



**Makori & 2 others v Faulu Microfinance Bank Limited (Cause  
2141 of 2014) [2022] KEELRC 3793 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3793 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2141 OF 2014  
L NDOLO, J  
JULY 28, 2022**

**BETWEEN**

**ANNE WACEKE MAKORI ..... 1<sup>ST</sup> CLAIMANT  
JAMES ASIBA ..... 2<sup>ND</sup> CLAIMANT  
EMILY CHEMELI LANGAT ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**FAULU MICROFINANCE BANK LIMITED ..... RESPONDENT**

*(Arising from the judgment and decree of ON Makau, J dated September 23, 2021.)*

**RULING**

1. On September 23, 2021, ON Makau, J delivered judgment in this matter, *inter alia*, awarding the 1<sup>st</sup> claimant, Anne Waceke Makori the sum of Kshs 11,444,800 in compensation for unfair termination of employment, while at the same time allowing the respondent's counterclaim against the 1<sup>st</sup> claimant in the sum of Kshs 10,597,214 plus interest at commercial rates from September 23, 2021, in respect of a loan amount owed by the 1<sup>st</sup> claimant to the respondent bank.
2. The respondent thereafter moved the court by way of notice of motion dated November 11, 2021, seeking the following reliefs:
  - a. Stay of execution of the decree issued by the court pursuant to the judgment rendered on September 23, 2021 and specifically a stay of execution in respect of that portion of the decree which requires the respondent bank to pay the 1<sup>st</sup> claimant, Anne Waceke Makori, a sum of Kshs 11,444,800 (subject to statutory deductions) (with interest at court rates from September 23, 2021);



- b. Review and variation of a portion of the judgment and decree of September 23, 2021 and specifically the portion that ordered that the 1<sup>st</sup> claimant should pay the respondent bank an amount of Kshs 10,597,214 (plus interest at commercial rates from September 23, 2021).
3. The first prayer was granted at the *ex parte* stage by Onyango, J on November 17, 2021.
4. The respondent now asks the court to review the judgment and decree dated September 23, 2021, in the following terms:
  - a. That in addition to the Kshs 10,597,214 to be paid by the 1<sup>st</sup> claimant to the respondent bank, the 1<sup>st</sup> claimant do pay to the respondent the interest accrued on the said amount (calculated at staff interest rates) from the date of termination of her employment on November 11, 2012 up and until the date of the judgment on September 23, 2021;
  - b. That the aforesaid Kshs 10,597,214 plus interest accrued thereon (at staff interest rates) from November 11, 2014 up until September 23, 2021 do attract commercial interest rates from the date of the judgment up until payment in full.
5. The application is supported by an affidavit sworn by the respondent's Head of Legal, James Murage and is based on the following grounds:
  - a. Judgment in this matter was rendered by ON Makau, J on September 23, 2021;
  - b. In rendering the judgment, the court decreed, *inter alia*, that the respondent bank should pay the 1<sup>st</sup> claimant, Anne Waceke Makori, a sum of Kshs 11,444,800 (subject to statutory deductions) (with interest at court rates from September 23, 2021) as compensation for unfair termination of her contract of employment;
  - c. In respect of the counterclaim, the court decreed that the 1<sup>st</sup> claimant should pay the respondent bank an amount of Kshs 10,597,214 (plus interest at commercial rates from September 23, 2021) in respect of a loan amount owed by the 1<sup>st</sup> claimant to the respondent bank;
  - d. In decreeing that the 1<sup>st</sup> claimant pays the said Kshs 10,597,214 loan amount, the learned trial judge failed to take into account the interest (at staff rates) accrued on the said amount from the date of termination of the claimant's employment on November 11, 2014, up until the date of judgment;
  - e. Two judges of this court, Onyango, J and Abuodha, J, had on two different occasions, on December 5, 2014 and February 12, 2016, respectively ordered that the 1<sup>st</sup> claimant continues (from the date of termination of her employment) to service her loans at staff rates, pending the hearing and determination of the main suit;
  - f. The above orders of the court as rendered by Onyango, J and Abuodha, J have neither been appealed nor set aside;
  - g. The learned trial judge, ON Makau, J himself acknowledged, under paragraph 118 of the judgment, the foregoing findings by his fellow judges;
  - h. The 1<sup>st</sup> claimant has not serviced the loan amount of Kshs 10,597,214 (with or without interest) from the date of termination of her employment on November 11, 2014;



