



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 464 'B' OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BERNARD NDUNGU MBUGUA

CLAIMANT

VERSUS

NAIROBI WATER AND SEWERAGE COMPANY LIMITED

RESPONDENT

RULING NO. 2

1. Before me, for determination is the Claimant/Applicant's Notice of Motion Application dated 3rd November, 2020 seeking the following orders:

(i) Spent

(ii) THAT, the Ruling of the Court delivered on 18th September, 2020 be reviewed.

(iii) THAT costs of the Application be provided for.

2. This Application is premised on the grounds **THAT**:

(i) This Court in its Ruling delivered on 18th September, 2020 failed to take into account the provisions of Paragraph 2, Page 10 of its final Judgment.

(ii) That based on the above the Court made a finding in favour of the Applicant and stated that his summary dismissal was reduced to a normal termination and was thus a payable limb in the Claimant's Claim.

(iii) This Court proceeded to order the Respondent to pay the Claimant's terminal dues in accordance with the terms of service of the Claimant's employment.

(iv) Parties were further directed on 7th November, 2019 to tabulate the decretal award payable to the Claimant and approach the Court only if the same is not agreed upon.

(v) The parties hereto never had a sitting to discuss the sums payable to the Claimant as the Claimant's Counsel on record at the moment Mr. Michael Owuor passed on. This further necessitated the Claimant to engage the current Counsel on record who proceeded to file an Application for tabulation vide the Motion dated 9th March, 2020.

(vi) The Applicant maintains that this Court in its Ruling of 18th September, 2020 failed to take into consideration its Orders of 7th November, 2019 as read with the Judgment of 12th July, 2019 on the ground that no computation was done as directed.

(vii) The sum of Kshs.310,343.75 allegedly paid by the Respondent as final settlement cannot therefore be deemed as such given that no computation had been **done as directed**.

(viii) It is on this basis that the Claimant/Applicant seeks to have the impugned Ruling of 18th September, 2020 reviewed.

3. The Application is further supported by the Affidavit of **BERNARD NDUNGU MBUGUA** sworn on 3rd November, 2020, in which he reiterates the grounds as set out on the face of the Notice of Motion Application.

4. In response to the Application the Respondent filed an Affidavit in which the Respondent acknowledges that an amount of Kshs.310,345.75 was paid out to the Claimant.

5. The Affiant further maintains that the instant Application is devoid of merit the due amount having already been settled by the Respondent. It therefore argued that the Application ought to be dismissed with costs to the Respondent.

6. Parties agreed to dispose of the application by way of written submissions.

Submissions by the Parties

7. In his Submissions the Claimant/Applicant maintains that no tabulation was ever made by the parties as directed by this Court in its Judgment of 12th July, 2019 and that the tabulation of Kshs.310,343.75 allegedly paid by the Respondent does not appear in the Court record.

8. He further submitted that the said sum was arrived at following mutual computation and was not sanctioned by the Court. He therefore argued that he has made out his case for the review of the impugned ruling of 18th September, 2020 in the interest of justice to allow for the compliance with the Court's Orders of 7th November, 2019.

9. He further urged this Court to order the deduction of Kshs.310,343.75 paid to him by the Respondent from the amount to be computed as full and final settlement of his claim.

10. In conclusion the Claimant/Applicant urged this Court to find his Application meritorious and to allow the same as prayed.

Respondent's Submissions

11. The Respondent on the other hand submitted that the application for review has no merit and that the same ought to be dismissed with costs to the Respondent.

Analysis and Determination

12. After considering the parties' arguments and the evidence adduced, I find that the issue for determination is whether or not the application for review is merited.

13. This court is clothed with powers to review its judgments and/or Rulings as provided under Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. The circumstances under which the court may exercise the discretion to review as set out under Rule 33 are 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 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.

[Emphasis added]

14. I have perused Court record in this matter and note that the Claimant/Applicant has in fact preferred an Appeal against the impugned Ruling of 18th September, 2020 vide his Notice of Appeal dated 29th September, 2020 and lodged with the Employment and Labour Relations Court on 30th September, 2020.

15. The instant Application therefore fails on this limb by dint of the provisions of Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 which provide that an application for review may only be made where no appeal has been preferred by the Applicant. There is no indication that the notice of appeal has been withdrawn or that the Applicant has abandoned the appeal. This Court can therefore not proceed to discuss the merits of the Application.

Conclusion

16. The Application dated 3rd November, 2020 is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2021

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE