



East African Portland Cement Company Limited v Charo (Cause 106 of 2017) [2022] KEELRC 3895 (KLR) (19 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3895 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 106 OF 2017
JK GAKERI, J
SEPTEMBER 19, 2022**

BETWEEN
EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED APPLICANT
AND
CHARLES KOMBE CHARO RESPONDENT
(Being an application for review of the judgement delivered on February 24, 2022.)

RULING

1. By a notice of motion application dated April 28, 2022, the respondent/applicant seeks orders That:
 - i. The court be pleased to issue an interim order of stay of execution of judgement delivered on February 24, 2022, resultant decree, warrants of attachment, proclamation notice and any other consequential orders pending the hearing and determination of this application.
 - ii. The court be pleased to mark and record that the respondent/applicant's notice of appeal dated March 4, 2022 as withdrawn pursuant to a notice of withdrawal dated April 25, 2022.
 - iii. The court be pleased to review the judgement delivered on February 24, 2022 by setting aside the same and instead dismissing the claimant's suit with costs.
 - iv. The court be pleased to make such further and or other orders as it may deem just, fair, reasonable and appropriate in the circumstances in order for the ends of justice to be met.
 - v. The costs of this application be provided for.



2. The application is expressed under article 159(2) of the *Constitution of Kenya, 2010*, sections 3, 12, 16 and 20 of the *Employment and Labour Relations Court Act, 2011*, rules 17 and 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and all other enabling provisions of law and is supported by the sworn affidavit of Simon Peter dated April 28, 2022 and the grounds annexed thereto.
3. The deponent states that he is the legal officer of the respondent and is well versed with the matters germane to this case.
4. That after judgement was delivered on February 24, 2022, the claimant/respondent has obtained warrants of attachment and proclaimed the respondent who is desirous of having the judgement reviewed and has consequently withdrawn the notice of appeal.
5. It is the respondent's case that the claimant had been paid gratuity having been a *bona fide* member of a pension scheme managed by Zamara Actuaries, Administrators & Consultants Ltd from January 31, 2012 to February 13, 2019.
6. That the respondent/applicant had also paid the claimant three (3) months salary in lieu of notice and the four (4) months compensation awarded was unjustified.
7. That the foregoing information was not availed to the court in good time owing to the challenges associated with the work from home directives occasioned by the Covid-19 pandemic as evidenced by copies of internal memos attached.
8. That if the orders sought are not granted, the claimant will be unjustly enriched by receiving double compensation and the respondent stands to suffer substantial loss.
9. That justice demands that a party should not be condemned before the evidence available is evaluated.

Claimant/respondent's Case

10. The claimant/respondent's affidavit dated April 19, 2022 in response to the Application under certificate of urgency depones that court awarded the sum of Kshs 11,124,099.048 including gratuity of Kshs 7,737,873.048.
11. That since the respondent did not state the amount it had paid the claimant in its defence, it is too late in the day to raise the issue.
12. That the assessed terminal dues of Kshs.7,137,511.45 was not tabulated particularly in relation to how the sum of Kshs 2,082,386.24 was arrived at as taxation and should be added to the net payment upon review.
13. That the amount payable was subjected to recovery of debts and the amount paid was Kshs 4,178,519.26.
14. That the claimant/respondent was not given the documents to verify payment and did not sign a discharge voucher.
15. That the court should accord the respondent/applicant a credit of Kshs 5,055,125.21 and the deponent be paid the sum of Kshs 6,068,913.838 with costs and interest.

Applicant's Submissions

16. The applicant/respondent identifies no specific issue for determination but addresses several themes including review jurisdiction, threshold, doctrine of unjust enrichment, judicial notice, material and non-disclosure.



