



Otieno & 32 others v Jaramogi Oginga Odinga University of Science and Technology & another (Cause 346 of 2014) [2023] KEELRC 1562 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1562 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 346 OF 2014
CN BAARI, J
JUNE 22, 2023

BETWEEN

MONICA A OTIENO & 32 OTHERS CLAIMANT

AND

JARAMOGI OGINGA ODINGA UNIVERSITY OF SCIENCE AND TECHNOLOGY 1ST RESPONDENT

BONDO TEACHERS TRAINING COLLEGE 2ND RESPONDENT

RULING

1. Before court is the 1st respondent's motion dated November 28, 2022, and filed before court on similar date, brought pursuant to sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act, order 45 rules 1 and 2 and order 51 rule 1 of the Civil Procedure Rules, and articles 48 and 50(2) of the Constitution. The 1st respondent seek orders:
 - i. Spent
 - ii. Spent
 - iii. That the honourable court be pleased to review/set aside and or vary its ruling dated October 21, 2021, in particular paragraph 11 thereof to have it comply with the judgment dated July 5, 2018, that sums due are payable by both respondents for the period the claimant's worked for them and the same are due on the claimants' attaining retirement age.
 - iv. That this honourable court be pleased to declare the execution levied by Pambo Investments Auctioneers as against the 1st respondent/applicant on November 18, 2022 to be null and void *ab initio*, the warrants of attachment issued be recalled and the claimants directed to settle the auctioneer's costs if any.
 - v. Spent



- vi. That the costs of this application be provided for.
2. The motion is supported by grounds on the face and the affidavit of Jeptanui Katwa. The crux of the motion being that this court by a ruling dated October 21, 2021, entered judgment for the claimants in the sum of Kshs 4, 464,298.92/- on account of pension and gratuity, while the substantive judgment dated July 5, 2018 stated that the sums due are payable by the respondents for the period the claimants worked for them and upon attaining retirement age.
 3. The 1st respondent avers that there is an apparent error on the face of the record with respect to the ruling, and that the same should be reviewed/set aside and/or varied.
 4. The 1st respondent further states that there exist substantive and proper grounds upon which the orders sought ought to be granted.
 5. The claimants opposed the motion *vide* grounds of opposition and a replying affidavit sworn by Monica Otieno the 1st claimant on January 25, 2023.
 6. The claimants' aver that the instant motion is an afterthought for having been filed thirteen months after the ruling sought to be reviewed, and further that this court is functus officio in as far as this matter is concerned.
 7. It is the claimants' position that there is no error apparent on the face of the orders as alleged, and that the tabulation filed by them, relates to gratuity from the date of employment by the 2nd respondent, until they joined the service of the 1st respondent.
 8. The claimants contend that gratuity due and owing remains the obligation of the 1st respondent from the time they joined its service until retirement and/or exit. It is their position that the ruling of October 21, 2021, was properly delivered and that no appeal was preferred against it.
 9. On the question of when the pension/gratuity becomes due and payable, the claimants have in paragraph 17 of their replying affidavit acknowledged that the same becomes due and payable upon exiting the service of the respondents.
 10. The claimants aver that those of them that have since retired from the service of the 1st respondent, have not been paid their gratuity accrued from initial employment to 2010, when they joined the 1st respondent.

Determination

11. I have considered the application together with grounds in support, those in opposition and the parties' submission. The singular issue for determination is whether there exists an error apparent on the face of the ruling rendered in this matter on October 21, 2022, as to warrant the grant of review orders.
12. Section 16 of the *Employment and Labour Relations Court Act* and rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, empowers this court to review its judgments, awards, orders or decrees.
13. The orders sought to be reviewed/set aside and/or varied read as follows: -

“Paragraph 10 in view of the time it has taken the 1st respondent to file and serve the computed gratuity/pension owing and payable to the claimants, and in view of the fact that the computation has not been filed to date, the court adopts the computation filed by the



claimants as the gratuity/pension owing and payable to the claimants to form part of the judgment delivered in this matter on July 5, 2018.

11. For the avoidance of doubt, it is ordered that the 1st respondent pays the claimants a total gratuity/pension of Kshs 4,464,298.89/=”
14. Review of judgment, award, order or decree is possible 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.
15. The ground for the review sought herein, is on account of an error said to be apparent on the face of the record. Specifically, the applicant avers that under paragraph 11 of the ruling this court proceeded to issue a decree against the 1st respondent to release benefits to employees who had not served in its service.
16. In the case of *Zablon Mokuva v Solomon M. Choti & 3 others* [2016] eKLR, it was held that an error apparent on the record is a simple error that can be easily corrected without belaboring to give wide or two-way interpretation. It is direct.
17. The judgment of Justice Maureen Onyango delivered on her behalf by Justice Nduma Nderi on July 5, 2020, made pronouncement on who was to pay the amount to be tabulated. I thus agree with the 1st respondent that paragraph 11 of the ruling of October 21, 2021, could easily be interpreted to mean that the 1st respondent was solely responsible for the full amount payable.
18. On when the amount was to be due and payable, this court did not spell out the time when the pension/gratuity becomes payable, as the same was clear from the judgment earlier rendered, to be the time when the claimants exit the service of the respondents.
19. I thus return that the orders of the court granted on October 21, 2021, are reviewed, to the extent that the respondents are liable to pay the claimants the sum therein, in accordance with the judgment of the trial court, while the amount payable remains unchanged.
20. I conclude by holding that the claimants are at liberty to within the law, levy execution for amounts that are due and payable as against the respective respondents.
21. The interim stay orders are lifted in view of the clarification made herein.
22. The claimants/respondents will bear the auctioneer’s costs and each party shall bear their own costs of the instant application.
23. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 22ND DAY OF JUNE, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Rakewa present for the Claimants

Ms. Odhong present for the 1st Respondent



N/A for the 2nd Respondent

Ms. Omolo - C/A

