



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

CAUSE NO.2030 OF 2015

BERNARD E. N. GACHURI CLAIMANT

VERSUS

JAMII BORA BANK LIMITED..... RESPONDENT

RULING

The claimant filed application dated 30th October, 2020 under the provisions of Order 45 and seeking for orders that;

There is an error on the face of the record and the court may be pleased to note that contrary to paragraph 57 of the judgement the claimant has in his Memorandum of Claim sought his terminal dues which includes among others

(a) 49 days' pay accrued leave = Ksh.234, 000/=; (b) access to his pension contributions and (c) be issued with a Certificate of Service in accordance with the law. The terminal dues claimed are well captured in paragraph 13 and 14 of the judgement.

In light of the fact that the terminal dues were specifically claimed in both Memorandum of Claim and on Claimant's Written Submissions it is only fair and just that the court be pleased to rectify the error and take appropriate action.

Costs be provided for.

The application is supported by the claimant's affidavit and on the grounds that the accrued leave due to employees of the respondent are officially included in their pay slips every month until the leave is taken. The terminal dues are within the law. upon going through the judgement delivered on 16th July, 2020 and particularly paragraph 57 the claimant noted that he was entitled to terminal dues which according to the court were not sought in the memorandum which was in error because terminal benefits were clearly claimed and captured in the judgement at paragraphs 13 and 14,

The claimant avers in his affidavit that based on his claim and the judgement, there is an apparent error on the record and seek the court 50 address and allow him 49 days accrued leave, access to pension contributions and certificate of service which dues were left out in the judgement award.

In reply, the respondent filed Grounds of Opposition that the application by the claimant is in abuse of court process and should be dismissed. That the judgement delivered on 16th July, 2020 the court awarded the claimant ksh.2 million being damages together with costs of the suit. Parties agreed on costs and payment of judgement sum in instalments and the respondent proceeded to draw 3 cheques for Ksh.900, 000 vide cheque number 6287; Ksh.900, 000 vide cheque number 6286; and ksh.474, 440 vide cheque number 6288 in full and final settlement of the decretal sum and costs.

Other grounds are that the claimant has received the payments and the application seeking a review of the judgement is done way after and should be dismissed. The application does not meet the threshold of Order 45 and the court has since rendered itself and stands *functus officio* as held in **Menginya salim Murgani v Kenya Revenue Authority [2014] eKLR**.

both parties filed written submissions, the on the affidavit, grounds of opposition the single for determination is whether the court should review the judgement delivered on 16th July, 2020 with regard to an award for 49 days' pay accrued leave, access to pension contributions and issuance of a certificate of service.

In employment and labour relations, an application seeking review of the court judgement of orders should be premised on the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 20q6. Such requires an applicant to;

33. (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 judgment 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 judgment or ruling requires clarification; or

(d) for any other sufficient reason.

In this regard, the claimant application is that there was an error in the judgement and his accrued leave, access to pension and certificate of service were not awarded despite the court addressing these being claimed in the Memorandum of Claim and the court at paragraph 13 and 14 addressing the same and making a finding at paragraph 57 that terminal dues were payable but these were not included in the final orders.

The court, on good basis and sufficient cause, where there is an error apparent on the face of the record and upon application, may review its decision to conform to the findings of the review or quash its decision and order that the error be rectified.

Under paragraph 13 of the judgement the court outlined the claims made and which included;

i) One month pay in lieu of notice Kshs. 140,000/=

ii) Pay for the 39 days the claimant is alleged to have been under suspension

Kshs. 187,000/=

iii) 49 days' pay in lieu of accrued leave Kshs. 234,000/=

iv) 12 months' compensation for unfair Termination of employment

kshs 1,680,000/=

TOTAL 2,241,000/=

PLUS: General damages and declarations as pleaded. Interests of special and general damage; costs of the suit and any other relief that the court may deem fit to grant.

under paragraph 14 (d) to (i) the court further analysed the claims made as follows;

d) That if the Respondent is able to prove that they had formally suspended the Claimant on 3rd August, 2015, (which is denied) the Respondent be ordered to pay the Claimant his salary for August and 8 days in September, 2015, being the period under suspension.

e) The Respondent be ordered to pay one month pay in lieu of notice to the Claimant.

f) The Respondent be ordered to pay the Claimant 49 days' accrued leave plus service pay.

g) Order the Respondent to enable the Claimant to access his pension contribution as provided for under the law.

h) The Respondent be ordered to issue the Claimant with a Certificate of Service in accordance with the law.

i) The Respondent be ordered to pay the Claimant damages suffered as a result of the Respondent's documented erosion of the Claimants credibility through falsification of facts, slanderous and malicious.

In making their written submissions, the respondent specifically addressed these claims and which the court summarised in the judgement at paragraphs 42 with regard to claim for leave days due; and paragraph 43 on the claim for access to pension contributions.

Ultimately, there is a finding with regard to the claims made and under paragraph 57 the court made a finding that;

Remedies

57. Having found that the termination was null and void, the only remedy the Claimant is entitled to are his terminal dues which the Claimant has not sought in his Memorandum of Claim.

In the final award, the court awarded general damages due to malice actuated by the respondent against the claimant.

Paragraph 57 of the judgement is not in tandem with the analysis and submissions by the parties where the claimant specifically pleaded for the payment of leave days, access to pension contributions and a certificate of service. the respondent made submissions on these claims and the court has made a finding at *termination of employment was null and void* save proceeded to find that *the claimant is not entitled to his terminal dues which the claimant has not sought in his Memorandum of claim.*

These findings at paragraph 57 are in error. This is apparent by a look at the entire reasoning of the judgement.

The court in **Paul Kipkemoi Kiptoo v Board of Trustees National Social Security Fund (NSSF) [2019] eKLR** held that;

*To review a judgement or order of the court for a sufficient cause should be readily allowed. the overriding objective principle is to enable the Court achieve fair, Just, speedy, proportionate, time and cost saving disposal of cases before it; but does not operate to uproot established principles and procedures, but to embolden the Court to be guided by a broad sense of Justice and fairness as held in the case of **Nguruman Limited versus Shompole Group Ranch & Another [2014] [eKLR** and in the case of **Hunter Trading Company Limited versus ECF/011 Kenya Limited Civil Application No. Nai 6 of 2010 (UR3/2010)** for the proposition that, the overriding objective principle is intended to not only energize the process of the Court but also ensure that interpretation of any of the provisions of the law and the Rules made thereunder are compliant to the oxygen principle.*

In this regard, the court finds good basis for the application seeking review of the judgement delivered on 16th July, 2020. Leave pay is claimed for 39 days and not 49 per paragraph 29(ii) of the Memorandum of Claim and at Ksh.187, 000 and not 234,000.

Assessment of leave pay is payable based on the basic salary and not gross. The claimant has attached his payment statement for June, 2015 when he was earning ksh.140, 000 per month in basic pay.

For the 39 leave days claimed and addressed on the judgement such amounts to Ksh.187, 000. This is due for the leave days earned and not taken.

With regard to access to pension contributions, such is a matter addressed under a different regime and laws and upon termination of employment, the claimant ought to address with the fund manager(s) and or trustees or as the pension contributions are regulated.

A certificate of service is due at the end of employment and pursuant to the provisions of section 51 of the Employment Act, 2007. The reason for termination of employment does not affect such right.

Accordingly, application dated 30th October, 2020 is hereby found with merit; the judgement delivered on 16th July, 2020 is hereby reviewed in the following terms;

- a) Leave pay due for 39 days at ksh.187,000;**
- b) Certificate of service shall be issued pursuant to the provisions of section 51 of the Employment Act, 2007.**
- c) Each party shall pay own costs.**

Delivered in open court at Nairobi this 2nd day of March, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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