



**Ngege v Kamagambo Adventist College & another (Cause E034 of 2021)
[2023] KEELRC 2748 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2748 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E034 OF 2021
CN BAARI, J
NOVEMBER 2, 2023**

BETWEEN

ODONGO SALMON NGEGE CLAIMANT

AND

KAMAGAMBO ADVENTIST COLLEGE 1ST RESPONDENT

**DR SAMUEL MISIANI, PR JAPHETH OCHOROKODI & ELD DAVID SANDE
(SUED IN THEIR CAPACITY AS LEADERSHIP OF SDA CHURCH-WEST
KENYA UNION CONFERENCE) 2ND RESPONDENT**

RULING

1. Before Court is the Claimant/Applicant's motion dated 7th July, 2023, seeking the review of orders made vide a judgment rendered in this matter on 29th June, 2023. The motion is supported by grounds on the face and the affidavit sworn by the Applicant.
2. The Applicant avers that it approached Court through a claim dated 26th February, 2021, seeking various reliefs, which they submit were pleaded and proved during the hearing of the suit.
3. It is the Applicant's submission that the Court made an error in not awarding or addressing their prayer numbers (c) & (g) in the statement of claim, which concerned unpaid salaries for the period that the Applicant had worked and payment of termination allowance in accordance with the Respondents' working policy.
4. It is the Applicant's assertion that he is entitled to unpaid salaries as working without pay is breach of his employment contract. The Applicant further states that the Court held that pay slips produced in evidence were not conclusive evidence of payment. The Applicant had reliance in the case of *Joseph Ouko Lwambe v Royal Garments Industries EPZ Ltd* [2018] eKLR to buttress this position.



5. The Applicant finally avers that the motion meets the requirements of Order 45 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act*, that allows for review.
6. The Respondents opposed the motion vide a replying affidavit sworn by George O. Oromo on 16th July, 2023. The Respondents states that the Court pronounced itself satisfactorily in respect of every limb of the reliefs sought by the Claimant.
7. The Respondents further avers that the only relief that remains standing out in the Claimant’s application is the one touching on paragraph 5(vii), which was a relief that sought

“An inquiry into whether the 1st and 2nd Respondents are obliged to pay the Claimant a Termination Allowance after at least seven years of service as stipulated in the ECD Working Policy; an on such determination, order that the Claimant be compensated under this regime accordingly.”
8. It is the Respondents’ assertion that there was no specific relief sought by the Applicant for unpaid salaries for the month of April 2018 to July 2018 in his Statement of Claim. They further states that the Claim in the Statement of Claim touching on payment for the months of April 2018 to July 2018, are for reduced salaries and NOT unpaid salaries as is now sought in the application.
9. The Respondents further aver that the claim for unpaid salaries is a new relief that was neither pleaded, proved nor sought in the Applicant’s Statement of Claim, and the Claimant is estopped from introducing it at this stage, when the matter is concluded and the file closed.
10. It is the Respondents’ submission that this application does not fall within the parameters for review on the basis that the Applicant is asking the court to reopen the case, yet the Court is already functus officio.
11. The Respondents state that if the Applicant is aggrieved by the Court decision, the most he can do is seek redress in a Court superior to this. The Respondents further submit that the Court pronounced itself on all the reliefs sought and those not granted were dismissed, hence there is no error.
12. Parties urged the motion orally on 3rd October, 2023, wherein, they reiterated their pleadings.

Analysis and Determination

13. The issue that falls for consideration is whether the Applicant is entitled to the review orders.
14. 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.”
15. The Applicant’s assertion is that the Court in the judgment sought to be reviewed, made an error in not awarding his prayers (c) & (g), which he claim were pleaded and proved. The reliefs in issue are spelt out as follows under the statement of claim:
- “(c) An order that the 1st and 2nd Respondents are jointly or otherwise obliged to pay the cumulative sum of Kshs. 165,255.56 being the unpaid net salary of the reduced for the months of April, May, June, and July, 2018.
- (g) An inquiry into whether the 1st and 2nd Respondents are obliged to pay the Claimant a termination allowance after at least seven years of service as stipulated in the ECD working Policy; and on such determination, order that the Claimant be compensated under this regime accordingly.”
16. Although the Applicant’s claim in the instant application is in relation to unpaid salary, prayer (c) of his statement of claim, and from which the judgment flowed, is a claim for reduced salary.
17. Under paragraphs 79 and 80 of the judgment, this Court had this to say on the claim relating to reduced salaries: -
- “(79) In my view, it is clear that the Claimant was indeed alive to the Respondent’s financial situation, and that the 1st Respondent had obtained the approval of the employees to reduce salaries as evidenced by the wage sheet prepared and executed by the Claimant in January, 2018.
80. I thus find the Claimant’s claim for payment of reduced salaries lacking in merit and is dismissed.”
18. The foregoing excerpts of the judgment delivered on 29th June, 2023, are a clear indication that the Court addressed itself on the issue of reduced salary claimed by the Claimant/Applicant.
19. I thus agree with the Respondents that there was no specific relief sought by the Applicant for unpaid salaries for the months of April 2018 to July 2018 in his Statement of Claim, and in now doing so, he is only seeking to reopen the suit and/or asking this Court to sit on appeal on its own decision.
20. The scenario presented under the instant application, offends the doctrine of *functus officio*, which demands that a person vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter (See *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR)
21. Further, it is also clear that what the Applicant now refers to as an error, is actually his attempt at amending his claim through the back door. In *National Bank of Kenya Ltd v Ndungu Njau* (1997) eKLR the Court stated thus:
- “A review may be granted whenever the court considers that 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.....”
22. In my view, there is no error or omission in the judgment subject of this application that calls for correction in the form of review orders. The Court pronounced itself on the issues raised herein, and the decision can only be reversed on appeal.



23. On the issue of payment of termination allowance, the same was neither proved nor pleaded as alleged. The Applicant in his oral testimony did not testify on the issue, and in any event, the Court in its judgment, awarded the Applicant/Claimant compensation for unfair termination and to award what the Applicant calls a termination allowance, would only amount to unjustly enriching the Applicant at the expense of the employer.
24. In conclusion, I hold that the application as drawn, does not meet the grounds set under Section 16 of the *Employment and Labour Relations Court Act*, read with Rule 33(1) of the *Employment and Labour Court (Procedure) Rules* for the grant of review orders.
25. The application is dismissed with costs to the Respondents.
26. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS
2ND DAY OF NOVEMBER, 2023.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Anyango present for the Claimant

Mr. Onyango present for the Respondents

Erwin Ongor- C/A

