



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

ELRC. CAUSE NO. 14 OF 2020

EMILY CHEPTKURUI SANG.....CLAIMANT

-VERSUS-

THE COUNTY PUBLIC SERVICE BOARD, KERICHO COUNTY.....1ST RESPONDENT

THE GOVERNOR KERICHO COUNTY, PROF. PAUL K. CHEPKWONY.....2ND RESPONDENT

RULING

1. On 23.9.2021, Wasilwa J delivered a judgment by which she reinstated the claimant to her employment position with back pay plus compensation for unfair termination equalling to six months' salary and costs of the suit. The respondents were aggrieved by the said decision preferred an appeal by filing a Notice of Appeal dated 27.9. 2021.

2. Again the respondents filed the Notice of Motion dated 6.10.2021 seeking the following orders:

- a. That the Honourable Court be pleased to review, vary, set aside and/or vacate the orders made on 23.9.2021.
- b. That the Honourable Court be please to grant further orders as it may deem fit and expedient in the circumstances.
- c. That costs of the application be provided for.

3. The application is supported by the Affidavit sworn on 6.10.2021 by Mr. Joel Bett, the County Secretary and Head of Public Service Kericho County. The claimant has opposed by her Replying Affidavit sworn on 21. 10.2021.

Applicant's case

4. The applicants' case is that while reviewing its payroll to ascertain the back pay for the claimant, they have discovered new and important evidence which was not within their knowledge at the time of the hearing. According to them the new finding warrants review of the Court's judgment.

5. They contended that since March 2020 when the claimant was dismissed to September 2021, she continued receiving her monthly salary and other entitlements. The claimant concealed the fact that she was receiving all her salary and as such there was no basis to claim back pay. According to the applicants, the claimant is also not entitled to compensation of 6 months' salary for unfair termination because of the conduct.

6. They argued that the concealment of the said material facts by the claimant was with the aim of defeating the ends of justice and unjustly enriching herself. Therefore they urged the court to find that there are sufficient reasons for reviewing or setting aside the impugned orders.

7. Finally they stated that the application was made without unreasonable delay and contended that it is in the interest of justice that the application be allowed as prayed.

Respondent's case

8. The claimant contended that the alleged discovery of new and important evidence is not valid ground for review since the applicants by virtue of being her employer, they knew that she was receiving her salary because they are the ones who approved the payment. In addition, she contended that she made the application dated 1.4.2020, and the same was compromised by consent of the employer that the status quo

before 20.3.2020 be maintained. The said order was never stayed, varied or set aside and as such she remained in the payroll and the employer paid her the salary less allowances.

9. In view of the foregoing matters, she believes that the application does not meet the threshold for granting review. According to her the dispute at hand is an administrative issue that ought to be expeditiously resolved by the applicant tabulating what is owed to her net of the amount already paid.

10. On without prejudice, the claimant contended that the applicants have already filed a Notice of Appeal under Rule 75 of the Court of Appeal Rules against the same judgment they are now seeking review. She has also filed her Notice of Address of service under Rule 79 of the Court of Appeal Rules. She contended that the applicants had the option of pursuing either the appeal or review but not both. Therefore, since they have already preferred an appeal, the review application amounts to abuse of the court process and should be dismissed with costs.

Issues for determination and analysis

11. I have carefully considered the materials presented by the parties. The relevant law in the application for review is Rule 33(1) of ELRC Procedure Rules 2016 which provides that:

“(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 an 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 reasons.”

12. The issues for determination in the instant applications are therefore:

a. Whether the applications were made without unreasonable delay.

b. Whether the applicant has established any of the above grounds for review.

Whether application was made after unreasonable delay

13. The application for review was filed on 6.10.2021 while impugned judgment as delivered on 23.9.2021. The time taken to make the application was less than a month from the date of the judgment. Consequently, the court finds that the application was made without unreasonable delay.

Whether the applicant has established any ground for review.

14. The ground upon which the application stands is that there is discovery of new and important matter or evidence which, after the exercise of due diligence, could not be produced by the applicants during the hearing. The new evidence according to applicants is that while reviewing their payroll to compute the back pay to the claimant, it was discovered that the claimant continued to receive salary from March 2020 when she was dismissed to September 2021 when the impugned judgment was delivered.

15. However, the claimant contends that the alleged discovery is not a valid ground for review because at all material times the applicants had knowledge of the information that she was receiving salary by virtue of their position as the employers, and being the ones who approved the payment of salaries. She further contends that there was a court order for her to remain in the payroll which was obtained by a compromise between her and the employer.

16. I have carefully considered the foregoing arguments and the court record. There is no dispute that the court has unfettered discretion to review its own decisions upon certain thresholds being met by the applicant as set out under Rule 33 of the ELRC Procedure Rules 2016. The question at hand is whether the applicants have established on balance of probability that there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the impugned judgment or decree was passed.

17. To begin with, I wish to observe that the court record does not show existence of the alleged court order directing that *status quo* before 20.3.2020 be maintained. There was therefore no court order allowing the claimant to remain in the respondents' payroll. The only order on record and which was given by Mbaru J on 10.4.2020 in respect of the application dated 1.4.2020 was for preserving the claimant's position pending the hearing of the application *inter-partes*. The said order was extended severally by consent till the court rendered the impugned judgment. Consequently, the allegation by the claimant that she was retained in the payroll by a court order is not factual.

18. The claimant was receiving the salary after the dismissal and without any court order reinstating her to employment. The said conduct of

receiving salary from public funds without any services rendered for one and half years after termination raises integrity query on the claimant's part. She totally concealed that matter from the court during the hearing and it never featured anywhere in the proceedings. It was a well-guarded secret that was only discovered after the judgment.

19. Although, the claimant contends that the applicants knew that she was receiving the payment of her salary, I hold a different view. The court takes judicial notice that the County government employs a big number of employees and the respondents herein may not be able or be in a position to scrutinize the payroll to ascertain that former employees are removed from the same. There is an officer who has that mandate and if he acted negligently and failed to notify the Applicants, then the latter cannot be presumed to know about the status of the payroll. Therefore I agree with the applicant that it was not within their knowledge before the passing of the impugned judgment that the claimant was receiving salary after the termination.

20. I would also add that no reasonable employer or Governor of a County would fathom a situation where, a dismissed employee who is fighting for reinstatement in court, could be receiving salary from public coffers without rendering any service. In the circumstances, I find that the applicants were entitled to bring the instant application for review of the impugned judgment.

21. In view of the foregoing observations and findings, I am satisfied that the applicants have established a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the judgment was passed.

22. Consequently, I allow the application dated 6.10.2021 by reviewing and varying the impugned judgment to the extent that the order for back pay is substituted with the order that the claimant has already received her salary for the period she was out of employment from March 2020 to September 2021.

23. As regards the award of 6 months' salary compensation for unlawful dismissal, I find that the applicants have not established the ground for review or setting aside of the same. However, the foregoing finding does not mean that I am in agreement with the trial court that the alternative relief of compensation for the unlawful dismissal was merited after granting the primary relief of reinstatement with back pay.

24. In conclusion, I allow the application to the extent stated above. The rest of the judgment remains as it were. The applicant is awarded costs of the application.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY NOVEMBER, 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 15th 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