



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 7 OF 2018

(FORMERLY KISII CIVIL APPEAL CASE NO. 93 OF 2015)

(Before Hon. Justice Mathews N. Nduma)

BOOM A. BOSIRE.....APPELLANT

VERSUS

GUSSI MWALIMU CO – OPERATIVE SAVINGS AND

CREDIT SOCIETY LIMITED.....RESPONDENT

RULING

1. The Court delivered Judgment in this Appeal on 6th December 2018 and the final order was set out under paragraph 18 (a) to (e) as follows:-
2. Accordingly, the Appeal succeeds to the following extent and the final orders of the court are as follows:-
 - a. *“The appellant is to be paid by the Respondent three month salary calculated at the appropriate scale of Assistant Senior Book Keeper in lieu of notice.*
 - b. *The Respondent to pay salary at scale of Assistant Senior Book Keeper for the period the Appellant was under suspension.*
 - c. *The respondent to pay under payments set out and proved by the Appellant from the date of confirmation to the Position of Assistant Senior Book keeper to December 2004, the date the retrenchment took effect.*
 - d. *The Respondent to confirm payment of all the terminal benefits set out in the letter of retrenchment including salary to December 2004: payment in lieu of leave for the year 2004 and severance pay calculated at one month’s salary for each completed year of service.*
 - e. *For the avoidance of doubt, the salary applicable in the computation of these terminal benefits is that applicable to the position of Assistant Senior Book Keeper to be confirmed by the Respondent within 14 days of this Judgment failing which the monthly payment of Kshs. 49,930 provided by the appellant to apply in computation of the items (a) and (d) above.*
 - f. *Respondent to pay costs of the Appeal and the trial in Court below.”*
3. This application was filed on 3rd September 2019, eleven (11) months after the Judgment was delivered, the respondent/Applicant praying for an order inter alia:-
4. That the court be pleased to set aside, vary, annul, and/or quash the erroneous decree dated 23rd February 2019 herein and all consequential orders emanating therefrom.
5. The application is premised on grounds set out on the face of the notice of motion dated 2nd September 2019 and in the supporting affidavit of Evans Atei Masira Hon. Secretary of the applicant which may be summarized as follows:-
6. That the respondent in whose favour the Judgment was delivered has proceeded to use an erroneous scale for computation of salary thereby arriving at an erroneous decretal amount together with interest thereon.

7. That the applicant has been condemned to pay an erroneous decree, obtained without notifying the applicant in the sum of Kshs. 8,633,519.75/=.
8. That on 19th December 2016, the respondent in compliance with the Judgment of the Court delivered on 6th December 2018 filed the correct scale applicable in the computation of the Judgment sum.
9. That the respondent ignored the said scale duly filed and proceeded to use an erroneous scale hence arriving at the erroneous decree to the loss and detriment of the applicant.
10. That the application be granted as prayed.

Replying Affidavit.

11. Respondent/applicant filed a replying affidavit dated 13/9/2019 on the even date in which he deposes *inter alia* that respondent did not comply with the Judgment of the court in that:-
- a. The applicant did not calculate the 3 months' salary at the appropriate scale of Assistant Book Keeper in lieu of Notice.
- b. The applicant failed to pay salary at the scale of Assistant Book Keeper for the period under suspension.
- c. The applicant failed, ignored and/or neglected to confirm payment of terminal benefits set out in the letter of retirement including salary in December 2004, payment in lieu of leave for the year 2004 and severance pay calculated at one month's salary for each completed year of service.
12. That the salary scale applicable for the position of Assistant Senior Book Keeper was to be confirmed by the Applicant within 14 days and in default the respondent was at liberty to apply the salary scale of Kshs. 49,930 per month.
13. That the respondent drew the decree, confirmed same to the applicant and was duly received on 10th January 2015. That the respondent's advocates prepared the bill of costs which was duly taxed and execution commenced.
14. That the Applicant failed, neglected and/or refused to confirm payment scale within 14 days, the respondent was entitled to apply the scale of Kshs. 49,930 as directed in the Judgment. The application lacks merit and it be dismissed.

Determination

15. The only material issue for determination in this application is whether the applicant complied with the Judgment of the court to confirm the salary payable to the position of Assistant Senior Book Keeper within 14 days from 6th December 2018, the date of the Judgment.
16. If the respondent furnished the respondent with the said scale within the prescribed period, the respondent was obliged to utilize the scale furnished by the applicant. If the applicant defaulted in furnishing the respondent with the said scale, the respondent had the right to apply the scale of Kshs. 49,930 as directed in the Judgment of the Court.
17. That applicant annexed to the application a letter written to the Deputy Registrar E & L R C dated 18th December 2018 and not copied to the respondent indicating that the gross salary scale of Assistant Senior Book Keeper was Kshs. 35,047. The letter was not filed in Court within 14 days since it bears not court stamp to that effect nor does it bear acknowledgment of receipt by the Deputy Registrar E & L R C Kisumu within the 14 days or at all.
18. Clearly the applicant is in default of the directive in the Judgment of the court under paragraph 18 (d) of the Judgment. In terms of the said clause therefore, the respondent was mandated to apply the salary of Kshs. 49,930 which the respondent proceeded to do.
19. This matter is *res judicata* and the Court cannot revisit it. No Appeal or application for review of the Judgment of the Court was lodged by the Applicant within the prescribed time frame or at all.
20. The application lacks merit and is dismissed with costs.

Judgment Dated, Signed and delivered at Nairobi this 11th day of June, 2020

Mathews N. Nduma

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, this ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

Mr. Mose for Respondent /Applicant

Mr. Bosire Gichana for Appellant/Respondent

Chrispo – Court Clerk