



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 457 OF 2017

(As Consolidated with Case Numbers 458, 459 and 460 all of 2017)

ERIC OYIER OMONDI.....1<sup>ST</sup> CLAIMANT

DAVID O. OIMA.....2<sup>ND</sup> CLAIMANT

MERCY FLORA ALUOCH.....3<sup>RD</sup> CLAIMANT

SAMSON NTONGAI.....4<sup>TH</sup> CLAIMANT

VERSUS

CATHOLIC UNIVERSITY OF EAST AFRICA.....APPLICANT

RULING

1. Before court is a Notice of Motion application dated 25<sup>th</sup> January, 2021, brought pursuant to Order 45 of the Civil Procedure Rules. The Applicant seeks review of the Judgment of the court delivered on 9<sup>th</sup> December, 2019, on the ground that the figures in paragraph 4 therein, do not reflect the accuracy of the accrued salary arrears owing to the Claimants, and that they are an error apparent on the face of the record.

2. The Applicant's case is that the figures subject of the consent, and those recorded in the judgment of the court are different, the former having been picked from the Claimants/Respondents' claim, and not those agreed in the final consent.

3. The Claimants/Respondents opposed the application vide a replying affidavit sworn by one *Sharon Ochieng Omollo*, Counsel for the Claimants/Respondents herein. The Claimants Counsel avers that the figures subject of the instant application were arrived at by the consent of the parties, and no explanation has been given for the new figures, and further wonders why the issue was not raised earlier.

4. The Respondents further submits that there is a proper consent reached and recorded in the presence of counsels for both parties, and which has a contractual effect, hence cannot be set aside there being no fraud, mistake, or misrepresentation demonstrated at the time of procuring the consent. The Respondents further aver that there is no new and important evidence which was not within the knowledge of the Applicant at the time the decree was made to warrant the review.

5. The Respondents further question the undue delay in seeking review, and aver that the instant application is an afterthought.

6. Parties filed submissions and which have been duly considered.

**Determination**

7. I have considered the application, the grounds on the face of the motion, the affidavit in support, the averments in opposition, and the submissions of the Parties. The issues for determination, are whether the application meets the threshold for setting aside of a consent judgment and whether the judgment delivered on 9<sup>th</sup> December, 2019 should be reviewed.

**Whether the application meets the threshold for setting aside of a consent judgment**

8. The principles that the court considers in setting aside of a consent judgment, were spelt out in the case of *Brooke Bond Liebig vs Mallya (1975) EA 266*, where Mustafa Ag. VP opined thus;

**“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or *misunderstanding*. None of the factors which could give rise to the setting aside of a consent agreement existed.”**

9. The Applicant asserts that the amounts subject of the consent were Kshs. 91,450/- for 1<sup>st</sup> Claimant, Kshs. 231,050/- for the 2<sup>nd</sup> Claimant, Kshs. 531,473/- for the 3<sup>rd</sup> Claimant and Kshs. 173 325/- for the 4<sup>th</sup> Claimant. The Judgement subject of this ruling indicated the amounts payable to each of the Claimants as Kshs.92,000, 324,000, 796,000 and 264,000/- respectively.

10. As submitted by Counsel for the Applicant, the amounts stated in the impugned judgment, are similar to those in the Claimants’ statements of claim. It would then seem that the court in arriving at the figures payable, directly picked the amounts as they appear in the Claimants’ claim.

11. The Applicant has not provided this Court with the consent recorded between the parties to demonstrate that the figures in the consent, now an order of the court; are different from the figures in the Judgment herein. The Applicant has therefore not proved an apparent error or mistake in the face of the Judgment.

**Whether the Judgment delivered on 9<sup>th</sup> December, 2019 should be reviewed.**

12. Rule 33. (1) of the Employment and Labour Relations Court (Procedure) Rules, provide as follows in respect of 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;....”**

13. The court has already found that the Applicant has not demonstrated there being a mistake or error in the face of the Judgment subject of this ruling. It then follows, that the Applicant has not sufficiently justified the review of the Judgment.

14. The Court further notes with concern, the time within which this application was filed, and the fact that the Applicant has continued paying the amount decreed in the Judgment, for close to 17 months without questioning the figures.

15. In the absence of the consent recorded between the parties, coupled with the delay in filing this application, the motion dated 25<sup>th</sup> January, 2021, and filed in Court on 18<sup>th</sup> May, 2021, is without merit and is hereby dismissed.

16. The Orders herein shall apply to Causes No.458, 459 and 460 of 2017.

17. Parties shall bear their own costs of the application.

18. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2022**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Ms. Anuro h/b for Ms. Achieng for the Claimants

Mr. Obara present for the Respondent

Christine Omollo – C/A