



**Munialo v Nzoia Water Services Company Limited (Cause
188 of 2018) [2023] KEELRC 1815 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1815 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 188 OF 2018
CN BAARI, J
JULY 27, 2023**

BETWEEN

PATRICK WANYONYI MUNIALO CLAIMANT

AND

NZOIA WATER SERVICES COMPANY LIMITED RESPONDENT

RULING

1. Before Court is the Respondent's motion application dated April 17, 2023, brought pursuant to Articles 47,48 & 50 of the Constitution, Sections 12, 13, 16, 20 & 29 of the Employment and Labour Relations Court Act, Rules 28 and 33 of the Employment and Labour Relations Court Procedure Rules, and Sections 1A, 1B & 3A of the Civil Procedure Act. The Respondent/Applicant seeks Orders THAT:
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 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. The Honourable Court be pleased to review the judgment, award and/or orders and decree pronounced on January 27, 2022
 - v. The warrants of attachment and sale issued by the Honourable Court on April 6, 2023, and the proclamation notices by Nyaluoyo Auctioneers dated April 11, 2023 be declared null and void and/or they be withdrawn in their entirety.
 - vi. Costs be borne by the Claimant/Respondent.
2. The application is supported by grounds on the face of the motion and the supporting affidavit of Patricia Caroline Okello. The crux of the motion being that advance payments were made to the



- Claimant/Respondent herein, and which information was not brought to the attention of the Court during the hearing, with the result that the amount already paid formed part of the award made in favour of the Claimant.
3. The Respondent/Applicant avers that the Claimant/Respondent's failed to disclose the amount already paid to him, and his Advocates proceeded to instruct Auctioneers to obtain warrants of attachment and sale so as to execute.
 4. It is the Respondent/Applicant's aversion that considering statutory deductions, the award due to the Claimant/Respondent was Kshs 4,588,989.64, and which amount it has fully settled.
 5. It is the Respondent/Applicant's contention that it is important to review the judgment of the Court taking into consideration the new issues of advance payment of gratuity and salary made to the Claimant, so that he does not benefit twice from public funds.
 6. Parties urged the application by way of *viva voce* evidence on June 21, 2023. Counsel for the Respondent/Applicant submitted that this Court is empowered under Rule 33 of the Employment and Labour Relations Court Procedure Rules, 2016 to review its judgment/orders on account of new matter or evidence.
 7. It is the Applicant's submission that upon checking its files, it discovered that the Claimant/Respondent herein, had been paid a service gratuity and a salary in advance, and which issue was not brought to the attention of the Court during trial.
 8. It is its further submission that the Claimant/Respondent was aware of this fact, and did not bring it to the attention of the Court resulting in an award for gratuity, while the same had already been paid.
 9. It is the Applicant's submission that the Claimant/Respondent is not a agent of the Kenya Revenue Authority (KRA), and is thus not entitled to receive statutory deductions on its behalf. It is its further submission, that being an employer, it is the Applicant who should deduct and remit the deductions to KRA on behalf of the Claimant.
 10. The Applicant finally submits that it was an oversight on their part not to have raised the issue of advance payments during trial, and that the Claimant is not entitled to benefit twice from public funds.
 11. Counsel for the Claimant/Respondent submitted that the application herein, violates Section 74 of the [Employment Act](#), 2007, that requires that an employer keeps proper employee records.
 12. It is his argument that the Applicant/Respondent is seeking to amend its pleadings post judgment, and in the process take a different cause of action in the guise of an application for review.
 13. It is the Claimant's further submission that the Respondent/Applicant is in Court to seek protection from imminent execution. It is his further submission that no effort has been made to show that the evidence now before Court could not be traced within the trial period.
 14. The Claimant's Advocate further submitted that the Applicant has not moved the Court within reasonable time, and without unreasonable delay, and that the delay has not been explained.
 15. It is Counsel's submission that there is no compelling information brought to show that the Claimant was paid.
 16. It is his prayer that the application is dismissed for having failed to meet the threshold for grant of review orders.



Determination

17. I have considered the motion, the grounds in support, those in opposition and the oral submissions by both parties. The issue that arise for determination is whether the Applicant/Respondent's application meets the threshold for grant of review orders.
18. Section 16 of the *Employment and Labour Relations Court Act*, empowers this court to review its judgements, awards, orders or decrees in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.
19. Rule 33 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides thus 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.”
20. The Applicant/Respondent seeks review on the basis of discovery of new and material evidence which could not be traced at the time the matter was before court, and could therefore not be produced at the time of trial.
21. The new evidence relates to payments on account of service gratuity and salary advance made to the Claimant/Respondent herein, before the suit subject of the judgment sought to be reviewed was instituted.
22. In the judgment rendered by this Court on January 27, 2022, the Claimant/Respondent was awarded the following reliefs:

“In conclusion Judgment is entered for the Claimant against the Respondent as follows: -

 - i. Three months salary in lieu of notice at Kshs 1,181,634.00
 - ii. 6 months salary as compensation for unfair dismissal at Kshs 2,363,268.00
 - iii. Gratuity at 31% for the years worked.
 - iv. A certificate of service
 - v. Costs of the suit and interest.”
23. In *Rose Kaisa v Angelo Kaiza*, the court held:

“Before a review is allowed on the ground of discovery of new evidence, it must be established that the Applicant had acted with due diligence and the existence of the evidence was not



within his knowledge; and if found that the Petitioner did not act with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause...”

24. The Claimant/Respondent has not denied receipt of advance pay on account of service gratuity. Further, he has not denied the pay slips produced before this Court as prove of this payment.
25. The money in issue came from public coffers and it would be improper to allow the Claimant to benefit twice from public coffers when he, just like the Respondent/Applicant, knew that he was paid the gratuity but proceeded to make a claim for the same.
26. I hold that the award to the Claimant/Respondent on account of gratuity be and is hereby varied premised on the payment already made in respect of service gratuity.
27. I however have not found new evidence showing that the Claimant received a salary advance.
28. I conclude by holding that the application herein, meets the threshold for grant of review orders.
29. Section 49(2) of the Employment, 2007, expressly provides that any payment made by the Employer on account of remedies for wrongful dismissal and unfair termination, shall be subject to statutory deductions.
30. It thus goes without saying that the award to the Claimant/Respondent is subject to statutory deductions, and which can only be deducted and remitted by the employer/Applicant on behalf of KRA and not by the Claimant.
31. I thus concur with the Applicant’s submissions that the Claimant/Respondent is not a KRA agent.
32. I hold that for the avoidance of doubt, the amount payable to the Claimant/Respondent is subject to statutory deductions, and which is to be deducted and remitted by the Applicant.
33. In whole, the Judgment rendered in this matter on January 27, 2022, is reviewed and/or varied as follows: -

Judgment is entered for the Claimant against the Respondent as follows: -

- i. Three months’ salary in lieu of notice at Kshs 1,181,634.00
- ii. 6 months salary as compensation for unfair dismissal at Kshs 2,363,268.00
- iii. A certificate of service
- iv. Costs of the suit and interest.
- v. Parties shall bear their own costs of the application.
- vi. The warrants of attachment and sale and the proclamation notices by Nyaluoyo Auctioneers are withdrawn.
- vii. The Respondent/Applicant will bear the Auctioneers costs.

34. Orders of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH DAY OF JULY, 2023.

C. N. BAARI

JUDGE



Appearance:

Mr. Maruti Present for the Claimant/Respondent

Mr. Makori present for the Respondent/Applicant

Christine Omolo- C/A