17. As regards review jurisdiction, reliance is made on rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* which provide for review of judgements decree or order in defined instances.
18. The decisions in *Francis Origo & another v James Kumali Mungala* [2005] eKLR and *Nasibwa Wakenya Moses v University of Nairobi & another* [2019] eKLR are cited in support of the submissions that the applicant is required to establish at least one of the circumstances outlined under rule 33 above.
19. Article 159 of the *Constitution of Kenya, 2010* and section 3 of the *Employment and Labour Relations Court Act, 2011* are relied upon to urge that substantive justice should be the guiding principle.
20. On the legal threshold, it is urged that the respondent/applicant has discovered new and important matter or evidence after exercise of due diligence, which could not be produced during the hearing, that gratuity had been paid as well as three months' notice.
21. It is the applicant's submission that the finding of unfair termination should not have been made as the claimant was paid gratuity and three months salary in lieu of notice. That the 4 month's salary award was unjustified.
22. As regards unjust enrichment, the decisions in *Pamela K Butanyi v University Council for the Kenya Polytechnic University College* [2015] eKLR and *DK Njagi Marete v Teachers Service Commission* are relied upon for the proposition that remedies should be proportionate to the injuries suffered by the employee. That unless the orders sought are granted, the claimant will be unjustly enriched.
23. The court is urged to take judicial notice of the fact that the evidence could not have been availed owing to the challenges occasioned by Covid-19 restrictions regarding working from home.
24. It is urged that the respondent/applicant has so many employees that it was unable to ascertain that the claimant had been fully paid.
25. Reliance is made on the decision in *Kenya Foreign Recruitment & Employment Agencies Workers Union & 5 others v Registrar of Trade Unions* [2021] eKLR, where the court took judicial notice of the scaled down operations of courts during the Covid-19 pandemic.
26. As regards non-disclosure, it is urged that the claimant approached the court with dirty hands by failing to disclose that he had been paid gratuity as well three months notice period. That the non-disclosure was intended to defeat the cause of justice and as a consequence the entire judgement should be set aside and the claim dismissed.
27. The decision in *Aggrey Murumba & 13 others v Teachers Service Commission & another* [2019] eKLR is relied upon to urge that a party ought to lose any advantage obtained by material non-disclosure.
28. Finally, it is urged that the right to fair hearing is a fundamental right that cannot be denied and a person ought not be condemned before its evidence is evaluated.

Claimant/Respondent's Submissions

29. The claimant/respondent identifies no specific issue(s) for determination but submits that the court is being called upon to find that the applicant was unaware that it had paid the claimant on February 2, 2017 and relies on internal memos dated March and May, 2020.
30. In opposition to the application, the claimant/respondent urges that the tabulation of payments dated February 2, 2017 was not communicated to the claimant nor did he sign a discharge voucher but admits that he received Kshs 3,878,519.26 on February 16, 2019.



31. It is submitted that the applicant should only claim credit for Kshs.7,137,511.45 subject to a competent authority ascertaining the tax deductions of Kshs 2,082,386.24.
32. It is the claimant's case that the covid-19 memos dated March and May, 2020 as well as the payments to the claimant were made before the respondent filed its defense. That failure of the applicant to avail the evidence of payment is not a ground for review.
33. It is submitted that the applicant was privy to the information from February, 2017, 2018 and February, 2019 when the final payment was made which does not qualify as discovery of new evidence.
34. The decision in *DK Njagi Marete v Teachers Service Commission* [2013] eKLR is relied upon to urge that the applicant's ground for review was outside purview of rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.
35. The court is called upon to take judicial notice of the fact that the suit went through pre-trial conference and a hearing date was fixed by consent and no new evidence has been discovered which could not have been provided by exercise of due diligence.
36. It is further submitted that the court should not be hoodwinked by the claim of the difficulties occasioned by the Covid-19 pandemic. That the proceedings were conducted virtually after all documents had been filed.
37. As regards the right to be heard urged by the applicant, it is submitted that records show that the applicant was served and instructed and advocate to represent it in 2017, responded to the claim and participated in the proceedings. The decision in *Mandeep Chauhan v Kenyatta National Hospital & 2 others* [2013] eKLR is relied upon in support of the submission.
38. The court is urged to find that there is no error on the face of the record or discovery of new or important evidence which could not have been availed during the hearing.
39. The court is urged to dismiss the application but allow amendment of decree by reducing the conceded payment of Kshs 7,137,511.21 and direct the Kenya Revenue Authority to assess the tax payable and finally order reimbursement of Kshs 876,605.95 deducted on account of staff debts.

