



**Ogello v Sidian Bank Limited (Cause 764 of 2019)  
[2022] KEELRC 13351 (KLR) (1 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13351 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 764 OF 2019  
MN NDUMA, J  
DECEMBER 1, 2022**

**BETWEEN**

**MWOSERO STEPHEN OGELLO ..... CLAIMANT**

**AND**

**SIDIAN BANK LIMITED ..... RESPONDENT**

**RULING**

1. The application by the claimant/applicant dated May 20, 2022 seeks for an order in the following terms: -
  1. Spent
  2. That the judgment issued by the honourable court delivered on the March 24, 2022 be reviewed to include commission for the month of December, 2016 where the applicant surpassed target by Kshs 26,935,345.94.
  3. Costs of the application.
2. The application is based on a deposition by the applicant that claimant had pleaded the above target for the last quarter of 2016, as captured in the claimant's response to the respondent's response to the memorandum of claim dated January 9, 2019.
2. That the respondent in the response to the memorandum of claim affirmed that the claimant had surpassed his target for the last quarter of 2016. The applicant prays that commission in the sum of Kshs 4,040,301.89 be included in the judgment upon review.
3. The application is opposed by a counter application of the respondent dated May 10, 2022 supported by affidavit of Collins Sebatia. The claimant filed a replying affidavit to the application dated May 10, 2022 dated 1 June 7, 2022.



4. Further, the respondent filed grounds of opposition dated 8<sup>th</sup> June, 2022 and a replying affidavit dated July 12, 2022 to the application dated May 20, 2022.
5. The two applications address the same subject matter being whether there are any apparent matters in the judgment of the court which ought to be corrected.
6. The court has jurisdiction to review its own judgment pursuant to rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#). This jurisdiction is discretionary as was held in the case of [Transport Workers Union v Etihad Airways](#) [2019] eKLR.
7. In the replying affidavit, the respondent states that the claimant is bound by the pleadings in the statement of claim. That the claimant did not plead that he was entitled to commission for the 4<sup>th</sup> quarter of the year 2016 which he now seeks to be included in the judgment of the court. The respondent cited the case of [Elizabeth O Odhiambo v South Nyanza Sugar Company Limited](#) [2019] eKLR, where the court held;

“The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plugging into the realm of speculation and might aggrieve the parties or one of them or at any rate decision given on a claim or defence not pleaded amounts to a denial of justice.”

8. The respondent prayed that the application for review be dismissed.
9. The court has carefully considered the pleadings by the parties and in particular paragraph 6(a) of the memorandum of claim, dated July 31, 2019 in which the claimant averred
  6. The claimant avers that in the period worked, he made the following recoveries above target;
    - a. In the last quarter of 2016 he collected Kshs 46,183,785.96 against a target of Kshs 60,000,000.
10. The claimant prayed for payment of the commission calculated at 15% of the collected amount above target in respect of the aforesaid period, *inter alia*.
11. In the statement of response at paragraph 17, the respondent pleaded;

“7. In response to paragraph 6, the respondent states that:-

  - a. The collection from the last quarter of year 2016 when he was on probation was Kshs 37,994,49.6 against a target of Kshs 17,989,770.06.
12. The claimant did not amend his statement of claim to reflect the averments by the respondent under paragraph 7 of the statement of response but purported to agree with that pleading in its reply to the statement of response.



13. The claimant did not amend its witness statement either to reflect the position set out by the respondent under paragraph 7 of the statement of response. Therefore, the evidence by the claimant before court was and remains that:-

“In the last quarter of 2016, he collected Kshs 46,183,785.96 against a target of Kshs 60,000,000.

14. The court therefore finds that it did not err by not including the last quarter of 2016, as one of those period in respect of which the claimant was entitled to payment of commission. The amount prayed for in the application dated May 20, 2022 was not pleaded and not proved by the claimant.
15. The application lacks merit and is dismissed with costs. The court however corrects paragraph 4 (a) of the judgment by replacing the figure ...60,000.00 with 60,000,000. This settles all the issues raised in both applications.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 1<sup>ST</sup> DAY OF DECEMBER, 2022**

**Mathews N Nduma**

**Judge**

**Appearances**

M/s Kimathi for claimant/applicant.

Ms Mwhaki for respondent.

Ekale – Court Assistant.

