



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 224 OF 2015

SAMUEL BUNDI MOKORA.....CLAIMANT

-VERSUS-

MUSA CHEBIRINGET T/A FARMERS INN CLUB.....RESPONDENT

RULING

1. This ruling is in respect of the Respondent/applicant's application dated 24th February, 2021 filed under certificate of urgency on 2nd March, 2021 via the firm of Mongeri & Company advocates seeking the following orders;

- 1) **That this application be certified as urgent and heard ex parte in the first instance.**
- 2) **That this Honourable court be pleased to stay the execution of the decree issued on 27th October 2020 by Hon M Mbaru J. adopting the labour officer report/award as judgement of Court.**
- 3) **That the Honourable court be pleased to review and set aside the decree and or orders issued on 27th October, 2020 by Hon M. Mbaru J. adopting the labour officer report/award as the judgment of Court.**
- 4) **That pending hearing and determination of this application interpartes this Honourable Court be pleased to stay taxation of the claimant Bill of costs dated 20th November, 2020.**
- 5) **That this Honourable Court be pleased to refer the matter back to the labour officer for a fresh tabulation of dues.**
- 6) **That the costs of the application be provided for.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the Respondent **Musa Chebiringet** on 24th February, 2021 on the following grounds: -

- (a) That, neither the respondent nor his advocates on record had a chance to comment on the report prepared by the labour officer before it was adopted by the court.
- (b) according to him the amount in terms of terminal dues due to the claimant have been exaggerated by the labour officer.
- (c) That it is not known what amount of the claimant's salary was used by the labour officer in doing his tabulations and that he was not invited by the labour officer to give his input on the claimant's dues.
- (d) That the respondent is likely to suffer loss and damage if the application herein is not allowed.

3. In opposing the application, the claimant, **Samuel Bundi Mokora**, swore a replying affidavit dated 23rd March, 2021 and filed in this Court on 25th March, 2021 on the following grounds;

- a) That the application herein is scandalous, vexatious, and an abuse of court process as it encompasses different prayers governed by different rules therefore incapable of a proper response.
- b) That the Respondent herein seeks to review an order granted by this Court when he has not demonstrated the error apparent on record that he seek this Court to review.

c) That, the applicant herein was served with an application dated 1st October, 2020 seeking to adopt the labour officer's report and his counsel appeared in court and sought time to put a response if any but failed to file any response till the Court delivered its ruling on the application on 30th October, 2020.

d) That the applicant herein had ample time to respond to the application seeking to adopt the labour officer's report before the same was adopted by this Court therefore the current application is a mere delay tactic meant to delay the claimant enjoyment of his fruits of judgment.

e) That the application had been filed with undue delay about 4 months since the said judgment was delivered and no justification for the delay has been given by the applicant.

f) He therefore urged this Court to dismiss this application for lacking merit.

4. The parties herein disposed of the application by way of written submissions with the applicant filing on 29th April, 2020 and the Respondent on 27th April, 2020.

Applicant submissions

5. The applicant maintains that the labour officer report was prepared without his input. He argues that the labour officer's tabulation used basic salary that was not ascertained in that no evidence in form of pay slips were adduced to affirm the said basic pay. Further that he was never called upon to confirm the same when he is the record holder.

6. It was argued that the labour officer failed to give the respondent/ applicant an opportunity to be heard contrary to the express provisions of section 47 of the Employment Act.