- i. There is need for the judgment to be reviewed to incorporate, into the amount of Kshs 10,597,214, the interest accrued (at staff rates) from the date of termination of the 1<sup>st</sup> claimant's employment up until the date of the judgment;
  - j. The claimants have extracted the decree in respect of the judgment and in the circumstances, the respondent bank is reasonably apprehensive that the 1<sup>st</sup> claimant may proceed to execute the decree before the issue of what is properly due and owing from her to the respondent bank, up until the date of judgment, is determined;
  - k. The claimant bank is not opposed to paying the 2<sup>nd</sup> and 3<sup>rd</sup> claimants the sums decreed to be due and owing to them (minus statutory deductions) under the judgment and is in fact in the process of releasing the said sums to their advocates;
  - l. No prejudice will be suffered by the 1<sup>st</sup> claimant were the orders sought in this application to be granted as what is proposed by the respondent bank is to have the 1<sup>st</sup> claimant pay what is properly due and owing to the bank as per the loan agreements she had entered into with the bank and also as per the orders of the court as issued by Onyango, J on December 5, 2014, Abuodha, J on February 12, 2016 and ON Makau, J on September 23, 2021;
  - m. There exists an error on the face of the judgment and sufficient reason to justify a review of the decree of the court issued on September 23, 2021;
  - n. The instant application has been made without unreasonable delay;
  - o. The respondent bank is willing, as a condition for the grant of stay of execution as prayed, to pay as security for due performance of the decree that may be found to be ultimately binding on it, a sum of Kshs 100,000 a sum in excess of the difference between the decretal sum that was decreed as being due from the respondent bank to the 1<sup>st</sup> claimant (after statutory deductions) and the decretal sum that was decreed as being due from the 1<sup>st</sup> claimant to the bank in the counterclaim;
  - p. After applying statutory deductions to the sum due from the respondent bank to the 1<sup>st</sup> claimant, being Kshs 11,444,800 the sum that would be due to the 1<sup>st</sup> claimant is Kshs 8,238,318 which is less than the amount due from her to the bank, even before applying the staff interest rate of 4% from the date of termination of her employment on November 11, 2014 up until the date of judgment on September 23, 2021;
  - q. The respondent stands to suffer substantial loss in the event the prayers sought herein are not granted;
  - r. In the circumstances, it is only right and just that the instant application be heard and disposed of on a priority basis.
6. In response to the respondent's application, the 1<sup>st</sup> claimant, Anne Waceke Makori filed a replying affidavit sworn on February 25, 2022.
  7. She contends that in his judgment dated September 23, 2021, ON Makau, J factored in the orders issued by Onyango, J on December 5, 2014 and Abuodha, J on February 12, 2016.
  8. Makori states that by the present application, the respondent seeks to have the matter reheard and a new decision arrived at, which cannot be achieved by a review of judgment. She takes the view that this court is *functus officio*.



9. According to the 1<sup>st</sup> claimant, the respondent has not proffered any valid ground for review of judgment as provided in law. She points out that the power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of mistakes committed by the court below.
10. This court draws its power to review its own decisions from section 16 of the *Employment and Labour Relations Court Act* and rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*.
11. 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.
12. The respondent pursues the argument that by failing to take into account interest accrued on the loan amount owed by the 1<sup>st</sup> claimant, the trial judge occasioned an apparent error, calling for review of the judgment.
13. In dealing with an application for review, the court must caution itself against sitting on appeal over its own decision. The rule of thumb is that a matter whose determination would call for drawn out argument and reasoning cannot be the subject of review.
14. In *National Bank of Kenya Limited v Njau Njau* (1995-99) 2 EA 249, the Court of Appeal stated thus:

“A review may be granted where the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”
15. By its application, the respondent invites me to vary a substantive finding made by my brother judge in his judgment dated September 23, 2021. I find no legal basis to do so. As held in *Francis Njoroge v Stephen Maina Kamore* [2018] eKLR a wrong view on an issue may be a ground for appeal but certainly not a ground for review.
16. In the result, the respondent’s application dated November 11, 2021 is declined with costs to the 1<sup>st</sup> claimant.
17. The interim orders granted on November 17, 2021 are vacated.
18. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2022**

**LINNET NDOLO**

**JUDGE**



Appearance:

Mr Okweh Achiando for the Claimants

Mr Muchiri for the Respondent

