



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1405 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 21th May, 2020)

KINGSFORD MUKIRI GITARI

AGNES WAMBUI MAINA

DANIEL NYAUMA NYANUMBA

BERNADETTE MWAIZI MAYENZE

FAITH KABIRITHU ITHINYAI

RICHARD MUTHEE KIAMBI.....CLAIMANTS

VERSUS

SINTEL SECURITY PRINT

SOLUTIONS LIMITEDRESPONDENT

RULING

1. The 1st, 3rd, 5th and 6th Applicants filed a Notice of Motion on 5/11/2016 seeking the following orders:-

1. THAT this Honourable Court be pleased to review the Judgment delivered on 2/7/2019 in this matter.

2. THAT the costs of this application be provided for.

2. The application is based on grounds that:-

1. The Honourable Court delivered judgment in this matter on 2/7/2019 awarding the Applicants 8 months compensation at the monthly rate of Kshs. 30,000 per month.

2. The Honourable Court held that the Applicants were permanent employees who as per the contract of employment were entitled to Kshs. 39,000/-per month instead of Kshs. 30,000/-. They therefore seek a review for the multiplier to be Kshs. 39,000/- per month instead of Kshs. 30,000/-.

3. During the probation period their salary was Kshs. 30,00 and was to be increased to Kshs.

35,000 upon expiry of the probation period.

4. The Court should grant the Applicants overtime together with unpaid leave, which were both not considered in the Judgment.

5. The one month salary in lieu of notice awarded ought to be Kshs. 39,000/- instead to Kshs. 30,000/-.

6. The awarded reduction of salary for May 2013 ought to be Kshs. 25,000/- as opposed to Kshs. 10,000/-.

7. The unpaid June 2013 salary ought to be Kshs. 15,000/- instead of Kshs. 6,000/- awarded.

3. The application is supported by the Affidavit of Kingsford Gitari, the 1st Applicant herein on behalf of 3rd, 5th and 6th Applicants, sworn on 5/11/2019. He reiterates the grounds set out on the face of the motion.

4. The Respondent states that it opposed the application by the Replying Affidavit of Martin Rodgers Anangwe sworn on 28/11/2019. However, at the time of the Ruling, the Replying Affidavit was not on record.

Applicants' submissions

5. The Applicants submit that they seek a review for the multiplier to be Kshs.39,000 and a reduction of salary to Kshs. 25,000 and their unpaid salary to Kshs. 15,000. They further submit that their application essentially seeks to clarify the mathematical errors in judgment and is not geared to appeal through the back door. They therefore urge the Court to allow for a review of the multiplier of their salaries.

Respondent's submissions

6. The Respondent submits that a Court can only review its decree or order when either the order or the decree has satisfied the conditions under Order 45 Rule 1 of the Civil Procedure Rules. It further submits that Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 provides for 5 grounds which if satisfied the Court may review its decisions.

7. It submits that from the Applicants' application there is no new and important matter that could not be produced by the applicants at the time when the judgement was delivered. It relies on the case of **Stephen Githua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** where the Court of Appeal held that an application or review can only be allowed on strong grounds if its effect would amount to reopening the applicant's case afresh.

8. It avers that the judgment herein was delivered on 2/7/2019 while the application for review was filed on 5/11/2019. It submits that whereas 4 months appear not to be unreasonable the failure to explain the delay may cause the delay to be construed as unreasonable.

9. It submits that the Applicants have not elaborated any sufficient reason to warrant a review of the Court's judgment. It further submits that the Applicants have not shown that there is material that they could not acquire before or during the hearing of the suit.

10. It submits that the salary payable to the Applicants was Kshs. 30,000/- and the Kshs. 4,000/- paid to them as overtime is not part of their salary. It is therefore its submission that there is no basis for the additional claim of Kshs. 5,000 thus this claim must fail. It further submits that on this basis the Claim for Kshs. 39,000 must fail.

11. It submits that the unpaid salary that the Applicant's seeks being Kshs. 15,000/- instead of Kshs. 6,000/- was on a prorated basis to the number of days worked. It further submits that the Court granted

the Applicant's one month's salary in lieu of notice therefore this claim has already been paid.

12. It submits that the Applicants seek Kshs. 25,000/- for the reduction of salary for May 2013, overtime and unpaid leave but these claims were not prayed for in the suit. It relies on the case of **Daniel Otieno Migore v South Nyanza Sugar Company Limited [2018] eKLR.**

13. In conclusion, it submits that the application is unmeritorious therefore should be dismissed with costs.

14. I have considered the averments of both Parties. As submitted by the Respondent, this Court can review its orders or decrees as provided for under Rule 33 of the ELRC (Procedure) Rules 2016 which states as follows:-

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.

15. The Applicant seeks review of this Court's orders on ground of error on the record in that the Court had held the Applicants were permanent employees and so their salary was 39,000/= per month. That in spite of this, the Court used the multiplier of 30,000/= as salary instead of 39,000/= in calculating the remedies for the Applicants.

16. I have considered the application letters of the Applicants which show that their salary was 30,000/= per month but was to rise to 35,000/= upon completion of probation period. The contention by the Applicants that it was to rise to 39,000/= is not supported by any evidence.

17. I have however agreed that having made a finding that the Applicants were no longer on probation, it follows that I should have found that their salary rose to 35,000/= upon completion of probation period.

18. In calculating their remedies using 30,000/= as their salary, this Court was in error. I therefore correct this error and review my judgement to the extent that the remedies are now calculated using 35,000/= as the monthly salary. The judgement is accordingly reviewed at paragraph 22 to read as follows:-

1. 8 months' salary as compensation for unlawful and unfair termination = 35,000 x 8 = 280,000/=

2. 1 months' salary in lieu of notice = 35,000/=

3. Reduction of salary from May 2013 = 35,000 – 24,000= 9,000/=

4. Unpaid June 2013 salary = 13/30 x 35,000= 15,166/=

TOTAL = 339,166/= less statutory deductions

19. I have therefore allowed the application for review as sought as per this ruling.

20. Costs in the case. The rest of the judgement remains undisturbed.

Dated and delivered in Chambers via zoom this 21st day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njenga for Respondent – Present

S.N thuku for 1st, 3rd, 5th and 6th Claimants – Absent