



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO. 1583 OF 2013

KOKI MUIACLAIMANT

VERSUS

SAMSUNG ELECTRONICS

EAST AFRICA LIMITEDRESPONDENT

RULING

1. The application before me is the claimant's Notice of Motion dated 14.11.2019. It is brought under section 1A & IB of the Civil Procedure Act, Order 21 Rule 12(2), Order 22 & Order 45 Rule 1 of the Civil Procedure Rules and it seeks the following orders:

- (a) That the amount payable to the respondent as refund of the decretal sum be reviewed.
- (b) The applicant be allowed to pay the respondent the sum of Kshs.1,857,760.15 in equal monthly instalments of Kshs. 200000.
- (c) Costs of the application.
- (d) The application is supported by the claimant's affidavit sworn on 14.11.2019 and it is premised on the grounds set out on the body of the motion.
- (e) The application is opposed by the respondent by filing Replying Affidavit sworn by her Legal Manager Ms. Linda Karimi Kaal on 25.11.2019.

Applicant's case

4.Mr. Akello, Learned Counsel for the applicant submitted that this court entered judgment for the claimant in the sum of Kshs. 8,782,166.60 and stay of execution was granted pending appeal on condition that the respondent paid a deposit of Kshs. 4,705,843.75.

5. He further argued that after hearing the appeal, the Court of Appeal reduced the award to Kshs. 2,225,066.60 plus interest from the date of the trial court judgment to the date of appellate court judgment. Applying the interest rate of 12%, the counsel worked the award due to the claimant as Kshs. 2,225,066.60 plus Kshs. 623,097.00 interest equally to Kshs. 2,848,083.60. Based on the said sum, the counsel calculated the refund as Kshs. 4,705,843.75 – Kshs. 2,848,083.60 equalling Kshs. 1,857,760.15. Accordingly, the counsel urged that, the ruling by this court that the amount refundable is Kshs. 2,531,356.45 plus 14% interest from 29.9.2017 was an error which ought to be a basis for review.

6. The counsel further submitted that upon review of the sum refundable to the respondent, the applicant is ready and willing to repay the same on equal monthly instalments of Kshs. 200000. He therefore prayed for leave of the court to settle the refund of the Kshs. 1,857.760.15 by equal monthly instalments of Kshs. 200000.

Respondent's case

7. Mr. Kivindu, learned counsel for the respondent opposed the application and relied on the Replying Affidavit by Ms. Linda Kaal. He submitted that the claimant never challenged the decision after the application was allowed and his application dated 17.12.2018 for leave to appeal out of time against the assessed refund was dismissed. He further submitted that the application does not meet the threshold for review.

8. The counsel further opposed the request for leave to pay the refund of decreed sum by instalments. He contended that the applicant has paid nothing so far and the refund sum continues to attract interest. He contended that by Affidavit dated 10.8.2015, the claimant opposed

stay pending appeal and stated that she will be able to refund the decreed sum if the respondent's appeal succeeded after payment of the same.

9. He therefore prayed for the application to be dismissed with costs.

Rejoinder

10. Mr. Akello submitted that if the application is rejected the claimant will be forced to pay more money to the respondent than required.

Issues for determination

11. There is no dispute that the court entered judgment for the claimant on 23.7.2015 for the sum of Kshs. 8,705,843.75 out of which Kshs. 4,705,843.75 was paid to the claimant as a condition for stay pending appeal. It is further without dispute that the Court of Appeal reduced the award by this court to Kshs. 2,225,066.60 plus interest from the date of this court's judgment. Finally, there is no dispute that by a Notice of Motion dated 27.8.2018, the respondent applied for assessment of the sum refundable by the claimant to the respondent as Kshs. 2,531,356.45 plus interest of Kshs. 502,052.63 and the court granted the application on 8.10.2018. The issues for determination are:

(a) whether the sum assessed on 8.10.2018 was erroneous and should be reviewed to Kshs. 1,857,760.15.

(b) Whether leave should be granted to repay the sum refundable by equal monthly instalments of Kshs. 200,000.00

Review of the sum refundable

11. Under Rule 33 of the ELRC Procedure Rules, an aggrieved party may apply to the court for review upon all or any of the grounds set out by the rule for review. The application must, however, be made without inordinate delay.

12. In this case the impugned order was made on 8.10.2018 and the application for review was filed on 14.11.2019. The application was made after one year and in my view it was after an undue delay.

13. The ground upon which the application is made is an error in assessment of the sum refundable in the face of the Court of Appeal judgment delivered on 29.9.2017. The said judgment reduced the judgment debt to Kshs. 2,225,066.60 plus interest from the date of the trial court's judgment but subject to statutory deductions.

14. In granting the impugned orders, I agreed with the respondents's assessment of the sum refundable. First, I appreciated that the claimant was paid the money shortly after the judgment was passed and she enjoyed the same for almost 2 years before the Court of Appeal reduced the decreed sum to Kshs. 2,225,066.60. Secondly after subjecting the said sums to statutory deductions the sum due to the claimant was 1,557,546.67 plus interest from 23.7.2015 to 30.9.2017 being Kshs. 616,944.23 equalled Kshs. 2,174,490.00.

15. The said calculation was not disputed by the claimant and I had no reason to reject it. As per the Court of Appeal judgment reducing the sum of Kshs. 2,174,490 from the advance payment of Kshs. 4,705,843.00 the net refundable is Kshs. 2,531,453.00 plus interest from 29.9.2017 at court rates. Considering the said Court of Appeal judgment, I see no error or mistake apparent of the face of the record to warrant review of the impugned ruling. Consequently, I will not interfere with the same. If the claimant feels that I made a wrong or erroneous decision, the action to take is to appeal and not review.

Leave to pay by equal instalments

16. The claimant has enjoyed the money in issue since 2015 to date, almost 5 years. From 29.9.2017 when the Court of Appeal delivered judgment, the claimant has not bothered to refund even a penny to the respondent.

17. During the application by the respondent for the order of stay pending appeal, the claimant stated that she had the means to refund the decreed sum if the appeal succeeded. She made the vow under oath and as such she must fulfill the same. She must repay the debt forthwith otherwise, she would not only be deemed to have lied under oath but also the appeal would be rendered nugatory and prejudice the process of a fair trial.

18. This court is not going to allow a request to pay such huge money by the suggested instalments or at all because she lied to the court about her status as a woman of means with a thriving business which earns her bigger income than what the respondent was paying her.

Disposition

19. The claimant's application lacks merits and it is dismissed with costs.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE