



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 103 OF 2017

RICHARD CLIFFORD AWINO.....CLAIMANT

-VERSUS-

UNITED MILLERS LIMITED.....RESPONDENT

RULING

1. This ruling is in respect of the Respondent/applicant's application dated 19th July, 2021 filed pursuant to section 12(3)(i)&(viii), 17(1)&(2) of the Employment and Labour Relations Court Act, Rule 33 (1)(a)(b)(c) &(d) of the Employment and Labour relations Court(Procedure) rules 2016 and all other enabling provisions of law and inherent powers of Court, seeking the following orders;

- 1) **That this Honourable Court be pleased to review judgment delivered on 27.1.2021 to the extent it has duplicated the item on notice pay.**
- 2) **That the Court do find and review the judgment to be in tandem with the evidence tendered in Court to the effect that the claimant was paid salary for the month of January, 2017.**
- 3) **That the Court be pleased to find that the Respondent has complied fully with the judgment of the Court dated 27.1.2021**
- 4) **That the Costs of this Review application be borne by the Claimant.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn by, **Simon Ukokhe**, the Respondents Human Resource manager on 19th July, 2021 and based on the following grounds: -

- (a) That, the Honourable Justice M. Mbaru delivered judgment in this matter to the effect that the full and final terminal dues due to the claimant is Kshs 261,193 less the already paid sum of Kshs. 163,353.75 leaving a balance of Kshs.97,840.
- (b) That the claimant had actually been paid Kshs, 305,440 less statutory deduction leaving a sum of Kshs. 219,345 which was paid to the claimant account as evidence by the pay slips and the banking advise slip attached herein.
- (c) That after thoroughly reading through the judgment, the Court erroneously captioned notice pay twice leading to the wrong final dues.
- (d) The Applicant therefore urged this Court to review the judgment and allow the application as prayed.

3. In opposing the application, the Claimant/Respondent swore a replying affidavit dated 2nd October, 2021 on the following grounds;

- i. That the application herein is misconceived, incompetent, without merit and an abuse of Court process.
- ii. That when judgment was delivered in his favor on 21.1.2021, the applicants failed to pay the decretal sum and when execution became eminent they rushed to this Court with this Application.
- iii. It is the claimant case that there are requirements under Rule 33 of the Employment and Labour Relations Court Procedure Rules 2016 which have not been satisfied by the Applicant.
- iv. According to the claimant there is no error apparent on record to warrant the prayers sought.

v. That the annexed pay slip herein was not produced during hearing when the same was at the Respondent's disposal and the production seeks to adduce evidence after judgment contrary to the law.

vi. That the application is merely seeking to derail the wheels of justice with the effect of denying the claimant his fruit of judgment.

4. The Application was disposed of by way of written submissions with the applicant filing on 25th November, 2021 and the respondent filing on 18th November, 2021.

Applicant's submissions

5. The applicant submitted that it is apparent on the face of the judgment that there was error in calculation of the claimants dues leading to a wrong conclusion. It was argued that this Court has power to correct the said error as was held in **National Bank of Kenya Limited V Ndungu Njau[1997] eklr .**

6. The Applicant submitted that the notice pay was captured as a double item which is a typo error which this Court ought to correct.

7. It was argued that the documents which have now been annexed as evidence could not be possibly obtained at the time of trial and Rule 33 of this Courts Rules allows this Court to review its judgment on discovery of new and importance evidence. In this they cited the supreme Court case of India, **Ajit Kumar Rath V State of Orisa and others Supreme Court Case 596**. Accordingly, the applicant submitted that the bank slip which they could not access at the time is now accessible and therefore urged this Court to exercise its discretion and review the judgment herein.

Respondents Submissions

8. The respondents counsel submitted on two issues: whether the judgment delivered on 27.1.2021 and orders arising therefrom were granted irregularly and whether the applicant had met conditions for review.

9. On the first issue, it was submitted that the judgment of 27.1.2021 was entered regularly both parties having participated in the hearing until its conclusion. The Respondent cited the case of **Fidelity Commercial Ltd V Own Ndungu & Another, HCC NO. 241 of 1998(UR)** where the Court distinguished between a regular and an irregular judgment.

10. On the second issue it was submitted that for review to be considered there are conditions that must be met as provided for under Rule 33 of this Court Rules. The Respondent herein argued that the Applicant has failed to meet any of the said condition pre-requisite to the grant of review to warrant the issuance of the Orders sought.

11. It was further argued that as much as the Applicant alleged to have discovered new evidence now, it has failed to demonstrate how the said evidence was out of reach during trial and efforts taken in obtaining the said evidence thereof. In this the Respondent cited the case of **Tokesi Mambili and another V Simon Litsanga -Civil Appeal 90 of 2001 – Kisumu**.

12. On whether there is an error on the face of record, it was submitted that the alleged error is not apparent and obvious as alleged and will require this Court inference of facts to come to a conclusion therefore going beyond the scope of apparent error. The Respondent supported its argument by citing the case of **Nyamogo and Nyamogo V Kogo (2000) JELR 94555 (CA)**. where the Court discussed what constitutes an error on the face of record.

13. The Respondent herein then submitted that there is neither sufficient cause given by the applicant to warrant the issuance of the Orders Sought and the Respondent therefore prayed for the Application to be dismissed with costs.

14. I have examined the averments of the parties herein. The applicant has sought review of the Judgment of the court delivered on 27/1/21 on account of there being an error on the face of the record.

15. The applicant avers that the court made a duplicate award or notice pay and also awarded 2017 pay which had been paid.

16. In the Judgment delivered on 27/1/21, the court awarded notice pay of 63,069/= and another notice pay of 38,581.50.

17. In this regard, there is an error on the award of 38,581.50 as notice pay as the claimants salary was 63,069/=.

18. There is no error in awarding the claimant salary up to January 2017 as he worked that month.

19. The only error I find on the record and which I correct is to delete the duplicate notice pay 38,581.50 from the amount awarded leaving the total payable at 59,259/=.

20. The rest of the Judgment remains undisturbed.

RULING DELIVERED VIRTUALLY THIS 20TH DAY OF JANUARY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

No appearance for parties

Court assistant - Fred