Respondent's submissions

7. The Respondent submitted that the application herein is seeking a mongrel of prayers governed by different provisions of law, practice and procedure therefore incapable of a proper response which makes the entire application incurably defective and one deserving dismissal and cited the case of **Rajput –versus- Barclays bank of Kenya Limited & 3 others [2013] eklr.**

8. It was submitted that the applicant herein has not satisfied the conditions for grant of stay provided under Order 22, Rule 22(1) of the Civil Procedure Rules in that he has failed to demonstrate what loss he is likely to suffer if the said orders are not granted, that he made the application with undue delay and no reason is given for the delay and lastly that the applicant has failed to state whether he is ready to give security for due performance of the decree. He buttressed his argument by citing the cases of **Antoine Ndiaye –v- African Virtual university [2015] eklr** and **Prilscot Company Limited –v- Monica Heho[2015] eklr.**

9. On the prayer for review, the respondent submitted that the applicant is misleading the court when he alleges that he was not given an opportunity to make comments on the Labour officer report/ award before the same was adopted in Court. On the contrary, it was indicated that the applicant herein was served with an application dated 1st October, 2020 attaching a copy of the labour officer award which the Claimant/ Respondent herein sought to adopt. The respondent avers that if the applicant had any objection, he should have raised the same during that time.

10. It was submitted further that the applicant herein is seeking to review the orders of this Court but failed to satisfy condition provided under Rule 33 of this Court's Rules such as discovery of new and important matter, that there is some mistake or error apparent on the face of record, if the judgment or ruling requires clarification and for any other sufficient reasons.

11. Counsel cited the case of **Attorney General & Others –v- Boniface Byanyima** where the court defined mistake or error apparent on face of record to mean error that does not require extraneous matter to show its correctness. An error so manifestly clear that no court would permit such error to remain on record.

12. It was submitted that the applicant took about 4 months before filing this application and the delay has not been explained at all as contemplated under Rule 33 of this Court's Rules. He reinforced his argument by citing the case of **Nairobi Civil Appeal No. 93 of 2013 Between Nerta Gohil –versus- Fidelity commercial Bank Limited** where the Court held a delay for 5 months to be inordinate. Similarly the respondent herein urged this Court to find the delay herein to be inordinate and dismiss this Application with costs to the Claimant/ Respondent.

13. I have examined the averments and submissions of the parties herein. The applicant seeks review of orders issued by Hon. Mbaru J on 27/10/2020 adopting the Labour Officer's report.

14. However I have looked at the court record, there is no ruling delivered by J. Mbaru on 27/10/2020.

15. However on 30/10/2020, this court delivered a ruling adopting the Labour Officer's tabulations.

16. The ruling may be the one in contention. From the record, the respondents and claimants appeared before the trial Judge on 13/10/2020.

17. The claimants sought to have the Labour Officer's report to be adopted. The respondent's counsel Mrs. Moenga indicated that she had no objection to the report's adoption though she had not looked at the report.

18. The court then indicated that the respondent would be given time to look at the report and mention set for 26/10/2020.
19. On 26/10/2020 the parties again appeared before the Hon. Judge and counsel for Respondent Mr. Mongeri indicated that the counsel for Respondent had been busy and sick.
20. The court set its ruling for 27/10/2020 but this was moved forward to 30/10/2020 when the report was adopted.
21. In my view the respondent had an opportunity and time to look at the County Labour Officer's report and make comments on the same.
22. The Respondents failed to do this despite having the opportunity.
23. The Respondents now aver that they had no chance to comment on the report which is not correct.
24. The Respondents also seeks a review of the court's orders of 27/10/2020.
25. Rule 33 of Employment & Labour Relations Court (Procedure) Rules 2016 states as follows:-

33. Review

(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.

(2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to Review. Kenya Subsidiary Legislation, 2016 2507 any other judge if that judge is not attached to the Court station.

(3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.

(4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.

(5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.

(6) An order made for a review of a decree or order shall not be subject to further review.

26. For this application to succeed, the applicant has to establish that there is new and important matter, or there was an error on record on the Judgment or Ruling which requires clarification and lastly for any other sufficient reason.

27. The applicant has not established any of the above provisions which can lead to a review of the Court's ruling.

28. In my view, there is nothing to be reviewed in the ruling of the court and the application is found to be without merit.

29. I dismiss this application accordingly. Costs to the respondents.

RULING DELIVERED VIRTUALLY THIS 10TH DAY OF JUNE, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Daye for the Claimants – present

Mrs. Moenga for Mongeri & Co. for Respondent – present