Determination

40. The issues for determination are;
 - (i) Whether the respondent/applicant's application meets the threshold for review of judgement, order or decree.
 - (ii) Whether the respondent/applicant is entitled to the orders sought.
41. As to whether the application herein meets the threshold, the starting point are the relevant provisions on review of judgement, order or decree.
42. Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* 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 judgement 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 judgement or ruling requires clarifications; or
 - d. For any other sufficient reason.
43. To sustain an application for review under rule 33, the applicant must premise the same on at least one of the circumstances enumerated by the Rule. Worthy of note, section 80 of the [Civil Procedure Act](#) which provides for review has no prescribed circumstances and is undoubtedly wider than rule 33.
44. Section 80 provides;
- "Any person who considers himself aggrieved –
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this court, may apply for a review of judgement to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit."
45. Relatedly, section 16 of the [Employment and Labour Relations Court Act, 2011](#) confer upon the court jurisdiction to review its judgements, awards, orders or decrees in accordance with the Rules.
46. The court is also guided by the sentiments of the Court of Appeal in [Francis Origo & another v James Kumali Mangala](#) (*supra*) where the court stated;
- “... from the foregoing, it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay...”
47. In [Nasibwa Wakenya Moses v University of Nairobi and another](#) (*supra*), the court stated thus;
- “... An application for review may be allowed on any other “sufficient reason”. The phrase ‘sufficient reason’ within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in order 45 rule I...”
48. The applicant’s case is that it has discovered new and important matter or evidence which it could not have availed at the hearing. That the claimant had been paid gratuity and three (3) months’ notice and the awards under these two heads should be set aside.
49. It is argued that the above state of affairs was occasioned by the Covid-19 restrictions effective March, 2020 which inter alia required employees to work from home (memo dated March 30, 2020 and May 5, 2020).



50. The latter memo details the various approaches prescribed by the Ministry of Health to prevent the spread of Covid-19 including proceeding on leave or unpaid leave if leave days had been exhausted, shift working and working from home.
51. It is not in dispute that the Covid-19 pandemic caused unprecedented disruption of ordinary human activities and people were forced to adopt to new ways of doing things and courts were not in exception.
52. The virtual hearing of cases, the norm today is a development attributable to the Covid-19 pandemic.
53. It has taken time for parties to adapt to the new way of life and in particular the filing of documents through the portal.
54. In as much as, the suit went through pre-trial as correctly submitted by the Claimant/respondent, the respondent/applicant may have been disorganized by the shift system and other disruptions occasioned by the pandemic, the fact that it filed its defense late notwithstanding.
55. As submitted by the claimant, payments were made between February, 2017 and February, 2019 after the suit herein had been filed.
56. The court is persuaded that the scaling down of court operations, coupled with restrictions at the respondent's workplace may have contributed to the non-production of the documents at the hearing on November 29, 2021.
57. Relatedly, courts have taken judicial notice of the disruptions caused by the Covid-19 pandemic and attendant restrictions and as submitted by the Applicant. It is not in dispute that the respondent is a big organization with a huge workforce.
58. For the foregoing reasons, the court is satisfied that the applicant has meet the threshold for review of the judgement delivered on February 24, 2022 in the context of rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.
59. As regards the reliefs sought, the respondent/applicant seeks the setting aside of the judgement delivered on February 24, 2022 and dismissal of the claimant's suit with costs.
60. It requires no emphasis that whereas this court has jurisdiction to review its judgements, rulings, orders and decrees it has no jurisdiction to change its decision on a review application.
61. The invitation to dismiss the suit is of no moment.
62. The pith and substance of the application herein is that the respondent/applicant has evidence which it could not have adduced at the hearing and which was and is important to its case against the claimant. That the claimant was paid gratuity and three months' notice but was awarded the same by the court.
63. According to the respondent/applicant, these payments absolved the respondent from further liability as the claimant was not dismissed, he retired.
64. In the court's view, while evidence of payment of gratuity in lieu of notice was elemental to the case, the award of compensation is a different issue.
65. The respondent/applicant did not at any point give the claimant a notice of retirement setting out computation of his dues. Perhaps this would have obviated the suit herein. Even after the suit was filed, the respondent did not reach out to the claimant, it merely deposited money into his bank account without any tabulation of the respective amounts.



