



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 404 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

KENYA PRIVATE UNIVERSITIES WORKERS UNION (KPUWU)...CLAIMANT/APPLICANT

VERSUS

CATHOLIC UNIVERSITY OF EASTERN AFRICA.....RESPONDENT

RULING

1. The application before me for determination is dated 9th June 2021. The Applicant seeks review of the judgment of this Court delivered on 13th May 2021. The Claimant avers that there is an error or mistake on the face of the record as the Court inadvertently failed to take into account the prayers in the amended claim.
2. The Respondent opposes the application through the replying affidavit of Lorine Atsieno Muchongori, the Assistant Legal Officer in which she states that the application is fatally defective, lacks merit and does not meet the conditions for review of the judgment delivered on 13th May 2021.
3. Further, that the Applicant has not demonstrated that the impugned decision has an error on the face of the record making the same amenable to review.
4. It is further the averment of the Affiant that the Respondent having filed a notice of appeal on 25th May 2021, the application is intended to derail the appeal.
5. It is the averment of the Affiant that this Court is *functus officio*.
6. The application was disposed of by way of written submissions which the parties duly filed and exchanged.
7. The issues for determination are whether the judgment is amenable to review and if so, whether there is an error on the face of the record for which a review is merited.
8. Review of judgments and orders is provided for under Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 as follows –

Section 16 of the Employment and Labour Relations Court Act

16. Review of orders of the Court

The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.

Rule 33 of Employment and Labour Relations Court (Procedure) Rules

33. Review

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;
- 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.

[Emphasis added]

9. In the instant application, the Applicant acknowledges that there is an appeal that has been preferred by the Respondent to the Court of Appeal, a notice of appeal having been filed by the Respondent. Indeed, ground (iii) of the application reads –

“On 13th May 2021, the Respondent had indicated that they were going to appeal the said judgment and hence the need to review the judgment before the memorandum of appeal is filed and or the record of appeal is prepared and served.”

10. The Rules of this Court are clear that review can only be filed against a decree or order where no appeal has been preferred or where no appeal is allowed. In this suit, the Respondent having preferred an appeal, the judgment of this Court is not subject to a review as the Applicant can raise the issues raised in its application for review in a cross appeal.

11. Besides the foregoing which is sufficient reason to dismiss the instant application, the error referred to on the face of the record is not evident in the judgment. Although the judgment does not refer to the prayers in the amended claim, the prayers considered by the Court were as set out in the submissions of the parties which are based on the amended claim. The prayers sought in the amended claim as reflected on the face of the instant application were considered by the Court and declined. For instance, the prayer that the Court considers salary up to July 2019, which is in the amended claim, was declined and the Court awarded salary up to 18th June 2019, the date of termination. Reason was given in the judgment why salary could not be awarded beyond 18th June 2019.

12. Further, the Court considered pay in lieu of notice, which was demanded at four months’ salary but awarded in accordance with the provisions of the CBA which is based on years of service for each grievant.

13. The Court further considered the prayers for leave, leave allowance, public holidays, gratuity, overtime, salary increment for 2008 – 2019, compensation and special damages sought in the amended claim and awarded what was due. The fact that the Court did not award the prayers sought in the amended memorandum of claim does not mean the same was not considered. Should the Applicant be dissatisfied with the award, it is free to appeal against the same.

14. From the foregoing, I find that the application has no merit and dismiss the same.

15. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF FEBRUARY, 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE