



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 506 OF 2018

FREDRICK WESONGA ADIERI.....CLAIMANT

- VERSUS -

KENYA REVENUE AUTHORITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th January, 2021)

RULING

The Court (Rika J) delivered judgment in the suit on 29.06.2020 for the claimant against the respondent for orders as follows:

- a) It is declared termination was unfair.
- b) The respondent shall pay to the claimant equivalent of 10 months' salary in compensation and 3 months 'salary in notice, totalled at Kshs.2, 353, 000.00.
- c) Certificate of service to issue.
- d) Costs to the claimant.

The respondent has filed an application on 02.11.2020 through John Marigi Advocate seeking review of the judgment. The application was under Article 159 of the Constitution, Section 20(1) of Employment and Labour Relations Court Act, Rule 33 and Rule 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The respondent prayed for orders:

- 1) (spent)
- 2) (spent)
- 3) (spent)
- 4) That the Court be pleased to review the judgment dated 29th June 2020 and decree dated 20th July 2020 confirming that:
 - a) The claimant had already cleared with the Authority and had been paid Kshs. 6, 550, 000.00 which was inclusive of the three (3) month's salary in lieu of notice of Kshs.543, 000.00.
 - b) The termination had already been transmuted into a normal termination once the claimant had been compensated in back payments.
- 5) That the Honourable Court be pleased to issue a declaratory finding that the claimant committed the offence of perjury contrary to section 20(7) of the Employment and Labour Relations Act, and in line with Rule 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
- 6) That costs be provided for.

The application was based on the annexed supporting affidavits of Frankline Kiogora and Wilson Gaconi and upon the following grounds as urged for the applicant:

- 1) The crucial information that was not presented during the hearing of the case has since come to the fore and it is in the interest of justice that the Honourable Court revisits the matter within the purview of review.
- 2) The respondent filed the notice of appeal against the judgment on 08.07.2020 and requested for typed proceedings in order to lodge its appeal.
- 3) The respondent has already filed a reference dated 30.09.2020 against the Deputy Registrar's Ruling on costs of the suit dated 10.09.2020.
- 4) The respondent has forgone the lodgement of the appeal in favour of review process on the basis of this new and crucial information.

In urging for a review, the applicant's case is that there is new and crucial information and secondly, despite the notice of appeal on record, the applicant has forgone the lodgement of the appeal in favour of the present application for review.

There is no dispute that the claimant in the memorandum of claim prayed for, amongst other claims, payment of three (3) months' salaries in lieu of notice at Kshs. 543, 000.00. It is also clear that the respondent in the memorandum of response (paragraph 14) stated thus, "**The claimant will be paid withheld salary and allowances up to and including 31st August 2018 as well as three months' salary in lieu of notice....**" Again, the respondent's witness Frankline Kiogora (Assistant Manager, Human Resource Department) at paragraph 10 of his witness statement confirmed that the claimant would be paid salary and allowances up to including 31.08.2018 as well as three months' salary in lieu of notice. The supporting affidavit by the said Frankline Kiogora is elaborate about the pleadings and the witness statement in that regard.

Now, the said Frankline Kiogora at paragraph 13 of the supporting affidavit states that the claimant had already cleared with the respondent but the documents had been misfiled in a dummy file that was not at the Employee Relations – Human Resource Department and the completed clearance form is exhibit FK7 signed on 06.09.2018. At paragraph 9 of the supporting affidavit Frankline Kiogora confirms that he testified that the claimant would be paid the Kshs. 543, 000.00 in lieu of the three months' notice. However, unknown to him and the Human Resource Department where he served, the claimant had already been paid Kshs.6, 550, 000.00 prior to filing of the suit and which included the Kshs. 543, 000.00 in lieu of notice. Exhibit FK8 on his supporting affidavit is the change advice by the salary section on the claimant's termination of services and which shows the itemised payments to be made included the three months' salary in lieu of notice and the same was checked by the same Frankline Kiogora (as F.K Gitonga) who signed on 31.08.2018 (the statement of claim having been filed on 14.12.2019). In the Judgment the Court found thus, "**27. The prayer for 3 months' salary in lieu of notice is conceded at paragraph 14 of the statement of response and paragraph 10 of Gitonga's Witness Statement. It is granted at Kshs. 543, 000.00.**" In the supporting affidavit, Frankline Kiogora Gitonga states at paragraph 14 that the claimant had, prior to filing the suit, been paid Kshs. 6, 550, 000.00 including the Kshs. 543, 000.00 in lieu of the three months' notice. It is urged that the termination had therefore been transmuted to normal termination because the withheld salaries and pay in lieu of notice had been paid per exhibit FK 8 on itemised headings and particulars on payments to the claimant and exhibit FK9 on the summary of whatever was actually paid.

