



**Maingi v Milicons Limited (Civil Appeal E043 of 2022)  
[2023] KEELRC 3138 (KLR) (20 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3138 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CIVIL APPEAL E043 OF 2022  
NJ ABUODHA, J  
NOVEMBER 20, 2023**

**BETWEEN**

**STEPHEN KITHEKA MAINGI ..... APPELLANT**

**AND**

**MILICONS LIMITED ..... RESPONDENT**

**RULING**

1. The Respondent filed application dated 6<sup>th</sup> July, 2022 under sections 12(3) (v) &(vi) and section 16 of the *Employment and Labour Relations Court Act, 2011*; rules 17(1) & 33(1)(b)(c) & (d) and (2) of the *Employment and Labour Relations Court (Procedure) Rules* 2016 seeking for orders that the reviews and/or vary its judgment of 28<sup>th</sup> March, 2023.
2. The Application was based on grounds that there was a mistake or error apparent on the face of the record and the judgment required clarification and further that there were other sufficient reasons for review in that the judgment was in breach of the law.
3. The application was supported by the Affidavit of Stephen Kitheka Maingi the Appellant herein, who averred that he wished the Court to review its judgment of 28<sup>th</sup> March, 2023 as there was a mistake or error apparent on the face of the record in that the judgment was silent on the prayer for service pay.
4. The Appellant averred that the service pay was prayed for in the lower court and the Respondent had admitted the same by making part payment of Kshs 16,800/= and once the court established he was a permanent employee he was entitled to the service pay.
5. The Appellant further averred that the judgment was also silent on issue of interest on the award made by the court. That he was entitled to the interest having been deprived of his dues as an employee for over 4 years.



6. The Appellant averred that the judgment needed some clarifications like which statutory deductions were applicable on the monies awarded as taxation should not be levied on awards as per Section 3 of the *Income Tax Act*.
7. The Appellant also averred that the Judgment was contradictory in that in the body the court states that the certificate of service was issued to the Appellant yet the court still ordered that the Appellant be issued with certificate of service. That the court did not make a clear finding on the claim for damages for unfair termination.
8. The Appellant averred that the court fell short of finding that redundancy procedures were not followed by the Respondent which made the termination unfair hence entitled to damages. That the Court's action of substituting the claim for damages to one month's notice was in breach of law as they are two separate and distinct remedies under the law and one remedy could not stand in place of another. The Court gave payment of Kshs 89,900 as the reason for not awarding damages. The said amount was 2 weeks unpaid wages, part payment of leave, service pay and ex-gratia payment hence could not be damages for unfair termination.
9. The Appellant averred that Kshs 33,500/= which was part of Kshs 89,900/= should not be deducted from the judgement sum because it was a gift and the Respondent did not pray for it be treated as payment.
10. The Appellant further averred that the court made an arithmetical error in its calculations for underpayments in that it pegged the Appellant's salary paid at Kshs 18,000 but did not make an allowance for the fact that the Appellant testified that he worked on weekends and public holidays hence entitled to double pay on those days.
11. The Appellant finally prayed that the court reviews the judgment and awards, service pay, damages for unfair termination, underpayments and interests.
12. In reply the Respondent filed its Replying Affidavit sworn on 15<sup>th</sup> May,2023 by Miriam Ogotu the Human Resource Manager of the Respondent and averred that there was no mistake apparent on the face of the record on the court being silent on the prayer for service pay. The company did not have an agreement for service pay.
13. The Respondent averred that the Appellant was not approaching the court with clean hands by failing to disclose that he was paid Kshs 87,900/= by the Respondent and the amount of Kshs 16,800/= indicated as service was for the 28 days he had worked as a casual employee but not paid. The total amount of Kshs 87,900/= had Kshs 33,500 as ex-gratia payment which the Appellant had not disclosed to the court.
14. The Respondent averred that the court held that each party bears their own costs which was the court's discretion and to challenge this should be in a different forum not a review. The applicable deductions on the award were provided for in the *Employment Act*. The Prayer for damages was subject of an appeal. The respondent further alleged that the Appellant was trying to appeal through the back door.
15. The Respondent averred that the Application was a waste of court's time and brought in bad faith since the issues raised by the Appellant/Applicant were subject of an Appeal. The Respondent urged the court to dismiss the Application for lack of merit.



## Determination

16. The Court has considered the pleadings and submissions filed by the parties herein and note that rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provides for review 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.
17. The Applicant relies on mistake or error on face of record and further seeks clarification of the judgment. The Appellant raises issue of the judgement being silent on service pay, interest and statutory deduction. He further takes issue with the quantum of damages awarded by the Court for unfair termination, procedure of redundancy and arithmetic calculation of dues. From the perusal of the supporting affidavit however, the Court does not seem to see any mistake or error apparent on the face of record or any clarification needed or sufficient reason for review.
19. In *Kenya Engineering Workers Union v Steel Structures Limited; Kenya Building, Construction, Timber and Furniture Industries Employees Union (Interested Party)* [2020] eKLR the Court agreeing that there was no new evidence explained the ground of sufficient reason as follows;
- As submitted by the Respondent and Interested Party, the affidavit sworn by John Thiong'o does not amount to a discovery of new evidence that was not within the knowledge of the Applicant. Further, I do not find that this is sufficient reason for review. In *Nasibwa Wakenya Moses v University of Nairobi & another* [2019] eKLR the Court held:
- “An application for review may be allowed on any other “sufficient reason.” The phrase ‘sufficient reason’ within the meaning of the above rule is analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in *Sadar Mohamed vs Charan Singh and Another* where the Court held that: -
- “Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).”
20. From the above proposition it is clear that sufficient reason ought to relate with discovery of new evidence or error on the face of record which in this case the Court is not persuaded there was any. There was no error on the face of record. On the issue of interest on costs, the court held that each party would bear their own costs hence the issue of interest does not arise. In any event this was a matter that went to the discretion of the trial Court and if was wrongly exercised, could only be challenged on appeal. On the issue of statutory deduction on the award, this was provided for under section 49(2) of the *Employment Act* hence no clarification was needed.
21. On the claim for damages for unfair termination, the same also goes to discretion of the court and could only be challenged on appeal if improperly exercised. In essence therefore, the Appellant would



seem to be invoking the review jurisdiction of the Court on matters which could only be raised on appeal. That cannot happen as the Court cannot sit on appeal on its own decision.

22. From the foregoing, the Court is of the view that the issues raised by the appellant herein do not fall within the purview of the Court in the exercise of its review jurisdiction. The application is therefore found without merit and is hereby dismissed with costs.
23. It is so ordered.

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2023**

**DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2023**

**ABUODHA NELSON JORUM**

**JUDGE**

