



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC JUDICIAL REVIEW NO 4 OF 2015

ABDALLA MOHAMED MCHINGA.....CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

R U L I N G

1. By a Notice of Motion dated 17th December, 2020 the applicant through the firm of Olaly Cheche sought the following Orders; -
 - a. **That the application be satisfied urgent and service may be dispensed in the first instance.**
 - b. **That this Honourable Court be and is hereby pleased to review its orders and decree made on the 18th November, 2020.**
 - c. **That the costs of the application be in cause.**
2. The application is supported by grounds herein and the supporting Affidavit of **Abdalla Mohamed Mchinga** the claimant/ Applicant herein.
3. The claimant avers that the Honourable Deputy registrar has persistently failed to include fully, the matter to be included in the tabulations of decretal sum payable to him as envisaged in the judgement of 4th April, 2014 thus leading to a miscarriage of justice.
4. He avers that the tabulations do not cover suspension, interdiction, reduction in rank(demotion) baggage allowance, promotion and other benefits.
5. He stated that this matter has been mentioned several before this court owing to the protracted disagreement on the tabulation of the decretal sum payable to him following the judgement of Justice Byram Ongaya delivered on 4th April, 2014.
6. According to the claimant, it was part of the aforesaid judgement that the interdiction, suspension and reduction of rank were declared unfair and were set aside for want of due process.
7. Further that, the respondent was ordered to pay dues of the judgement by 1st May, 2014 failing to which interest at court rate to apply from 17th July, 2012 to payment in full. Also that the respondent was to pay the cost of suit.
8. The claimant avers that the parties herein have not agree on the sum payable to him, consequently that the deputy registrar was directed by this Court to effect proper and full tabulation, which he contends, the Deputy registrar has time and again calculated amount payable due to reduction of rank only leaving all the others out.
9. According to the claimant, the deputy registrar in her ruling of 18th April, 2019 failed to explain how she arrived at the principal sum of **Kenya shillings One Million, three Hundred and Forty Thousand, Three Hundred and Sixty-Eight (Kshs. 1,340,368/-)**. As such he indicated that the deputy registrar did not take into account the amount lost during the period of suspension, interdiction, baggage and other benefits like promotions and commuter allowances.
10. He stated that he has never been restored to his former position even after the court ordered the respondent as such. Further that the

interpretation of the judgment and the deputy registrar pronouncement never addressed the issue of demotion or reduction of rank meted against him to enable him enjoy proper status.

11. That on 9th December, 2019, the claimant alleged to have raise these issue before this Court and the court directed the claimant once gain to the deputy Registrar to address the said issue. The claimant states that the Deputy registrar did not make any new findings and this court directed that the decree of 18th November, 2020 be adopted.

12. The claimant stated that he is still aggrieved by the orders of this Court of 18th November, 2020 and avers that the total figure of the money lost as a result of interdiction, suspension and demotion is **Kenya Shillings Three Million, Nine Hundred and Fifty-Seven Thousand Three Hundred and Twenty-Nine (Kshs. 3, 957, 329/-)** excluding cost of suit and accruing interest. In this he attached a schedule of his calculation marked as annexure AMM-1. Further that the figures guiding his calculation was new evidence that was discovered later after judgment.

13. He further stated that the attached scheduled was discovered later after the delivery of judgement and that the same was not within his knowledge before the delivery of the said judgment on 4th April, 2014.

14. The Respondent opposed the application and filed a replying affidavit deposed upon by **Winnie Jebet Cheruiyot**, a senior state counsel, on 20th January 2021.

15. The Respondent's deponent avers that; the decision of the deputy registry was adopted by this court as a decision of this Court as such the only remaining recourse for the claimant/ Applicant is to seek redress at the court of Appeal.

16. She averred that the deputy registrar was only tasked to calculate the decretal sum as was directed under paragraph (b) of the judgment delivered by Justice Byram Ongaya on 4th April, 2014.

17. Further that similar calculations were arrived at by muendo Muli, a human resource assistant serving under the ministry of public service, youth and gender affairs, and that according to Muendo Muli the job group that the claimant ought to be reinstated to is Job Group J and not N as alleged. They attached a copy of the affidavit with annexed tabulations marked as annexure WJC-1.

18. It is contended that the tabulation on the amount payable to the claimant is not new evidence as alleged but that the applicant herein has presented before the deputy registrar his own version of the tabulation in his affidavit of 13th March, 2019.

19. It was submitted that the amount payable is arguing interest every single day and the interest was at Kshs. 1,253,616. 40/- on 18th November, 2020. This was as a result of the lengthy period which parties took to negotiate this matter as the parties could not agree on the job group the claimant was to be reinstated to and the decretal sum payable.

Submissions

20. The claimant/applicant submitted that the greatest difficult in this matter that has caused him to seek redress in this Court is that Justice Byram Ongaya, who determined this cause did not specify what damages are payable to the claimant for the unfair interdiction, suspension and reduction in rank in order for the deputy registrar to factor the same when calculating what is owing to the claimant.

21. Further that, as per the second limb of the judgement, the Honourable Deputy registrar calculated the amount owing to the claimant during suspension, interdiction and reduction of rank but failed to factor in wage increments and automatic promotions that occur in the ordinary course of events which could have been at job group N and not G as he currently hold.

22. He thus urged this court to state how much, in separate heads; interdiction, suspension and reduction of rank would each issue attract in terms of damages with interest from the time of filing of suit to payment in full.

Respondent's Submissions

23. The respondent submitted from the onset that the decision of the deputy registrar is the decision of this court as such this court is exercising its jurisdiction to review its decision. Further that this court had already interpreted the court's judgment and that if the applicant is still aggrieved with that decision then he ought to have filed an appeal at the court of Appeal.

24. It is submitted that the only bone of contention in the judgement of 4th April, 2014, was with regard to Order(b). further that the rest of the orders were clear and therefore the deputy registrar was right to only deal with prayer (b) to the exclusion of others. Further that the decision of the deputy registrar was adopted by this Court and the only recourse that the applicant has is to move to the court of Appeal.

25. It is submitted that the decision of 18th November, 2020 ought not be reviewed. The respondent submitted that the claimant has not explained what evidence he has in his possession that would convince this court to review its Judgment and further that the claimant has not demonstrated the difficult he had in discovering the new evidence he alleges.

26. He submitted that the instances which an order of court can be reviewed is limited as provided for under Order 45 rule 1 of the Civil Procedure Rules;

[Order 45, rule 1.] Application for review of decree or order. 1. (1) Any person considering himself aggrieved— (a) by a

decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

27. Accordingly, it was submitted that, it's not enough to merely allege that one has discovered new evidence. One has to show what evidence they have discovered and further demonstrate that the evidence could not have been accessed by the applicant even after exercising due diligence.

28. In conclusion, the Respondent urged this Court to disallow the application and uphold the ruling of 18th November, 2020 as the Respondent is suffering in that interest continues to accrue on the decretal sum and the same will be a burden to the tax payer if this court allows the application herein.

29. I have examined the averments of the parties herein. From the Judgment of Hon. Ongaya J dated 4/4/2014 the court ordered that the claimant is entitled to full salaries, allowances and benefits flowing from (a) which is interdiction, suspension and reduction in rank and this was to be computed by the claimant and filed in court in 7 days from recording of that figure.

30. It is not clear whether the claimant submitted their tabulation as per the court's Judgment. However on 25/2/2019 Hon. Justice Mbaru issued an order directing that the amount extracted as per the Judgment was 1,340,369/= and the claimant was to work with the Deputy Registrar to ensure execution.

31. The Deputy Registrar issued the certificate as directed by court and the amount now payable amounted to 2,636,799.40. This was on 18/4/2019. On 25/7/2019, the Hon. Justice Mbaru delivered a ruling confirming the findings of the Deputy Registrar on the Judgment of the court.

32. The applicant now seeks a review of the above Ruling on account of having new and important evidence which was not available at the time the Judgment was first delivered in 2014.

33. On this issue, the tabulation having been done in 2019 the applicants are coming late in time and are guilty of laches.

34. Secondly the applicant have not demonstrated before this Honourable court the new and important evidence they now seek to rely on. They have only stated that the applicant would have been reinstated to a different Job group without demonstrating how that would have been.

35. In my view, there is no new and important evidence placed before this court that would warrant review of this court's Judgment and orders.

36. I therefore find the application without merit and I dismiss it accordingly.

37. Costs to the respondents.

RULING DELIVERED VIRTUALLY THIS 25TH DAY OF MARCH, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Cheche for the Applicant

No appearance for Respondent

Court

Clerk

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Wanyoike