The other supporting affidavit is by Wilson Gaconi, the respondent's Chief Manager, Human Resource Department. On 21.07.2020 he received an email by the respondent's advocates about satisfaction of the decree herein. He embarked to address the satisfaction of the decree and in the process discovered that the claimant had already been paid a sum of Kshs. 6, 550, 000.00 inclusive the three months' pay in lieu of the termination notice. He states that the Finance Department had processed the payment of the claimant's final dues but misplaced payment receipts which were inadvertently misfiled. The payment of withheld salaries and three months in lieu of termination notice meant that the termination had been transmuted to normal termination as per the contract of service and had that information been placed before the Court at the hearing of the suit, the outcome in the judgment would have been different. The claimant was the only person who knew of the fact of his payment and he is therefore culpable in terms of section 20 (7) of the Employment and Labour Relations Court Act, 2011 and which states, "**A person who makes any statement or furnishes any information which the person knows, or has reasonable cause to believe, to be false or misleading in material particular, commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both.**" It is urged that the Court should protect itself from litigants who seek to mislead the Court and taint judicial process and the Court should not be tricked to make awards. The prayers sought should therefore be granted. The respondent's advocates wrote a demand letter dated 01.10.2020 to the claimant's advocates alleging that in view of the evidence by the claimant at the hearing of the present suit, the claimant had committed the offence of perjury and the claimant should admit that the Kshs. 1, 810, 000.00 awarded herein for unfair termination and the sum of Kshs. 543, 000.00 in lieu of three months' notice had already been paid to the claimant. It is the applicant's case that the claimant has never replied the letter. The letter further stated thus, "**Our instructions are also to inform you that we will be recording a complaint with the police so that your client can be prosecuted for perjury.**" The letter concluded that the applicant would therefore not process the payment of decretal sum as awarded in the judgment.

The claimant opposed the application by filing his replying affidavit on 10.11.2020 through Sharia Nyange Njuguna & Company Advocates. The claimant urged the following grounds of opposition:

- 1) The application is fatally defective as the applicant purports to adduce additional evidence which was in his possession and knowledge during the pendency of the suit.
- 2) The applicant has not established any clerical mistake, incidental error or omission that should be rectified by the Court and apparent on the face of the record as per Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
- 3) The judgment was based on the pleadings and evidence on record.
- 4) There exists a notice of appeal against the judgment and the application for review is brought in bad faith, is unmerited, an abuse of Court process and prejudicial to the claimant.

- 5) The matters alleged in the supporting affidavits are denied.
- 6) The claimant was paid withheld salaries and allowances withheld during the period of interdiction in 2012 as per the termination letter produced in Court. The termination was not a normal termination but was an unfair termination as found in the judgment. At the hearing it was never proved that the claimant perjured himself.
- 7) That the Court should have arrived at a different outcome in the judgment is no good ground for a review application.
- 8) The applicant does not want to honour the judgment hence the present application which amounts to intimidation.
- 9) The application by the notice of motion dated 28.10.2020 should be dismissed.

The parties made written as well as oral submissions. The Court has considered the submissions, material on record, and the parties' respective positions and makes findings as follows.

To answer the **1st issue** for determination, the Court returns that as submitted for the claimant, the applicant has failed to show that there exists new evidence which with due diligence was not available at the time of the hearing of the suit as alleged for the applicant. The evidence is that throughout the process leading to the termination of the claimant the applicant's Human Resource Department was involved and duly informed. In particular, the documents involved were throughout in possession of the applicant and its relevant officers and departments. The applicant has offered no reasonable or any explanation why the payment documents would be prepared by its Finance Department and not made available at the hearing and why the suit with serious financial implications was not specifically addressed by all its relevant offices. In any event exhibit FK8 of the supporting affidavit by Frankline Kiogora Gitonga and who was a witness at the hearing of the suit confirms that he was aware of the itemised particulars of the claimant's final dues including the three months' pay in lieu of the termination notice. The application will therefore fail on account of alleged new evidence which with due diligence was not available at the time of the hearing. The applicant has failed to establish, as per Rule 33 (1) (a) of the Court's procedure rules, discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by the applicant at the time when the decree was passed or the order made.

To answer the **2nd issue**, the Court returns that it is not in dispute that the applicant filed a notice of appeal against the judgment and which is on record. The invoked Rule 33 precludes an application for review where an appeal has been preferred. The Court finds that the filing of the application while the notice of appeal was on record amounted to gambling that if the application failed then the proposed appeal remained available so that, as urged for the claimant, the application for review amounted to an abuse of Court process and the same is liable to dismissal.

To answer the **3rd issue**, the Court returns that the judgment was based on the pleadings and evidence. The applicant admitted the claim of three months' salaries both in the memorandum of response and in the witness statement by Frankline Kiogora Gitonga and the evidence accordingly. While it would be unjust enrichment for the claimant to be paid twice on that heading, the material before the Court at the hearing showed that he was entitled to the pay as awarded and he had so far not been paid accordingly and as was claimed. While making that finding the Court further finds that the exhibits on the supporting affidavits show a computation to pay and which amounted to a plan or design to pay but are not the evidence of such payment – the claimant having not admitted that he received the pay, there is no ground for the Court to make a finding of double payment and thus unfair enrichment in that regard. In such circumstances, the Court will not interfere with the award as made. In event of any double payment as may be established internally for the applicant, the Court considers that the applicant enjoys internal remedies such as surcharging its officers who may have occasioned the loss by failing to exercising due diligence prior to the hearing of the case and ensuring all relevant and material evidence had been placed before the Court at the hearing of the suit.

Further, the Court considers that there is no established ground to interfere with the Court's findings in the judgment that the termination was unfair and the compensation as awarded will stand so that it was misconceived for the applicant to allege that the judgment sum had already been paid as per its advocates' demand letter dated 01.10.2020 being exhibit WGH3 when it stated thus, "**Our instructions are therefore to invite your client to admit that the said monies were paid to him.**" The Court finds that an argument that the withheld salaries and pay in lieu of the termination notice had been paid rendering the termination a normal termination not amounting to unfair termination as found in the judgment, by itself, amounts to changing the character of the defence but which was not initially pleaded and relevant evidence and submissions provided for the applicant at the hearing of the suit. The Court returns that such unjustified change of the character of the suit as initially pleaded and to craft the suggestion that the judgment was therefore erroneous or wrong does not amount to a proper reason or ground for a review and must be discouraged by the Court as the present application must fail. The Court considers that the review procedure was not designed to introduce belated amendment of pleadings (or a new character of the suit) long after the delivery of the judgment and with a view to obtaining a remedy which is thought by the applicant to have be available based on the analysis of the judgment one way or the other – but which was not actually pleaded, proved and submitted upon prior to the judgment.

To answer the **4th issue** for determination, it is clear to the Court that a finding of criminal liability is subject to the rights of an accused person as per the provisions of Article 50 of the Constitution of Kenya 2010. The Court considers that the present application for review does not amount to a criminal proceeding and it is an abuse of court process to invoke the criminal law remedy, in an essentially civil proceeding, as has been invoked for the applicant. In particular, the Court returns that an offence under section 20(7) of the Employment and Labour Relations Court Act, 2011 would be triable before a Magistrate's Court with appropriate or competent jurisdiction and with full observance of the safeguards as per provisions of Article 50 of the Constitution and the enabling relevant legislations such as the Criminal Procedure Code and the Evidence Act in which evidence must be taken and tested to the traditional criminal liability standard of beyond reasonable doubt.

In conclusion, the application by the notice of motion filed on 02.11.2020 and dated 28.10.2020 is hereby dismissed with costs.

Signed, dated and delivered by video-link and in Court at Mombasa this Friday 29th January, 2021.

BYRAM ONGAYA

JUDGE