



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CUASE NO.862 OF 2014

GRACE OTIENO.....APPLICANT

VERSUS

THE SALARIES AND REMUNERATION COMMISISON.....RESPONDENT

RULING

The claimant filed application dated 2<sup>nd</sup> August, 2021 seeking a review of the judgement delivered on 17<sup>th</sup> February, 2017 and in response the respondent filed Notice of Preliminary Objection dated 10<sup>th</sup> September, 2021 and the subject of the ruling herein.

The objections are that;

*The claimant right to review the judgement delivered on 17<sup>th</sup> February, 2017 was extinguished upon filing of the Notice of Appeal and subsequent hearing and disposal of that appeal being Civil Appeal No.418 of 2017.*

Upon filing of the Notice of Appeal, this court became functus officio and thus does not have jurisdiction to hear the application.

The application herein is incompetent and incurably defective as the order being preferred for review has already been preferred to an Appeal to which the court has already pronounced itself.

The respondent submitted that following judgement herein on 17<sup>th</sup> February, 2017 the claimant was dissatisfied and filed appeal and in the Memorandum of Appeal ground 5 was seeking for a finding that the court had erred in denying the claimant interest on the damages awarded and the Court of Appeal dismissed the same.

The application seeking review and award of interests on the judgement is inviting the court to review the judgement of the Court of Appeal and upon such appeal this court lack jurisdiction.

Under Rule 33(1) of the Employment and Labour Relations court (Procedure) Rules, 2016 a person who is aggrieved by a decree or orders from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed may apply for review. Under these Rules, no application for review can be made where an appeal has been lodged s held in **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR**. this cannot reopen the case to allow a review upon the judgement by the Court of Appeal. Such would be in abuse of court process which would be in abuse of court process as held in **Satya Bhamu Gandhi v Director of Public Prosecutions & others [2018] eKLR**.

The claimant submitted that she filed the claim herein and was awarded notice pay, leave days, compensation, and costs of the suit and dissatisfied with the damages awarded lodged an appeal to the Court of Appeal which was disallowed.

The claimant has written to the respondent for payment of the award with accrued interest but has declined on the grounds that this was not awarded in the judgement hence the application seeking review.

The claimant is entitled to interests accrued on the award made 4 years ago. The claimant had claimed for costs and interest but the court in judgement awarded costs but not interests which is due. having been a successful litigant, the claimant is entitled to interests having waited for payment of 5 years as held in **Michael Murimi Kamanzi v Jamesons Industries Ltd and Another** and in the case of **Jasper Juma Nzuki v James Wanyama Mathuku & another HCCC No.45 of 2002**.

Determination

The right of review with regard to any orders, judgement or decree of the court is secured under the provisions of section 16 of the Employment and Labour Relations Act, 2011 and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules.

Under Rule 33(1);

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—*

Upon filing an appeal against the decree, order or judgement of the court, the right of review is lost.

In **William Karani & 47 others v Wamalwa Kijana & 2 others [1987] eKLR** the Court of Appeal held that;

... Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal. It would not be possible for example to pray for review because there was error on the face of the record, on the grounds that the court had no jurisdiction to pass the decree or order complained of, and then by an appeal complain of misdirections on the evidence. That would be an absurd use of the appeal process, because if the court had no jurisdiction, the misdirections on the evidence would, of course, be unimportant. The proper approach would be to put all the complaints into one appeal.

And in the case of **African Airlines International Limited v Eastern & Southern Africa Trade Bank Limited [2003] 1 EA 1 (CAK)** the court held that;

Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of a court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with.

The claimant has since filed an appeal under which all complaints ought to have been addressed as to file the instant application seeking a review of the judgement herein after the appeal, this court has rendered itself with finality. It stand *functus officio*.

Accordingly, objections by the respondent vide notice dated 10<sup>th</sup> September, 2021 are found with merit and hereby allowed. Each party shall pay own costs.

**DELIVERED IN OPEN COURT AT NAIROBI THIS 14<sup>TH</sup> DAY OF OCTOBER, 2021**

**M. MBARU**

**JUDGE**