



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1394 OF 2018

JACQUELINE M. MUTISO.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. On 17th June 2021, **O.N Makau J** delivered judgment in favour of the Claimant in the sum of Kshs. 696,000 less statutory deductions.
2. The Claimant subsequently filed a Notice of Motion dated 1st July 2021, asking that the judgment be reviewed so as to award her withheld salary together with three months' pay in lieu of notice.
3. The Motion is supported by the Claimant's own affidavit and is based on the following grounds:
 - a) That judgment was delivered on 17th June 2021, awarding the Claimant six months' salary as damages for unlawful termination of employment;
 - b) That in respect of the prayer for payment of withheld salary from 3rd October 2013 to 29th June 2021, the Court indicated that the Claimant had been paid all her salary;
 - c) That in respect of the three months' salary in lieu of notice, the Court indicated that the Claimant had been paid three months' salary in lieu of notice so it was not awarded;
 - d) That the foregoing reasoning was based on the witness statement of Grace Mwangi who misled the Court that the Claimant was paid all withheld salaries and emoluments;
 - e) That the Claimant is yet to be paid her withheld salary and emoluments contrary to the averment by the Respondent's witness, Grace Mwangi. The Claimant is yet to clear with the Respondent and the withheld salary and emoluments can only be paid upon clearance;
 - f) That substantial loss will be occasioned to the Claimant unless the judgment is reviewed and the Claimant is awarded all her withheld salary and emoluments from 3rd October 2013 to 29th June 2018 and the Claimant is awarded three months' pay in lieu of notice;
 - g) That it is in the interest of justice that the present application be allowed as prayed.
4. In its Grounds of Opposition dated 7th December 2021, the Respondent states the following:
 - a) That the application offends the provisions of Order 45 of the Civil Rules, 2010 and Section 80 of the Civil Procedure Act, on review. The Claimant has failed to demonstrate the error apparent on the record that can only be rectified by way of a review application;
 - b) That the Claimant is aware of the Respondent's intention to appeal the decision of the Court delivered on 17th June 2021, with a Notice of Appeal and letter requesting for typed proceedings and judgment being duly filed and served on the Claimant;

- c) That Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 prohibit an applicant from applying for review where an appeal is being preferred against the decision/judgment;
- d) That the Claimant ought to have challenged the issue of withheld salary and emoluments during cross examination of the Respondent's witness, Grace Mwangi who had testified vide her witness statement dated 13th May 2013;
- e) That the Claimant never made any prayer for an award of withheld salary and three months' salary in lieu of notice in her amended Memorandum of Claim and witness statement, both dated 11th July 2019;
- f) That the application seeks to reopen the Claimant's case to adduce evidence when the Court is now *functus officio* in that regard;
- g) That the prayers sought by the Claimant in the instant application are prayers that can only be canvassed in the Appellate Court and not in the instant Court;
- h) That the Claimant is inviting this Court to sit on appeal over its own judgment.

5. 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.

6. 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.

7. My understanding of the Claimant's plea in this application is for the Court to reconsider its findings and conclusions regarding an award for withheld salary and notice pay. In this regard, the Claimant states that the Court was misled by the Respondent's witness and hence arrived at an erroneous finding.

8. I do not think this can be cured by an application for review. In its decision in *Francis Origo & another v Jacob Kumali Mungala [2005] eKLR* the Court of Appeal stated the following:

"...an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal."

9. I do not need to say more. If the Claimant is dissatisfied with the findings and conclusions made by my brother Judge, her recourse lies in an appeal to the Court of Appeal not in a review application before this Court.

10. The Claimant's Notice of Motion dated 1st July 2021 is therefore declined with costs to the Respondent.

11. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF FEBRUARY 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Othim for the Claimant

Mr. Said for the Respondent