



sum of Kshs.30,364 and gratuity in the sum of Kshs.50,607 and that the amount due to the claimant as terminal dues being Kshs.62,394 was paid to NAKU SACCO SOCIETY LIMITED. That this was after statutory deductions for PAYE, NSSF, NHIF and union subscriptions, the total amount payable having been Kshs.81,624 before the deductions. It is for these reasons that the applicant seeks review, setting aside or variation of the judgment.

The claimant opposed the application. In the replying affidavit of NAMADA SIMONI, he deposes that this case was heard *ex parte* on 11<sup>th</sup> October 2018, a date that was fixed for hearing mutually in court, when the respondent and his Counsel failed to attend court. That the application by the applicant dated 3<sup>rd</sup> December 2018 seeking to reopen the case was also dismissed for non-attendance of the applicant and his counsel on 16<sup>th</sup> January 2019.

It is further deposed in the affidavit that the issues raised in the application were never raised in the response to the claim nor did the respondent provide any witness statement. That in any event, the court considered the defence in arriving at the judgment. That the respondent squandered its opportunity to tender its evidence and call its witnesses. That the documents the respondent wishes to rely on were in its possession all along but were never brought to the attention of the court since the year 2014 when the suit was filed.

Mr. Namada posits that the applicant has not satisfied the requirements for review under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules or given sufficient reason for the review of the court's award, that the court is *functus officio* and that litigation must come to an end. That the application is an abuse of court process and is only intended to delay the disposal of this suit and deny the claimant the fruits of his judgment.

The application was disposed of by written submissions. In the submissions of the applicant dated 16<sup>th</sup> and filed on 22<sup>nd</sup> January 2020, it is submitted that there is sufficient cause to grant the orders sought. For the definition of sufficient cause, the applicant relies on the decision in **The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government and Others, Civil Appeal No. 147 of 2006** where the court stated –

*"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant."*

The applicant further relied on the definition of sufficient cause and given in **Daphene Parry v Murray Alexander Carson (1963) E.A 546** and in **Parimal v Veena 2011 3SCC 545**. It further relied on the decision in **Wachira Karani v Bildad Wachira (2016) eKLR**.

The applicant submitted that failure to attend court by the Counsel was by error of not diarising the date of hearing which is excusable, relying on the decision in **John Nahashon Mwangi v Kenya Finance Bank Limited (In Liquidation) [2015] eKLR**.

It is the applicant's submissions that it is not its intention to deliberately obstruct the course of justice or delay the case, relying on the decisions in **Katsran Limited v Machakos County GOVERNMENT [2910] eKLR**, **C W G v H G N (2017) eKLR** and **Mbogo v Shah (1968) EA 93** all of which deal with

failure of Counsel to attend court.

For the claimant, it is submitted that the applicable law for review of judgment is Section 16 of the Employment and Labour Relations Court Act and Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016. It is submitted that the applicant has not shown any mistake or error apparent on the face of the record to warrant review.

It is further the submission of the claimant that the respondent has not demonstrated that it will suffer substantial loss relying on the decision in **Kenya Shell Limited v Kibiru (1986) KLR 410**.

The claimant urged the court to rely on the decision in **Mbogo and Another v Shah and Enoch Sasia and Another v Attorney General and 2 Others** and to dismiss the application.

### **Determination**

I have considered the application together with grounds and affidavit in support thereof. I have further considered the replying affidavit and the submissions by both parties.

The application herein basically seeks review of this court's orders made in the judgment by substituting the salary of the claimant that was applied in arriving at both the pay in lieu of notice and compensation awarded to the claimant in the judgment. The applicant further wishes to have amounts it alleges to have been paid to the claimant recovered from the award.

Review is provided for in Section 16 of the Employment and Labour Relations Court Act and Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016. The two provisions are as follows –

Section 16

### **16. Review of orders of the Court**

The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.

Rule 33(1)

### 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.

What the applicant has done is bring new evidence which was not available to the court at the time of hearing or writing the judgment. The circumstances when new evidence can be admitted post judgment for purposes of review as stated in Rule 33 is only where the evidence “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.”

What has been produced by the applicant does not fit into this category and the applicant has not alleged so. It is evidence which could easily have been filed with the defence. That evidence was not even referred to in the defence. The claim is very categorical, on the salary of the claimant. Paragraphs 3, 7 and 8 of the claim state as follows –

3. At all times material to this case and particularly from 7<sup>th</sup> July 2008 the Claimant was employed by the Respondent as a Store Assistant and worked as such continuously, with due diligence and to the Respondent's satisfaction. His last salary was computed at Kshs.24,982/= per month.

7. The claimant avers that arising from his unlawful/unfair dismissal, he is entitled to payment of his terminal benefits which he now claims as tabulated hereunder:-

(i) One month's salary in lieu of notice Kshs.24,982

8. The Claimant further submits that as a result of the illegal and unfair summary dismissal complained of above, he suffered abrupt loss of income and trauma and inability to meet his continuing obligations as a result of which he suffered damages for which he seeks compensation at 12 months' salary, being

Kshs.24,982 x 12 months Ksh.299,784

Further the prayers sought in the claim are as follows –

- (a) A declaration that the Claimant's dismissal from his employment by the Respondent was unlawful and unfair.
- (b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- (c) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs.324,766 as claimed below–
  - i. One month's salary in lieu of notice Kshs.24,982
  - ii. Compensation at 12 months' salary being  
Kshs.24,982 x 12 months Ksh.299,784
- (d) Interest on (c) above from the date of filing suit till payment in full.
- (e) Cost of this suit plus interest thereon.

In the respondent's statement of defence, there is admission of paragraph 3 of the claim. Paragraph 3 of the defence is reproduced below –

3. The Respondent is not in contention with the contents of paragraph 3 of the Memorandum of Claim in so far as the same is a merely statement of existence of a contract of service between the parties to this suit.

The respondent in admitting paragraph 3 of claim essentially admitted the salary of the claimant as pleaded in paragraph 3 of the claim.

There is no plea in the Statement of Defence denying the salary as stated in the claim. At paragraph 10 of the defence, the respondent pleaded as follows –

*10. The respondent further avers that despite the claimant action being of gross misconduct within meaning of Section 44(4)(g) of Employment Act the respondent leniently reduced the summary dismissal to normal termination and part of the dues remitted to the employees Sacco for which the Claimant is a member to recover a loan owed to the cooperative by the Claimant as Loan recovery.*

This was addressed in the judgment at page 5 as follows –

***“The claimant prayed for notice and compensation. The respondent at paragraph 10 of the defence pleads that the claimant’s summary dismissal was reduced to a normal termination and part of the dues remitted to the employees SACCO for which the claimant was a member to recover a loan owed to the Co-operative by the claimant as a loan recovery. No evidence was adduced of any loan owed by the claimant to the undisclosed SACCO or how much was owed by the claimant to the said SACCO. Further, no evidence was adduced of the remittance to the SACCO or even how much the respondent remitted. In the circumstance, the court finds that there is no proof of remittance of the claimant’s terminal dues to the SACCO.”***

It is trite law that parties are bound by their pleadings. Having admitted the salary pleaded by the claimant, the respondent is estopped from denying the same.

On the issue of gratuity paid to the claimant, none was awarded in the claim. On notice, awarded to the claimant, no mention was made in the defence of payment of notice.

As much as I sympathise with the respondent, his remedy is not with this court but perhaps against the Counsel who so negligently handled this case right from the beginning by failing to draft the defence properly, failing to file witness statements and bundle of documents, failing to attend court on a hearing date fixed in court by consent of parties, failing to attend court to prosecute its application for setting aside ex parte proceedings and in the present application, basing its submissions on matters not the subject matter of the application and not pleaded in the application. The claimant did nothing wrong to bear the consequences of the respondent’s counsel’s defaults.

I thus find no merit in the application and dismiss it with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF MAY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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> March 2020 and subsequent directions of 21<sup>st</sup> 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**