



**Mwangi v African Wildlife Foundation (Cause 1295 of 2016)
[2023] KEELRC 3358 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3358 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1295 OF 2016
JK GAKERI, J
DECEMBER 18, 2023**

BETWEEN

REGINA NJERI MWANGI CLAIMANT

AND

AFRICAN WILDLIFE FOUNDATION RESPONDENT

RULING

1. Before the court for determination is the Applicant's Notice of Motion dated 17th February, 2023 seeking orders that:
 1. This Honourable Court be pleased to review and set aside the order arising from the judgement delivered on 31st November, 2022 owing to an error apparent on the face of the record.
 2. That the costs of this Application be provided for.
2. The Application is expressed under Section 12(1) (3)(1) & (viii) of the *Employment and Labour Relations Court Act*, 2011 and Rules 17 and 33(1)(b) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and is based on the grounds set out on its face and the Supporting Affidavit by Mr. Job Nyasimi Momanyi sworn on 17th February, 2023 who deposes that when the court delivered its judgement on 3rd November, 2022, it failed to address its mind to the other prayers sought and failed to address the issue of house allowance which are separate issues under Section 31 of the *Employment Act*, 2007.
3. That the Claimant had sought a declaration of entitlement to housing allowance and severance pay in addition to damages for unfair termination which the court did not address its mind to due to an oversight.
4. That the applicant seeks a review of the judgement for purposes of correction of the apparent error/ omission on the part of the court.



5. According to counsel, there is a mistake apparent on the face of the record as the other prayers were not considered as they were independent prayers.
6. That the Application has been made without undue delay, in good faith, in the interest of justice and the delay, if any, is reasonable.
7. That no appeal has been preferred in the matter and the court has jurisdiction to correct the apparent error or omission on its part and it was in the interest of justice to have the judgement reviewed.
8. The Respondent did not file a Replying Affidavit but filed submissions.

Applicant's Submissions

9. As to whether the Application for review is merited, counsel submitted that the same was premised on Order 45 Rule 17 of the Civil Procedure Rules, 2010 and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 on account of some mistake or error apparent on the face of the record as the court did not address the issue of house allowance.
10. Reliance was made on the sentiments of the court in Paul Mwaniki v NHIF Board of Management (2020) eKLR on the essence of a mistake or error apparent on the face of the record.
11. Counsel urged that a review was necessary as the court disregarded/omitted or failed to consider the prayer for house allowance.
12. That the Claimant's evidence on non-payment of house allowance was uncontroverted and the court only addressed the issue of unfair termination.
13. The sentiments of the Court of Appeal in National Bank of Kenya Ltd v Ndungu Njau (1997) eKLR were cited to underline the circumstances in which a review may be granted as were those in Nyamongo & Nyamongo v Kogo (2001) 1 EA 173 at 174-175 cited in George Mbutia v Kenya Power & Lighting Co. Ltd (2001) eKLR on the meaning of error apparent on the face of the record.
14. Counsel urged that since house allowance was as statutory right, its omission was a mistake as copies of payslips on record showed that it was not paid.
15. That the applicant had sufficient grounds for a review of the judgement.

Respondent's Submissions

16. Counsel for the Respondent submitted that although the law permitted the applicant to apply for review, it is also clear that the application must be made without unreasonable delay as emphasized in Republic v Public Procurement Administrative Review Board & 2 others (2018) eKLR and in this case, the application was made almost 3 months later and thus did not meet the requirements for review. Sentiments of the Court of Appeal in Pancras T. Swai v Kenya Breweries Ltd (2014) eKLR were also cited on the meaning of "for any other reason" used in Order 45 Rule 1 of the Civil Procedure Rules, 2010.
17. On entitlement to house allowance, counsel submitted on whether a party could make a claim over an expired contract as the applicant was doing as her claim is dated 27th June, 2016.
18. Reliance was made on the Court of Appeal decision in Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho-Kariuki (2017) eKLR on the enforceability of fixed term contracts, to urge that once a contract lapses, no rights and obligations can be assumed or claimed post expiry.



19. Counsel submitted that the Claimant's salary of Kshs.183,550/= was above the minimum statutory wage and was consolidated and the Claimant had not demonstrated otherwise, as he who alleges must prove and had not raised the issue before.
20. Counsel submitted that should the court be inclined to exercise its discretion favourably to the applicant, then it ought to be guided by the sentiments of the court in *Trevar Marembe v For You Chinese Restaurant* (2021) eKLR where the court held that the claim for house allowance for previous year was statute barred.
21. Finally, counsel submitted that since the claim for house allowance was part of the primary claim, it was addressed in the judgement.
22. Counsel further submitted that the Notice of Motion before the court lacked merit and should be disallowed.

