



REPUBLIC OF KENYA



KENYA LAW
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Okong'o v Nine One One Group Limited (Employment and Labour Relations Cause 80 of 2018) [2023] KEELRC 667 (KLR) (14 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 667 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 80 OF 2018**

**HS WASILWA, J
MARCH 14, 2023**

BETWEEN

DENNIS OKONG'O CLAIMANT

AND

NINE ONE ONE GROUP LIMITED RESPONDENT

RULING

1. Before me for determination is the Claimant/Applicant's Notice of motion dated January 16, 2023, filed under certificate of urgency pursuant to Section 94 of the *Civil Procedure Act* Cap 21, Sections 3, 12(3)(viii) and 16 of the *Employment and Labour Relations Court Act*, Rules 17(1), 29(3) and 33 of the *Employment and Labour Relations Court (Procedure) Rules 2016*, Paragraph 11(a) of the *Advocates Remuneration Order* and all enabling provisions of law seeking for the following Orders;
 1. Spent.
 2. That this Honourable Court be pleased to review the judgment and decree herein dated June 16, 2022 and order that;
 - a. The award of 1-month salary in lieu of notice, underpayments of salary and public holidays being items 2(1), (2) and (3) in the decree accrue interest at Court rates from the date of filing the claim until payment in full.
 - b. The award of 10 months' salary as compensation for the unlawful contractual termination and costs of the suit being items 2(4) and (5) in the decree accrue interest at Court rates from the date of judgment until payment in full.
 3. That this Honourable Court be pleased to order that the Respondent has not filed a valid Notice of Objection to the Ruling on Taxation delivered on November 8, 2022.



4. That, in the alternative, this Honourable Court be pleased to grant leave to the Claimant to execute the decree herein pending the hearing and determination of the Respondent's intended reference against the ruling on taxation delivered on November 8, 2022.
5. That the costs of this application be borne by the Respondent.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of the Claimant deposed upon on the January 16, 2023.
3. The affiant stated that it is not clear from the judgement, whether the interest awarded by the Court is on costs, decretal sum or both. Further that the Court awarded interest from the date of judgment as opposed to the date of filing the suit, as is the norm, without giving any reasons.
4. The applicant avers that the taxed costs were assessed on the November 8, 2022 at Kshs 218,551. On November 17, 2022, the Respondent wrote a letter that seemed like a notice of objection, while also requesting for a ruling of the taxation. According to the applicant the letter of November 17, 2022 is not a letter of objection to taxation because the letter does not specify the items of the Bill of costs which are being objected as provided for under Paragraph 11(a) of the [*Advocates Remuneration Order*](#). In any case that no requisite fees were paid for the purported notice of objection.
5. It is stated that the Claimant is in dire need of the decretal sum to be able to meet his financial obligation especially for his school going children. He added that as much as there is no stay of execution or appeal preferred against the Judgement of the Court, the Notice of Objection is on record stalling taxation of the Bill of costs. The applicant thus urged this Court to grant them leave to proceed with execution pending the taxation of their Bill of costs.
6. Directions were taken for the application to be heard by written submissions, with the applicant filing on the February 8, 2023 and the Respondent on the February 23, 2023.

Applicant's Submissions.

7. The Applicant submitted on two issues; whether the judgement and the decree herein should be reviewed and whether there is a valid objection.
8. The Applicant submitted from the onset that since the Respondent has not file any response to the application the same is unopposed and should be allowed as prayed. He submitted that section 16 of the [*Employment and Labour Relations Court Act*](#) provides for Review of orders of the Court, while Rule 33(1) of the [*Employment and Labour Relations Court \(Procedure\) Rules*](#) provide for the procedure of undertaking review.
9. It was submitted that Rule 29(3) of the [*Employment and Labour Relations Court \(Procedure\) Rules*](#) provide for payment of interest on liquidated sum and argued that since his claim was for a liquidated sum the interest ought to have been applied from the date of filling suit and not the date of judgement as ordered by the Court. In this he relied on the case of [*Gilbert Kambuni Ongeri v Kenyatta National Hospital Board \[2018\] eKLR*](#) where this Court held that;-

“I have examined the parties’ averments and submissions herein. I note that from the Plaint, the Claimant sought damages for unlawful dismissal, pay in lieu of notice of 6 months, unpaid salaries, house allowance, medical allowance, and outstanding leave days amongst other prayers. In my judgement, I awarded the Claimant 1 months’ salary in lieu of notice, pending leave days, unpaid salaries and allowances, damages for defamation and damages for unlawful dismissal. My understanding of the law as it stands is that damages are must



be proved. Indeed these were proved and that is why this Court awarded the clamant that limb. Special damages must be proved with documentary evidence. In this respect the special damages proved include leave days, unpaid salaries and allowances and notice pay. I believe then for these, interest should accrue from the date of filing this claim. As for the other items awarded in terms of damages, interest has to remain at Court rates with effect from the date of the judgement. The application for review succeeds in part therefore with items awarded on damages remaining as previously awarded with interest running from the date of judgement and items 1 to 3 being awarded with interest accruing from the date of filing this claim. There will be no order as to costs on this application.”