66. It is disingenuous for the respondent/applicant to submit that the claimant retired from its service. The essential fact is that the claimant had a contract with the respondent but was terminated from employment effective January 1, 2017, while on leave.
- “ . . . your current contract notwithstanding the board on December 16, 2016 has decided that you retire mandatorily from the company’s service with effect from January 1, 2017”.
67. To submit that a letter written in the above terms is an ordinary retirement letter is undoubtedly to overstretch imagination.
68. The claimant had a legally binding contract of employment with the respondent and the parties thereto were bound by its terms. A separation otherwise than in accord with the terms of the contract or other mutually agreed method would be unfair within the meaning of section 45 of the *Employment Act*.
69. Needless to emphasize, the court made a finding that the termination of the claimant’s employment was unfair. That finding is not challenged by the review herein and it is of no moment. Consequently, the award of four (4) months gross salary as compensation under section 49(1)(c) of the *Employment Act* is of no merit.
70. Finally, the court is cognizant of the conduct of the claimant during the proceedings.
71. It is not in dispute that the claimant received a huge amount of money between February, 2017 and February, 2019 and was manifestly aware that it was from the respondent/applicant as will be demonstrated shortly.
72. He did not notify the court that he had been paid, irrespective of the circumstances in which payment was done. This was a critical fact the claimant should have brought to the attention of the court in its quest to administer substantive justice as submitted by the respondent/applicant.
73. The non-disclosure is so elemental that it would be injudicious for the court to allow the claimant to retain awards it obtained on account of the non-disclosure. The non-disclosure of payment was not only unconscionable but discreditable.
74. Although the claimant came to court with clean hands, the non-disclosure of payment of gratuity and notice at the hearing soiled his hands.
75. Finally, the respondent/applicant’s submission on the right to be heard and natural justice is puzzling. Reference to article 50(1) of the *Constitution of Kenya, 2010* is perplexing. The respondent/applicant is not alleging that it was not heard by an independent and impartial body or that the hearing was unfair. The gravamen of the submission is that it has a right to be heard again and if not heard its fundamental right to hearing will have been violated and it will have been condemned unheard.
76. The court is invited to rely on the sentiments of the Supreme Court of Uganda in *The Management Committee of Makando Primary School and another v Uganda National Examination Board* HC Civil Misc App No 18 of 2010 cited with approval by Lenaola, J (as he then was) in *Mandeep Chauhan v Kenyatta National Hospital & 2 others* (*supra*).
77. It is not in dispute that the respondent/applicant participated in this suit from 2017 to date and had sufficient opportunity to urge its case which it has enjoyed to date.
78. To put the argument into context, the hearing date was taken by consent before the Deputy Registrar on October 4, 2021 and hearing took place as envisaged.



79. The respondent's witness, Mr Joel Kemei gave evidence and was cross-examined and later filed its submissions.
80. Above all, the respondent's application for review herein has been accorded due consideration.
81. It is unclear as to what other right of hearing the respondent is yearning for.
82. It requires no gain saying that the claimant's allegations on taxation and deductions on staff loans were never raised at any point to be responded to by the respondent and a determination made on their merits. The figures relied upon the claimant/respondent were never brought to the attention of the court for unexplained reasons. The same cannot be litigated at this stage and no evidence was provided.
83. For the foregoing reasons, the court is satisfied that the respondent/applicant's application for review of the judgment dated February 24, 2022 is merited.
84. Consequently, the judgement dated February 24, 2022 is reviewed in the following terms:
- a. The award of Kshs 7,737,873.048 as gratuity payment is set aside.
 - b. The award of Kshs 1,451,201.4 as three (3) month's notice is hereby set aside.
 - c. Other awards made by the court on February 24, 2022 shall remain.
 - d. Parties to bear own costs.
85. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF SEPTEMBER 2022

DR JACOB GAKERI

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 March 15, 2020 and subsequent directions of April 21, 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.

DR JACOB GAKERI

JUDGE

