



REPUBLIC OF KENYA



**KENYA LAW**  
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**Munga v Parpia (Cause E142 of 2021) [2022] KEELRC 12922 (KLR) (24 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12922 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE E142 OF 2021**  
**JK GAKERI, J**  
**OCTOBER 24, 2022**

**BETWEEN**

**TEDDY WAWERU MUNGA ..... CLAIMANT**

**AND**

**SALEH PARPIA ..... RESPONDENT**

**RULING**

1. This is a Notice of Motion Application by Respondent dated 22<sup>nd</sup> August seeking a review of the ruling of the court delivered on 18<sup>th</sup> July, 2022.
2. The Application filed under Certificate of Urgency seeks Orders That;
  - i. Spent.
  - ii. The honourable court stays the execution of the Ruling delivered on 18<sup>th</sup> July, 2022 by the learned judge allowing Prayer No. 2 of the Claimant's Application dated 8<sup>th</sup> March, 2022 pending inter partes hearing of the application.
  - iii. The court be pleased to vary review and or set aside the Ruling delivered on 18<sup>th</sup> July, 2022 by the learned judge allowing Pray No. 2 of the Claimant's Application ordering the Respondent to pay Kshs.26,250/= to the Claimant for untaken leave within 21 days.
  - iv. Costs of the Application be provided for.
3. The Application is grounded on the grounds set out in paragraphs a – k of the Notice of Motion and is supported by the Affidavit of Saleh Parpia who depones that he believes that the ruling delivered on 18<sup>th</sup> July, 2022 has an error or mistake apparent on the face of the record that the intention of the request for claimant's tabulation of leave days was to reconcile his leave days tabulations with his employment records and was not to be construed as an admission in any case.



4. That the Claimant's demand letter was without prejudice, communication and should neither be admissible in courts records nor form the basis for the ruling that the subject of this instant application.
5. It is the affiant's case that the response was made in good faith and as part of a settlement proposal and the claimant did not respond to the same until 24<sup>th</sup> February, 2021, 5 days after the filing of this suit.
6. That he negotiated in good faith and it was the Claimant who did not negotiate and filed the instant suit.
7. That the affiant stands to suffer prejudice if the order is not varied, reviewed and/or set aside since it is premised on the contents of a Without Prejudice communication and the prayer is expressly denied in the pleadings.
8. That the claimant had no pending leave days owing, that the Claimant absconded duty repeatedly thus challenging his claims for untaken leave days.
9. That the interlocutory order granted is a matter which ought to be rightly proven at the main hearing where exhibits proving the same would be availed and subjected to cross-examination.
10. The affiant states that he stands to suffer substantial loss and prejudice unless the orders sought are granted and no prejudice will be occasioned to the Claimant if the orders prayed for are granted.
11. That it is reasonable and fair and in the interest of justice that the orders be granted.
12. When the application came up for hearing on 20<sup>th</sup> September, 2022, the Respondent was accorded 7 days to file and serve a response.
13. The court further directed that the application be disposed of by way of written submissions and parties were directed to file and serve two (2) page submissions and a ruling was reserved for 24<sup>th</sup> October, 2022.
14. By 14<sup>th</sup> October, 2022 when the court retired to prepare the ruling, the Claimant/Respondent had not responded to the application nor filed the two page submissions as directed.
15. The Respondent/Applicant filed the two page submissions.

#### **Respondent/Applicant's submissions**

16. The applicant identifies a singular issue for determination, whether the learned judge erred in holding that the Without Prejudice letter dated 30<sup>th</sup> December, 2020 did not pass muster of good faith and thereby was an exception to the rule of 'Without Prejudice'.
17. In urging its case, the Respondent submitted that the court relied on the fact that the Respondent did not respond to the Claimant's computations dated 24<sup>th</sup> February, 2021 as reflected in paragraphs 48 and 49 of the ruling and failed to consider that the suit was filed on 19<sup>th</sup> February, 2021, 5 days before he forwarded the computations as requested by the Respondent.
18. It is submitted that by filing the instant suit before sending the computations, the Claimant showed no good faith in the negotiation process and not the Respondent as erroneously held in the ruling.
19. It is urged that once the imputation that the Respondent failed to respond is disregarded, the Without Prejudice letters falls squarely within the Without Prejudice rule.
20. That the Respondent had requested for the computation to facilitate negotiations with the Claimant.