10. He also cited the case of [Geoffrey Rono v Nakuru County AP Commander & 2 others \[2019\] eKLR](#) where the Court held that:-

“[Employment and Labour Relations Court Act](#), 2011 requiring the Court to put into account the applicable Rules which in this case allow for the award of interests with regard to a liquidated claim, the Claimant having pleaded for his due wages and the Court in judgement on November 11, 2016 having awarded the same, interests ought to have issued. There is a good cause which this Court finds is sufficient to award interests on the liquidated sum of Kshs 1,014,955.00 from the date of filing suit until paid in full. This is what is just and fair.”

11. To further reinforce its argument, the applicant cited the case of [Patrick Mwaura Wagatira v Equity Bank Limited and another \[2021\] eKLR](#) where the Court relied on the case of [Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others \[2018\] eKLR](#), which Court observed: -

“I have come to the conclusion that the Learned Trial Magistrate erred by not advertng her mind to whether interest was payable on the liquidated sum she ordered the Respondent to pay to the Appellant. Had the Learned Trial Magistrate done so, she would have likely reached the conclusion that the Appellant was entitled to an award of interest at Court Rates from the time of filing the suit since she had already concluded that the Appellant was entitled to a liquidated amount which she had been deprived of by the actions of the Respondents. This is the predictable rule on award of interest on liquidated sums that has emerged from our Courts’ repeated application of Section 26 of the [Civil Procedure Act](#). The cases cited above reached the conclusion that where a claim is for liquidated damages, unless there is good cause, the interest should be calculated from the date of filing the suit”.

12. Accordingly, it was submitted that the award of costs from the time of judgement was an error on the face of record and urged this Court to correct the same and award him interest from the time of filling this suit.

13. On whether there is a valid objection to the Bill of costs, it was submitted that Paragraph 11 of the [Advocates Remuneration Order](#) provide for objection to decision on taxation and relied on the case of [Machira & Co advocates v Arthur K Magugu & Another\[2012\] eKLR](#) where the Court held that:-

“Sub-rule (1) requires the party objecting to give notice in writing within 14 days “of the items of taxation to which he objects.” As the trial judge correctly found, the Respondents notice of August 1, 2001 did not comply with that provision. It did not specify the items objected to so that the taxing officer could give his reasons on them. As we have pointed out the intendment of the Rules Committee in providing for objections to bills of costs to be dealt with by references and not appeals or reviews was expedition. If vague notices are given taxing officers might be forced to give their reasons for their taxation of each item



including even those not objected to. That would of course defeat the purpose of that expeditious procedure. Having not specified the items objected to and sought reasons for their taxation, the Respondents notice of August 1, 2001 was fatally defective. It follows that the Respondents reference based on it was incompetent and we agree with counsel for the Appellant that it should have been struck out. Having not given a proper notice specifying the items objected to and seeking the reasons for their taxation at the figures they were taxed, the issue of when the taxing master's decision was received is immaterial and does not avail the Respondents. Under sub-rule (2), time stops running from the date a proper notice is filed, which of course must be within 14 days of taxation, until receipt of the taxing master's reasons for his decision."

14. Based on the above, it was submitted that the purported notice of objection has not outlined the items the Respondent seeks to object as such the same cannot raise a reference and urged this Court to find as much.
15. In conclusion, the Applicant submitted that in the event the Court does find the Objection valid, then to grant it leave to pursue the decretal sum while the bill of costs is pending for taxation.

Respondent's Submissions.

16. The Respondent on the other hand submitted on only one issue; whether the application is merited.
17. It was submitted that as much as the application herein is an amorphous claim, the same is principally on review as provided for under Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules* and for the Claimant to allege that there is an error on the face of the record on mere fact that the Court did not award him costs from the date of filling the suit, does not meet requirements under Rule 33. In this they cited the case of *National Bank of Kenya v Ndungu Njau (1997) eKLR* where the Court held that;

"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. 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."

