



**Kenya Engineering Workers Union v Farm Engineering Industries Limited
(Cause E003 of 2022) [2023] KEELRC 2334 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2334 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E003 OF 2022
CN BAARI, J
OCTOBER 5, 2023**

**BETWEEN
KENYA ENGINEERING WORKERS UNION APPLICANT
AND
FARM ENGINEERING INDUSTRIES LIMITED RESPONDENT**

RULING

1. Before court is the claimant/applicant's motion dated May 9, 2023, brought pursuant to section 16 of the *Employment and Labour Relations Court Act* and Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules*. The Applicant seeks that the court reviews the judgment delivered on April 20, 2023, and order the respondent to pay the claimant service pay/gratuity in accordance with clause 21 of the Collective Bargaining Agreement (CBA) between the parties herein.
2. The application is supported by grounds on the face of the motion. No affidavit in support of the motion was filed with the application.
3. The applicant avers that the judgment was against the parties' CBA which provides that any employee with between 3 and 5 years of service, is entitled to payment of one month salary in lieu of notice, while those who serve for between 5 and 10 years, are entitled to service pay/gratuity of 19 days for each completed year of service.
4. The applicant seeks that the court reviews its judgment and make an award per clause 21 of the CBA.
5. The respondent opposed the motion vide a replying affidavit sworn on June 20, 2023 and further lodged a preliminary objection similarly dated.
6. It is the respondent's position that the instant motion violates Rule 17(8) of the *Employment and Labour Relations Court (Procedure) Rules*. It had reliance in *Skair Associates Architects v. The Evangelical Lutheran Church of Kenya & 4 others* to buttress this position.



7. The respondent further avers that the claimant has not submitted the grounds upon which the motion is premised in that it has not said whether there is an error or mistake in the judgment or even demonstrated sufficient reason to review the judgment.
8. The respondent states that the claimant/applicant is inviting this court to sit on appeal in its own decision, the court having already found that the CBA in question was not produced in evidence during trial and nor has it now been produced.
9. It is the respondent's further submission that the applicant has already lodged an appeal before the Court of Appeal on the entire judgment of this court and that the application herein, does not meet the threshold set under section 16 and Rule 33 of the ELRC Act and Rules.
10. Parties urged the motion orally on July 25, 2023, wherein, they reiterated their pleadings.

Determination

11. I have considered the application, the grounds in support, the replying affidavit in opposition and the oral submission by both parties. The issue for determination is whether the applicant has established grounds for review of the judgment of this court rendered on April 20, 2023.
12. 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. 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.”
13. The applicant's application is premised on the assertion that the court did not make an award for payment of gratuity/service pay, yet the same is provided for under the CBA between the parties herein.
14. The court in its judgment sought to be reviewed, stated as follows at paragraph 63: -

“For reason that neither the CBA nor the grievant's letter of appointment was produced in evidence, the court is unable to establish whether the grievant was entitled to either service pay or a gratuity in addition to the NSSF contribution.”
15. By this paragraph, it is clear that the court addressed the issue of gratuity and stated its reasons for not allowing the claimant's prayer. The CBA has not now been produced before court as to be deemed as new evidence which could not for some reason be produced at the hearing.



16. Further, it is clear that under Rule 33 of the *ELRC Procedure Rules*, a party can only seek review orders where they have not lodged an appeal. The court was told during the hearing of this motion, and which submission the applicant did not controvert, that the applicant herein, has already filed an appeal against the same judgment now sought to be reviewed, which action disentitles the Applicant to review orders.
17. In conclusion, I find and hold that the applicant's application does not meet the threshold for grant of review orders, and is hereby dismissed with no orders on costs.
18. Orders of the court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 5TH DAY OF OCTOBER, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Haraka present for the Claimant/Applicant

Mr. Njiru h/b for Mr. Gitonga for the Respondent

Ms. Christine Omolo-C/A

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