21. The Respondent submits that the request for the computations was not an offer to pay by an endeavour to clear the record and obtain the correct facts pertaining to the claim.
22. The court is urged that the Respondent stands to suffer prejudice if the Without Prejudice correspondence is admitted to infer liability.
23. The court is further urged to set aside the ruling dated 18<sup>th</sup> July, 2022.

### **Determination**

24. The singular issue for determination is whether the application dated 22<sup>nd</sup> August, 2022 is merited.
25. The pith and substance of the application is that the ruling dated 18<sup>th</sup> July, 2022 contains an error on the face of the record which necessitated the review application herein.
26. It is urged that the Respondent acted in good faith and it was the Claimant who opted not to negotiate.
27. Section 80 of the *Civil Procedure Act* provides that;  
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 Act 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.
28. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 is more detailed on the grounds on which an application for review of a decree or order may be made and includes some mistake or error apparent on the face of the record or for any other sufficient reason.
29. Needless to emphasize, the court addressed the issue of whether the Respondent's letter written on a Without Prejudice basis was an admission of liability or was excepted by the rule and relied on several judicial authorities in arriving at its decision.
30. As emphasized in the ruling dated 18<sup>th</sup> July, 2022, the Respondent's letter stated as follows;  

“Your client had only worked for 5 months hence any demand for leave should be calculated under section 28(1) (b) of the Act, where employment is terminated after the completion of two or more consecutive months of service during any twelve months leave earning, to not less than one and three quarter days leave with full pay in respect of each completed month of service in that period to be taken consecutively. Let us have your computation of the amount.”
31. This letter led to the computations submitted by the applicant's counsel on 24<sup>th</sup> February, 2021 which the Respondent did not respond to to accelerate the negotiations.
32. It is submitted that the Respondent had in fact acted in good faith but the Claimant's action of filing the suit, 5 days before forwarding the computations was not an act in good faith.
33. Puzzlingly, it is also submitted that by requesting for the computations, the Respondent was merely endeavouring to clear the record and obtain the correct facts. As the employer, the Respondent is required to maintain up to date records of employment at all times, including matters germane to leave



days. The only duty of the employee is to apply for leave. Records are kept and maintained by the Respondent.

34. The Respondent could not have ascertained the correct facts if he had no records of the leave days pending. It was his duty to inform the Claimant the actual number of leave days he was entitled to.
35. The request for the computation was to all intent purposes a request to the Claimant to indicate how much was due to him for leave, not to negotiate. It was the duty of the Respondent to have the records.
36. The failure by the Respondent to respond to the computations, the circumstances notwithstanding, was confirmation that he did not intend to negotiate. It is intriguingly why the Respondent did not make a counter offer or reject the computations he had requested for yet it was his duty to compute the leave days.
37. As observed in the impugned ruling, the court is not persuaded that the request for the computations were made in good faith to initiate or facilitate negotiations as the Respondent as employer is presumed to have all employment records. Leave days are not negotiable. It is a statutory right of every employee. There was nothing to negotiate about and the Respondent's non-responsiveness negated any good faith he had in the matter.
38. Finally, and atypically, the Respondent/Applicant cited no judicial authority to urge his case before court.
39. For the foregoing reasons, the court is not satisfied that the Respondent/Applicant has made a sustainable case for the court to review its orders made on 18<sup>th</sup> July, 2022.
40. In the upshot and as apparent from the foregoing, this application is for dismissal and is accordingly dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF OCTOBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**DR. JACOB GAKERI**

**JUDGE**

**DRAFT**

