after the application for review had already been filed, the Applicant has exhibited a notice of withdrawal of the said notice of appeal. In the considered view of this court, therefore, there is no appeal pending over the impugned judgment and there was no appeal pending as such at the time the application for review was filed.
44. On the issue of whether there has been inordinate and or unreasonable delay in filing of the application, this court is of the considered opinion that the delay of about five months, though not satisfactorily explained, is neither inordinate nor prolonged in the circumstances of this matter and in the interests of justice.
45. The review sought if granted would substantially alter the amount payable to the Claimant by reducing the award in the decree by a sum of Kshs.508,856.94/=. This cannot be said to be a light matter.



46. This court notes that while the decree was issued on 23rd May, 2022 execution proceedings have not commenced and hence no prejudice and or delay may be occasioned to the Claimant or any other party and no huge costs have been incurred by either party after the delivery of the judgment.
47. For the foregoing reasons, although this court is not convinced that the Applicant has demonstrated and or made a good case for review under Rule 33(1)(a) cited above this court is of the considered view that this is a good case for review under Rule 33(1)(d). In the interest of justice and fairness this court finds that there is sufficient reason for allowing review of the judgment delivered on 12th May, 2022 to the extent that the amount awarded in gratuity in the sum of Kshs. 508,856.94/= be removed and that a fresh decree be issued accordingly to reflect the correct amount due and payable to the Claimant.
48. As noted elsewhere in the preceding paragraphs of this ruling, this court cannot sit back and watch in the face of injustice and or unfairness to any party before it. The court cannot be helpless and or hopeless as the law has provisions to take care of all such situations in ensuring that justice prevails.
49. Contrary to the averments and allegations by the Claimant, if the said award of gratuity is allowed to stand the same shall be highly prejudicial to the Applicant as the same would amount to double payment and unjust enrichment on the part of the Claimant.
50. For all the above reasons, the application for review dated 14th October, 2022 is allowed to the foregoing extent and the judgment is reviewed accordingly. The decree issued on 23rd May, 2022 is hereby set aside for a fresh one to issue reflecting the correct position based on this review which has adjusted the award downwards in the sum of Kshs.508,856.94/=.

V. Costs

51. Although the application for review has succeeded, there is no satisfactory explanation on why the evidence on payment of gratuity was not availed during the hearing other than that the Applicant was under pressure and in a hurry in preparation of the trial and that the said evidence was not readily available. For the forgoing reason there is no order on costs for this application.

VI. Orders

52. Flowing from the foregoing, in regard to the Notice of Motion dated 14th October, 2022 this court makes the following orders –
 - a. The said application is allowed and an order for review granted to the extent that a sum of Kshs.508,856.94/= awarded as gratuity is hereby set aside, removed, and discounted from the award.
 - b. The decree issued by court on 23rd May, 2022 be and is hereby set aside and it is hereby ordered that a fresh decree be issued reflecting the correct amounts in line with the orders herein.
 - c. There is no order as to costs on the application.

DATED, DELIVERED VIRTUALLY, AND SIGNED, AT NAKURU THIS 2ND DAY OF FEBRUARY, 2023.

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DAVID NDERITU

JUDGE