18. As a result, it was submitted that the failure by the Court to award costs from the date of filing cannot be deemed as an error apparent on record to warrant review Orders. In this they relied on the case of *Nyamogo and Nyamogo v Kogo [2001] EA. 174*. He added that the applicant does not seek for clarification from the Court but for the Court to change its position on interest awarded. He argued that the prayer for costs to be awarded from the time of filing the suit was not prayed for in the Claim and also that payment of interest is a discretion of the Court.
19. It was submitted that under Rule 29 of the *Employment and Labour Relation Court (Procedure) Rules*, the Rules uses the verb 'may' on award of interest, showing that the award of interest is discretionary and in any case that the rules does not expressly provide that the said interest when paid should be done from the date of filling suit.
20. On the case cited by the applicant; *Patrick Mwaura Wagatira v Equity Bank Limited and another [2021] eKLR*, the Respondent submitted that the case herein can be qualified from the said case law



because in the case of Patrick Mwaura Wagatira, the Court had not determined the issue of interest warranting the decision by the Court.

21. The Respondent also relied on the case of *National Bank of Kenya v Ndungu Njau (1997) eKLR* and submitted that it cannot be a grounds for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. He added that the award of interest is a discretion of the Court and if the Applicant is dissatisfied, they ought to appeal against the decision of the Court and not seek review.
22. On the validity of the Notice of Objection, the Respondent submitted that in their letter of November 17, 2022, they objected to the ruling delivered on November 8, 2022 on the bill of costs and requested for a copy of the ruling, together with grounds and reasons for taxation. He argued that the taxing master only pronounced the taxed costs of Kshs 218,551 without giving reason for the said decision or how each item was taxed. On that note the case of *Machira & Co advocates V Arthur K. Magugu & Another [2012] eKLR*, is not applicable in this case. He added that the Notice of Objection was not ambiguous because they relied on a ruling that was virtually delivered. Also that it was impracticable for the Respondent to access the Ruling of the Court and only relied on the oral pronouncement by the taxing master.
23. The Respondent then submitted that since it has lodged an Objection to the ruling, the burden shift to the taxing master to provide grounds and or reason for its determination to enable the Respondent take further steps of lodging a reference.
24. On the leave sought to execute the decretal sum pending costs, it was submitted that the provisions of section 94 of the *Civil Procedure Act* are only applicable where the Costs have not been ascertained by taxation. On that basis, it was argued that costs have been taxed and the provisions of Section 94 of the *Act* are not applicable at this stage.
25. The Respondent, in conclusion, submitted that it is not objecting to the decretal sum awarded by the Court, therefore that there is no need to order execution proceedings when the Respondent is willing to pay the same but only that it is awaiting the costs to be ascertained in order to pay the lump sum.
26. I have examined the averments and submissions of the parties herein.
27. There are 2 issues for this Court's determination being:-
 1. Whether this Court can review its Judgment as prayed.
 2. Whether the Court should allow execution pending taxation of costs as prayed.
28. On the 1st issue, indeed the Court can review its judgment, ruling and orders as per Rule 33 (1) of the *ELRC (Procedure) Rules 2016* which 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;
 - (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”.

29. The applicants seeks review on the ground that this Court didn't order for costs to run from date of filing suit.
30. In the judgment herein delivered on June 16, 2022, I awarded the Claimant 1 month's salary as pleaded and holiday pay as pleaded.
31. I ordered for costs with effect from the date of judgement. The applicants contend that the award for 1 month's salary in lieu of notice, underpayment of salary and public holiday pay should be subject to costs from the date of filing suit.
32. The award of 1 month salary in lieu of notice only became payable after this Court made a finding on it and pronounced itself on it. This could not have been subject to interest at the time of filing suit.
33. As concerns underpayment of salary, it is indeed true that the need to pay this amount accrued even before the filing suit and therefore it was an error for this Court not to pronounce that interest was payable with effect from the date of filing suit.
34. This also applies to payments for public holiday which was due even before filing suit this being an entitlement which was due as was the applicant's salary.
35. I will review my Judgment and order that interest of public holiday not paid is also payable with effect from the date of filing suit.
36. On the issue of allowing execution pending taxation, I note that Section 94 of the CPA states as follows;-

“94. Execution of decree of High Court before costs ascertained Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation”.
37. The law herein envisages that on an application by a Decree Holder, the Court may direct execution of the same.
38. As it were, costs herein have been taxed and a ruling delivered by the taxing mistress.
39. In the circumstances, the issue of execution pending taxation has already been overtaken by events.
40. It is therefore my finding that the application to allow execution pending taxation is not allowed.
41. In the circumstances, review of the judgment of the Court dated June 16, 2022 is allowed only to the extent that the amount awarded under paragraph 41 limbs 2 and 3 are subject to interest with effect from the date of filing suit.
42. The rest of the judgment remains undisturbed.
43. Costs to the applicant.

RULING DELIVERED VIRTUALLY THIS 14TH DAY OF MARCH, 2023.

HON LADY JUSTICE HELLEN WASILWA



JUDGE

In the presence of:-

Ratemo for Claimant – present

Tanui for Respondent – present

Court Assistant - Mathew

