



**Kenya Hotels and Allied Workers Union & another v Mayfair Holdings Limited  
(Imperial Hotel) (Cause 35 of 2019) [2023] KEELRC 1057 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1057 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 35 OF 2019**

**CN BAARI, J**

**MAY 4, 2023**

**BETWEEN**

**KENYA HOTELS AND ALLIED WORKERS UNION ..... 1<sup>ST</sup> CLAIMANT**

**DANIEL OCHIENG OGAYI ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**MAYFAIR HOLDINGS LIMITED (IMPERIAL HOTEL) ..... RESPONDENT**

**RULING**

1. Before Court is the 2<sup>nd</sup> Claimant/Applicant's motion application dated 16<sup>th</sup> December, 2022, brought pursuant to Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules*. The Applicant seeks that the Court reviews part of the judgment delivered on 17<sup>th</sup> November, 2022.
2. The application is supported by grounds on the face of the motion and the affidavit of Daniel Ochieng Ogayi, sworn on 16<sup>th</sup> December, 2022.
3. The Applicant avers that the Court computed his dues based on a monthly salary of Kshs. 34,800 instead of Kshs. 45,045/- which was his consolidated salary at termination.
4. The Applicant further avers that the Court indicated in its judgment that it awarded the Applicant 8 months' salary in lieu of notice based on his pleadings, while his prayer in the amended statement of claim was for 12 months' salary as compensation for the unfair termination.
5. The Applicant further avers that the Court found that he had not proved his claims for prorated leave, service charge, housing, acting allowance and unpaid salary, while he had adduced evidence under his amended claim to support his claims.
6. The Respondent opposed the application vide grounds of opposition filed on 24<sup>th</sup> January, 2023. The Respondent's assertion is that there are no new matters warranting the court's review of the judgment in the matter.



7. It is the Respondent further argument that the application seeks to have the Court sit on appeal of its own judgment.
8. Parties canvassed the application by way of written submissions and both parties filed their submissions. and which have been duly considered.

### **Determination**

9. I have considered the application, the grounds and affidavit in support, the Respondent's grounds of opposition and the submissions by both parties. The issue for determination is whether the Applicant has established grounds for review of the judgment of this Court rendered on 17<sup>th</sup> November, 2022.
10. Section 16 of the *Employment and Labour Relations Court Act*, empowers this court to review its judgments, awards, orders or decrees in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.
11. Further, Rule 33 (1) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, provides as follows on review:

“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.”
12. The Applicant's application for review is premised on the Court misconstruing the evidence placed before it and arriving at the wrong decision. In *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR the court stated thus:

“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.....”
13. The Applicant argues that his salary at termination was Kshs. 45,045/- and not Kshs. 34,800 which the Court used to compute what is owed to him by the Respondent.
14. The computation of the sum payable to the Applicant under the judgment herein, was based on the totality of evidence before the Court, and not just the Applicant's amended statement of claim.
15. The Applicant for instance told the court during the hearing that his monthly salary at termination was Kshs. 30,000.00, yet this is not the amount used in the computation, and which amount is as a matter of fact, lower than the amount used in the computation.
16. The issues subject of the application in my view, are neither errors nor omissions on the part of the Court as to meet the threshold for grant of review orders. The issues subject herein, are matters that can



only be addressed before an Appellate Court, as to do so herein, would amount to this Court sitting on appeal in its own judgment.

17. In *Francis Origo & Another v Jacob Kumali Mungala* [2005] eKLR, the Court of Appeal held that an erroneous conclusion of law or evidence, is not a ground for review, but may be a good ground for appeal.
18. Further, in *Joseph Kipkemboi Tanui v Chief Defence Forces & 2 others* [2020] eKLR, it was held that an appeal lies for an error of judgment, while an error apparent on the face of the record is the subject for review.
19. In whole, I find the Applicant's application dated 16<sup>th</sup> December, 2022, devoid of merit, and is hereby dismissed with costs to the Respondent.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4<sup>TH</sup> DAY OF MAY, 2023.**

**C. N. BAARI**

**JUDGE**

**Appearance:**

**N/A for the 1<sup>st</sup> Claimant**

**Mr. Daniel Ogayi the 2<sup>nd</sup> Claimant/Applicant present in person**

**Mr. Ojuro present for the Respondent**

**Ms. Christine Omolo-C/A**