Determination

23. The singular issue for determination is whether the judgement delivered on 3rd November, 2022 ought to be reviewed with specific reference to the Claimant's entitlement to house allowance.
24. Before delving into the issue, it is essential to dispose of the issue of timing of the application raised by the Respondent's counsel.
25. It is not in contest that the judgement in question was delivered on 3rd November, 2022 and the application for review was filed on 17th February, 2023 slightly more than 3 months thereafter.
26. Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 provides that the application must be made within reasonable time.
27. In the court's view, a delay of about 3 months generally falls within the confines of reasonable time and the Applicant's Notice of Motion meets the threshold of the law.
28. It is common ground that Order 45 Rule 1 of the *Civil Procedure Rules* and Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 confer upon the court jurisdiction to review its decree or orders at the instance of the aggrieved party.
29. Rule 33 cited above provides that;
 1. A person who is aggrieved by a decree or 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 judgement or ruling –
 - a. ...
 - b. on account of some mistake or error apparent on the face of the record.
 - c. ...
 - d. ... for any other sufficient reason.
30. The upshot of this rule is that the aggrieved person must make an application to the court that passed the decree or made the order within reasonable time, which is a question of fact dependent on the circumstances of each case and more significantly, ensure that the application is grounded on at least one or more of the circumstances set forth in Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016.



31. In the instant case, the applicant premises her application on Rule 33(1)(b) that there was “some mistake or error apparent on the face of the record” in the judgement of the court.
32. It is trite that the phrase error apparent on the face of the record has no precise definition as expressed in *Nyamongo & Nyamongo v Kogo (Supra)*,
- “An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out.”
33. An error on the face of the record must be self-evident on the record and does not require a detailed examination.
34. Similarly, in *National Bank of Kenya Ltd v Ndungu Njau* (1997) eKLR, the Court of Appeal held that;
- “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. It will not be 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.”
35. Finally, the concept was elaborated by the Uganda Supreme Court in *Edison Kanyabwera V Pastori Tumwebaze* (2005) UGSC 1 as follows;
- “It is said that in order that an error may be a ground for review, it must be one apparent on the face of the record i.e an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on record. The error may be one of fact, but it is not limited to matters of fact and includes error of law.”
36. In the instant case, the applicant urges that the fact that the court did not address the reliefs sought with specific reference to house allowance constituted a mistake or error apparent on the face of record as in her view, the prayer was independent of the claim for compensation for unfair termination which failed. That being a statutory right, the prayer ought to have been considered even if the main claim failed.
37. Based on Rule 33(1)(b) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and the applicant’s averments and submissions, the court is persuaded that its failure to address the reliefs on merit amounted to a mistake or error apparent on the face of the record and a case for a review of the judgement delivered on 3rd November, 2022 has been made.
38. As regards the Claimant’s claim for house allowance, it is common ground that the Claimant/Applicant pleaded that she was never paid house allowance and attached copies of payslips to exemplify her case and prayed for its payment for the entire duration of service.



39. It is unclear as to how the sum of Kshs.2,476,515.30 was arrived at as the Claimant's salary varied from time to time.
40. The Respondent on the other hand argued that the Claimant's salary was consolidated but tendered no evidence of the alleged consolidation.
41. The copies of the payslips on record identify the salary as "Basic Pay" and have no entry for any allowance.
42. It is common ground that the last fixed term contract entered into by the Claimant/Applicant effective 1st August, 2014 to 31st January, 2015 stated that the Applicant's gross salary was Kshs.183,550/= annualized as Kshs.2,202,600.00.
43. Section 20(1) of the Employment Act, 2007 requires the employer to give the employee a written statement at or before the time at which any payment of wages or salary is made
44. The pay statement must state the gross amount of wages or salary, any variable pay and statutory deductions.
45. Copies of the applicant's pay slips on record have one entry under "Earnings" namely "Basic Salary" and have no entry for any other payment to the applicant.
46. Strangely, the "basic salary" is also indicated as the "gross salary." On the other hand, the contracts the applicant served under described her salary as gross.
47. Unless otherwise demonstrated, basic salary is the amount paid to the employee exclusive of allowances while gross is an aggregate of the basic salary and allowances.
48. "Basic Salary" cannot be the "gross salary".
49. Although the court is in agreement with the Court of Appeal decision in Grain Pro Kenya Inc. Ltd v Andrew Waitbaka Kiragu (2019) eKLR, that the payslip is not a contracting document, the Respondent is obligated to prove that it paid housing allowance to the Claimant/Applicant.
50. In the absence of evidence to demonstrate that the Claimant's salary was consolidated or the amount paid was inclusive of house allowance, it is the finding of the court that the Claimant was not paid any house allowance as required by the provisions of Section 31 of the Employment Act, 2007.
51. As to whether the applicant was entitled to house allowance, the Respondent argued that the critical issue was whether the Claimant could lay a claim under an expired contract and cited the sentiments of the court in Registered Trustees of the Presbyterian Church of East Africa and another v Ruth Gathoni (*Supra*) to urge that fixed term contracts had no rights, obligations or expectation beyond their expiry date.
52. It is not in dispute that the Applicant served the Respondent under distinct fixed term contracts since July 2002 and the contracts had a commencement date and end date and from August 2012, renewal was not automatic.
53. The last contract date 31st July, 2014 commenced on 1st August, 2014 and ended on 31st January, 2015, a duration of 6 months.
54. Is non-payment of housing allowance a continuing injury within the meaning of Section 90 of the Employment Act, 2007?



