



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2183 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS X. O. K'OMBUT.....PLAINTIFF

VERSUS

UNIVERSITY OF NAIROBI.....DEFENDANT/APPLICANT

RULING NO. 2

1. Before me for determination is an application by the Defendant/Applicant dated 9th June 2021. The Applicant/Defendant seeks orders THAT:

(i) Spent.

(ii) The Court be pleased to review and/or set aside dated 28th May 2021 so far it relates to the tabulation of the Claimants Claim of Kshs.5,178,476.04/-.

2. The application is based on the grounds set out on the face of the Notice of Motion Application and in the supporting affidavit of **David Mukii Mereka**, advocate for the Defendant/Applicant, sworn on the same date.

3. The grounds advanced on the face of the application and the supporting affidavit arise from a judgement delivered on 1st December 2020 and a subsequent ruling on tabulation delivered on 28th May 2021 by this Court.

4. The Applicant/Defendant's advocates avers that it is fair and just that the Court reviews its ruling and gives an opportunity to rectify the unprocedural filing of documents by an advocate which quote figures that are different from the amounts claimed in the plaint.

5. In addition, Counsel states that the amounts prayed for in the plaint and those granted in the final judgment were different. That the supplementary submissions on tabulation dated 12th May 2021 were not accompanied by a supplementary affidavit of the Claimant himself and therefore the said documents are not properly before this Court.

6. Counsel avers that the Claimant will not be prejudiced as the matter has been in Court for 10 years and an additional few days will not make a huge difference, taking into account that the decretal amount including interest will be substantial.

7. Counsel concludes that it is only fair and just that the Court allows for review of its ruling for the ends of justice to be met, decide what is due to the Claimant legally and avoid doing injustice to the Defendant.

8. In response to the application, Counsel for the Plaintiff filed a Replying Affidavit sworn on 7th October 2021.

9. Counsel avers that the tabulation filed by the Plaintiff was based on evidence before this Court as per its list of documents filed alongside its plaint

10. In addition, he states that the Court had given both parties an opportunity to submit on the issue of tabulation and that the Defendant/Applicant could have at the very least put in their tabulation to prove its allegations.

11. Counsel states that the Claimant had proved his case before this Court and that this application seeks to defeat the Claimant's enjoyment

of his dues which he has been pursuing for over ten years. He concludes that the application is frivolous, malicious and an abuse of Court process. He urges the Court to dismiss it.

Defendant/Applicant Submissions

12. Counsel for the Applicant submitted that the Court awarded an amount that had been prayed for in supplementary submissions and not in any pleadings or evidence tabled before Court. He relied on the case of **Daniel Toroitich Arap Moi & Another v Mwangi Stephen Murithi & Another [2014] eKLR** to support the argument that submissions are marketing language and do not constitute evidence at all.

13. Counsel also submitted that no amendment of the plaint was done to include the said amount and as such, the Claimant should be bound by his own pleadings. He relied on the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR** to support his position.

14. The Defendant/Applicant submitted that it was not accorded an opportunity to respond to the Plaintiff's tabulation.

15. Counsel stated that vide a letter dated 27th May 2021, the Applicant had stated that it would like to object to the tabulation of the Plaintiff but the same was not brought to the attention of the Court either by the Plaintiff's Counsel or Counsel holding brief for the Respondent's advocate.

16. He urged the Court not to visit the errors of the advocate on his client especially taking into account the amounts involved. He made reference to the case of **Belinda Muras & 6 Others**

v Amos Wainaina [1978] KLR.

Plaintiff's Submissions

17. The Plaintiff filed its submissions dated 2nd February 2022 in which Counsel submitted that the Defendant/Applicant has not demonstrated to the required threshold that it deserves discretion to be exercised in its favour.

Analysis and Determination

18. I have carefully considered the application, evidence filed therewith and submissions before me. The issue for determination is whether the application herein meets the threshold for review of judgment and orders and if the Applicant is entitled to the orders sought.

Whether this application is merited

19. The Applicant/Defendant filed this application seeking orders to review the Ruling this Court delivered on 28th May 2021. This ruling was a follow up to the Judgment delivered on 1st December 2020.

20. In the judgement, this Court had directed:

"I direct the Defendant to tabulate and present to Court the amount payable to the Plaintiff under those Terms of Service less what was paid to the Plaintiff within 60 days for purposes of final judgement. Should the Plaintiff not agree with the tabulation of the Defendant, he should within 30 days, file his own tabulation and present to Court for final determination..."

21. Upon delivery of the ruling following the above directions, this Court noted that the Defendant/Applicant's Counsel submitted

"That no amount was owing to the Plaintiff at the time of his departure from service at the Defendant and as such there was no need to file a further tabulation."

22. The Plaintiff had filed his tabulation which was served upon the Defendant/Applicant and upon which this Court ruled and stated:

"In view of the fact that the Respondent has not filed any pleading or evidence to controvert the computation of the Claimant, I adopt the undisputed tabulation by the Claimant and enter a final judgement for the Claimant against the Respondent in the total sum of Kshs.5,178,476.04."

23. The application before me seeks to review the above decision. Review is provided for in Section 16 of the Employment and Labour Relations Court Act as follows: -

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.

24. Further, Rule 33 of Employment and Labour Relations Court (Procedure) Rules provides as follows: -

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.

25. While error on the face of a judgement/ruling is enough justification for a Court to review its decision, the circumstances of this case do not disclose the same

26. Both the Respondent and its Counsel have dealt with this matter in a laissez faire manner since its inception, from not filing pleadings during the main suit to informing this Court after judgment had been entered against it that it found no need to file its tabulation because it believed it owed the Plaintiff no monies.

27. This Court gave the Defendant an opportunity to cross examine during the hearing of the suit despite not filing pleadings to defend itself. In addition, this Court granted the Applicant an opportunity to file its tabulations or at least prove what it had paid to the Plaintiff which it did not.

28. Counsel has argued that he was not accorded an opportunity to respond to the Claimant's tabulation. This argument cannot sell. It was Counsel's position before delivery of the final order on tabulation, which was very arrogantly relayed to the Court, that it had paid all the dues owed to the Plaintiff. He therefore cannot be allowed to have a second bite at the cherry after the manner in which the Respondent has handled itself during the conduct of this case.

29. Counsel has argued that the Plaintiff has waited for close to 10 years and waiting a few more days will not cause an injustice. I frown upon such attitude and approach. Whether it is 10 years or 10 days, it is too long a delay in the delivery of justice.

30. I find support in the holding of Gikonyo J. in **Fran Investments Limited v G4S Security Services Limited [2015] eKLR**:

“... reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under Article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff. This is the test I shall apply

here.”

31. **I therefore find that this application has been brought to delay the course of justice and to deny the Plaintiff the fruits of his judgement. The Applicant is not deserving of the orders sought. The application lacks merit and I accordingly dismiss it with costs to the Plaintiff.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH 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 had 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