



**IN THE REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC. CAUSE NO. 755 OF 2018**

**SIMON NDICU.....CLAIMANT**

**-VERSUS-**

**KARATINA UNIVERSITY.....RESPONDENT**

**RULING**

1. On 8.4.2021, I delivered judgment in favour of the claimant in which I awarded him Kshs.611,100 and directed that the same be paid subject statutory deductions. However the claimant was aggrieved and filed the application dated 16.4.2021 seeking the following orders:

***(a) Review and or vary of the said judgment to correct an error apparent on the record, namely, the award of Kshs611,100 be subjected to statutory deduction yet the said amount had been pleaded in the Amended Claim less statutory deductions.***

***(b) Costs of the application.***

2. The application is supported by the claimant's affidavit sworn on 16.4.2021 and it is opposed by the respondent vide the grounds of opposition dated 28.4.2021. the application was disposed of by written submissions.

3. The Claimant's case is that there is an error apparent on the face of the record which requires correction by the court, namely the direction that the sum awarded be subjected to statutory deductions. He contends that he pleaded the sum of Kshs.611,100 as net amount in the Amended Claim after statutory deductions. He further contends that he annexed documents at page 6,7,8,26,27, 36, 37,38,39,40,72 and 73 of his further list of documents dated 20.2.2020, to show that the said sum had already been subjected to tax. Therefore he urged the court to correct the said error so that the said sum is not subjected to statutory deduction for the second time.

4. The respondent's case is that the claimant did not plead in the Amended Claim or adduce any evidence to show that the sum of Kshs. 611,100 was less statutory deductions; that parties are bound by their pleadings; that the claimant is seeking to irregularly amend the claim after judgment which is abuse of the court process; that court's discretion should not be used to aid the indolence of the claimant; and that the application does not find support under Rule 33 of the ELRC procedure Rules.

5. Having carefully considered the application, affidavits and submissions, the only issue for determination is whether the claimant has established that there is an error apparent on the face of the record to warrant review of the impugned judgment.

6. The claimant contends that he pleaded and tendered evidence to show that the sum of Kshs 611,100 was net of statutory deductions but the court failed to see that. On the other hand the Respondent contends that the Claimant neither pleaded nor tendered evidence to show that the said sum was net of statutory deductions.

7. I have carefully perused the Amended Claim and confirmed that the claimant pleaded a claim of Kshs.611,100 as unpaid wages without any indication that it was net of statutory deductions. However in his Reply to Defence, he pleaded as follows in paragraph 5:

***“In reply to paragraph 4(e) of the response to the memorandum of claim the Claimant reiterates that the amount computed as unpaid wages of Kshs 611,110 in paragraph V of the amended Memorandum of Claim, is correctly computed and it is arrived at after factoring the 30% tax deduction which the respondent has not remitted to Kenya Revenue Authority (KRA)”***

8. The claimant also filed further list of documents dated 20.2.2020 to support the said pleadings. The claimant has annexed copies of the said documents to the instant application which were filed on 24.2.2020. The said documents were filed just before the courts were closed due to the Covid-19 pandemic. They were never placed in the court file. All what was on record was the Amended Claim and Reply to defence that were annexed to the application for leave dated 27.1.2020 that was allowed on 17.2.2020. As it can be remembered, there was

no proper platform for e-filing in February 2020.

9. Without such documentary evidence to prove that the sum claimed was net of statutory deductions, I made the award without considering the said evidence. The respondent did not dispute by affidavit that the claimant did not file the said documents on 24.2.2020 and served upon it on 3.3.2020. Consequently, I agree with the claimant that had the court considered the said documents, it would have arrived at a different decision. It would not have made the finding that the claim was less than what the respondent was offering and it would not have subjected the award to statutory deductions for the second time.

10. Having made the foregoing observation, I now find that there is an error apparent on the face of the record in the Judgment caused by the failure to place the claimant's list of further documents in the court file for consideration during the judgment. The said error is so obvious that it does not require much effort to establish.

11. In the case of **Nyamogo and Nyamogo v Kogo [2001] EA 174** the Court of Appeal held that:

*“An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”*  
[Emphasis added]

12. The application for review was made less than 10 days after the delivery of the impugned judgement which in the circumstances of this case was within reasonable time. Since the review only seeks to vary the order for statutory deductions, which was caused by a genuine error, I do not see any prejudice on the part of the respondent, but the claimant will suffer the same if the review is denied. Judicial time will also be saved by allowing the application as opposed to ordering a fresh trial.

13. In the end I allow the application by setting aside paragraph 21 of the impugned judgment and substituting therewith the following:

*“21. The claimant filed a list of further documents dated 20.2.2020 to substantiate his claim of Kshs.611, 100 as the net of his unpaid wages. Consequently, I enter judgment for payment of Kshs.611, 100. The said sum to be paid within 14 days from the day the claimant presents the documents required for accountability purposes. The claimant will also have costs and interest at court rates from the date of filing the suit.”*

14. The rest of the judgment remains unchanged. I will not condemn any party to pay costs of the application.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 2<sup>ND</sup> DAY OF SEPTEMBER, 2021.**

**ONESMUS N. MAKAU**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**