55. The court is not so persuaded for the reason that since the allowance is paid monthly, the cause of action arises at the end of every month as opposed to a continuation of a single wrongful act or omission.
56. In *Vipingo Ridge Ltd v Swalebe Ngonge Mpitta* (2022) eKLR, Manani J. expressed the view that;
- “I do not think that failure by an employer to remit any allowance or other payment that is payable periodically at agreed intervals constitutes a continuing injury or damage to the affected employees in terms of Section 90 of the *Employment Act* merely because the non-remittance has been consecutive. The consecutive failures to pay, in so far as they relate to distinct periods of payment of remuneration are separate and severable.”
57. The concept of continuing injury has been addressed in many decisions.
58. In *Mary Kitsao Ngowa & 36 others v Krystalline Ltd* (2015) eKLR, the Court of Appeal cited the definition of *Black’s Law Dictionary*, 10th Edition that;
- “Continuing injury denotes, an injury that is still in the process of being committed. An example is the constant smoke or noise of a factory” expressed itself as follows;
- “This definition connotes an injury that continues to happen at the time the claim is lodged and/or ongoing. In the context of an employment relationship, it presumes that the parties are still on a continuous engagement at the time of claim. What comes to mind is where for example, the dispute pertains to an industrial strike and one of the parties has moved to court on account of an injury that continues to be suffered during the subsistence of the employment and/or strike. However, in this case, it is not in dispute that at the time the claim was lodged, the employment relationship had already been severed. Indeed, it is the termination that gave rise to the cause of action. Any claims arising there from could therefore no longer be termed as continuing injury . . .”
59. The concept was also adverted to *Ol Pejeta Ranching Ltd v David Wanjau Muhori* (2017) eKLR as well as *Ephraim Gachigua Mwangi v Teachers Service Commission & B.O.M Thogoto Teachers College* (2018) eKLR.
60. In *the German School Society & another v Ohany & another* (Civil Appeal 325 and 342 (consolidated) (2023) eKLR, the Court of Appeal relied on the sentiments of the Supreme Court of India in *Balakrishna S.P. Waghmare v Shree Dnyaneshwar Maharaj Sansthan* AIR 1959 SC 798 as follows;
- “It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue . . .”
61. Based on the foregoing authorities and sentiments, the court is not persuaded that non-payment of house allowance was a continuing injury.
62. Having found that the Respondent failed to establish that it paid the Claimant/Applicant housing allowance as by law required, the court is satisfied that she was entitled to house allowance for the duration served subject to the provisions of Section 90 of the *Employment Act*, 2007 and is awarded house allowance at the rate of 15% of the basic salary for 3 years computed on the basis of the actual salary earned by the Claimant/Applicant for the 3 years as follows;



1. February 2012 to July 2012 $(15/100 \times 155,322.27 \times 6) = 139,790.043$
 2. August 2012 to June 2013 $(15/100 \times 173,824.04 \times 11) = \text{Kshs.}286,810.04$
 3. July 2013 to January 2015 $(15/100 \times 183,550 \times 19) = 523,016.02$
63. Finally, as regards severance pay prayed for by the applicant, it is clear that the prayer is unsustainable as the Claimant/Applicant was not declared redundant.
64. In the upshot, the Applicant's Notice of Motion dated 17th February, 2023 is successful and the judgement dated 3rd November, 2022 is reviewed as regards the reliefs sought and the Applicant is awarded house allowance for 3 years amounting to Kshs.949,717.993.
65. There shall be no orders as to costs.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF DECEMBER 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

