



**Transport Workers Union v Green Hills Investment Limited (Cause 58 of 2016) [2023] KEELRC 2907 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2907 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 58 OF 2016  
L NDOLO, J  
NOVEMBER 16, 2023**

**BETWEEN  
TRANSPORT WORKERS UNION ..... CLAIMANT  
AND  
GREEN HILLS INVESTMENT LIMITED ..... RESPONDENT**

**RULING**

1. On 27<sup>th</sup> July 2023, I entered judgment in favour of the Grievant as follows:
  - a. 12 months’ salary in compensation.....ksh 366,828
  - b. 1 month’s salary in lieu of notice.....30,569
  - c. Salary for 11 days in February 2013 (30,569/30\* 11).....11,209
  - d. Leave pay for 22.5 days (30,569/30\* 22.5).....22,927
  - e. Service pay for 9 years (30,569/30\*15\*9).....137,561
  - Total.....569,094
2. Subsequently, the Respondent filed a Notice of Motion dated 8<sup>th</sup> August 2023, seeking review and setting aside of the judgment.
3. The Motion is supported by an affidavit sworn by the Respondent’s Human Resource Manager, Peris Oloo and is based on the following grounds:
  - a. That there is an irregularity on the face of the record pursuant to the judgment dated 27<sup>th</sup> July 2023. The judgment is irregular because the Court did not consider that during the production of the Grievant’s evidence in chief and his subsequent cross examination, the



Grievant admitted having been paid all his terminal dues, including leave pay and pay for days worked in February 2023 in the cumulative sum of ksh 34,136;

- b. That the Court erroneously found that the Grievant was entitled to an award for service pay in the sum of ksh 137,561 while the Grievant failed to prove that any such amount was due and payable to him;
  - c. That despite the Respondent's request to the Union to mutually consider the efficacy of the judgment, the Union declined and instead insisted that the Respondent must pay the entire decretal sum;
  - d. That the said errors on the face of the record are sufficient reasons to enable the Court to consider and grant the orders sought in the Notice of Motion;
  - e. That the Respondent is aggrieved by the judgment of the Court and the application prima facie raises legal and factual issues that would reasonably cause the Court to stay execution of the judgment pending review of the judgment on the grounds *inter alia* that there is discovery of new and important matter of evidence which could not have been produced at the time of the hearing of the suit on 24<sup>th</sup> January 2023;
  - f. That in the meantime, the Respondent has paid the Grievant ksh 397,397 being partial payment of the decretal sum of ksh 569,094. This payment represents the award made for compensation for unfair termination (ksh 366,828) and one month's salary in lieu of notice (ksh 30,569);
  - g. That the Respondent's partial payment of the decretal sum is a clear demonstration that the Respondent is acting in good faith;
  - h. That in order to strike a proportionate balance that preserves the adjudicative authority of the Court, while ensuring that no party is unduly prejudiced, it is only fair and just that the orders sought are granted;
  - i. That the consequences of the judgment will unjustly enrich the Claimant despite the Grievant's admission that he had received his terminal dues and his failure to prove his entitlement to service pay as required under the relevant law;
  - j. That it is only fair and just in the circumstances that the orders sought be granted.
4. The Claimant filed a Reply dated 30<sup>th</sup> October 2023 by which it accuses the Respondent of shifting the burden of proof to the Grievant. The Claimant relies on Section 74(1) of the [Employment Act](#), which places the responsibility of keeping employment records on the employer.
  5. The Motion was urged by way of written submissions. In its submissions dated 25<sup>th</sup> October 2023, the Respondent reiterates its assertion that during the hearing, the Grievant admitted having been paid his terminal dues. The Respondent therefore faults the Court for allegedly failing to take the Grievant's admission into account, which the Respondent terms as an error apparent on the face of the record.
  6. The Respondent further faults the Court for making an award for service pay, which claim the Respondent contends, was not proved. In support of its applications on this limb of the judgment, the Respondent sought to produce the Grievant's NSSF Statement dated 1<sup>st</sup> August 2023.
  7. In its submissions dated 11<sup>th</sup> September 2023, the Claimant states that the Respondent has not established any ground for review of the judgment of the Court delivered on 27<sup>th</sup> July 2023.



8. The power of this Court to review its own decisions is donated by Section 16 of the *Employment and Labour Relations Court Act* and Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*.
9. Rule 33(1) of the Procedure Rules provides 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; or
    - b. on account of some mistake or error apparent on the face of the record; or
    - c. if the judgment or ruling requires clarification; or
    - d. for any other sufficient reason.
10. By its Motion, the Respondent invites the Court not only to review its judgment dated 27<sup>th</sup> July 2023, but to set it aside. The Respondent's dissatisfaction with the judgment arises from the awards for leave pay, service pay and salary for days worked in February 2013.
11. The Respondent states that the judgment of this Court is irregular first, because the Grievant allegedly admitted in evidence that he was paid his terminal dues and second, because he did not adduce any evidence to support his claim for service pay.
12. The Respondent terms the award on leave pay and salary for days worked as an error on the face of the record. It is now well settled that the window for review on this ground cannot be used as an opportunity for the Court to have a second look at its own decision; rather, its purpose is to facilitate correction of obvious errors that are apparent on the record.
13. This position was affirmed in *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR where it was held:

“A review may be granted whenever the court considers 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. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
14. The Court of Appeal, in its decision *Nyamogo and Nyamogo Advocates v Kogo* [2001] EA 173, pronounced itself on this issue in the following terms:

“There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two options, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the



original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

15. In similar fashion, in *Francis Njoroge v Stephen Maina Kamore* [2018] eKLR it was held that a wrong view on an issue may be a ground for appeal but certainly not a ground for review.
16. In this case, the Respondent faults the finding by the Court that the Grievant is entitled to leave pay, service pay and salary for days worked in February 2013. In urging its case, the Respondent relies on an alleged admission by the Grievant in his testimony before the Court.
17. Were the Court to be persuaded by the Respondent’s argument, it would have to take a second look at the Grievant’s testimony. Such a move would amount to a retrial and not a review. In reaching this conclusion, I am bolstered by the Respondent’s attempt to introduce new evidence in the form of an NSSF Statement.
18. On the whole, I find that the Respondent’s Notice of Motion is not an application for review but an invitation to the Court to have a second look at a case on which it has already rendered itself. This Court has no such powers.
19. The Respondent’s Notice of Motion dated 8<sup>th</sup> August 2023 is therefore declined.
20. The interim orders granted on 11<sup>th</sup> August 2023 are vacated.
21. Each party will bear their own costs.
22. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF NOVEMBER 2023**

**LINNET NDOLO**

**JUDGE**

Appearance

Mr. Ndege (Union Representative) for the Claimant

Mr. Ng’ang’a for the Respondent

