



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.139 OF 2015

MOHAMED KAFAFA ABDUBA.....CLAIMANT

VERSUS

COLOUR CROPS LIMITED.....RESPONDENT

RULING

The respondent, Colour Crops Limited by application and Notice of Motion dated 7th January, 2019 is seeking for orders that

There be an order of stay of execution of the decree herein pending hearing of application dated 27th December, 2018.

The application is made on the grounds that there is judgement herein and the claimant has commenced execution while there is application dated 27th December, 2018 pending and not heard. The essence of the respondent's application is with regard to application dated 27th December, 2018.

In the application the respondent is seeking for orders that;

The court be pleased to review and or vary the judgement of the court delivered on 30th July, 2018 with regard to the award for underpayment.

The grounds for the application is that in the judgement of the court delivered on 30th July, 2018 the award for underpayments amounting to ksh.82,143.00 and compensation of ksh.11,248.10 was arrived at by the court relying on the General Statutory Wage requirement in reaching its decision instead of relying on the Regulation of Wages in the Agricultural industry. The respondent operates in the agricultural industry hence the court ought to have relied on the Regulation of Wages (Agricultural Industry) Amendment orders. Under such wage orders the claimant is not entitled to an award for underpayments.

In the affidavit of Charles Stubbs Hewitt the managing director of the respondent states that the judgement of the court herein delivered on 30th July, 2018 I erroneous as it gave the claimant an award for underpayment amounting to ksh.82,143.00 and compensation at ksh.10,248.10 based on the general wage orders instead of ware regulations for the agricultural sector where the respondent operates. Under the applicable wage orders the claimant is only entitled to compensation amounting to ksh.5,606.00 for the years 2011, 2012 and 2013.

The law allow for review of a judgement as herein applied for by the respondent.

The claimant replied to the application dated 27th December, 2018 through the Replying Affidavit of peter Chege the advocate for the claimant and who avers that the orders of review of the judgement are premised on the assertion that the court erroneously relied on the general statutory wage instead of wages in the agricultural sector. The tabulation done in the memorandum of claim is based on the general amendment order. In defence, the respondent did not challenge the tabulation set out in the memorandum of claim or provided the agricultural wage regulations. This fact was not stated during the hearing.

Parties are bound by their pleadings.

The claimant was employed as a watchman in the respondent company based in Nakuru and which designation is not foreseen in the agricultural sector for the court application of the wage regulations therefrom. As a watchman the applicable Regulation of Wages is those for the protective industry and not agriculture.

There is no good cause to justify application for review as there is no stated error or discovery of new matters that was not available to the

respondent during and after judgement.

The judgement was delivered way back on 30th July, 2018 and until execution commenced there was inaction on the part of the respondent. Such delay should not be allowed and the application should be dismissed with costs.

Review of court judgement is allowed under the court Rules, Rule 33 and errors can be corrected as under Rule 34. An application filed under the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires that;

33. (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.

There must be a mistake or error apparent on the face of the record, need for clarification or for any sufficient cause.

In this case the respondent is seeking a review on the grounds that the underpayments were assessed based on the wrong wage orders as the respondent is in the agricultural sector and the court used the general wage orders.

In the pleadings the claimant pleaded that he was employed by the respondent, a company registered in Kenya. That he was employed as a watchman and was underpaid, overtime not paid and worked during public holidays without compensation.

In reply the respondent admitted the description of the parties and that the claimant had been paid the terminal dues through the office of the labour officer at Ksh.22,172.00. The work records include the contract of employment, tabulation of dues, payment certificate and letter of service dated 5th December, 2013.

From these work records it is not apparent that the respondent's company as registered is in the agricultural sector for the court to apply the wage regulations therefrom. During the hearing, the applicable Wage Regulations and orders were not addressed. During the hearing of the defence, the only assertion that clearly came out was that the claimant was a security guard for the entire duration of his employment by the respondent. That the security guards would be at work for 12 hours per day.

At the close of the hearing, the parties filed written submissions.

In submissions, the respondent has not applied which Wage orders and regulations operate for the company. At paragraph 12 of the submissions with regard to the claimed underpayments there is no contradistinction as to the applicable wage regulations and orders.

In the judgement of the court at paragraph 35 the finding is that the claimant was a watchman or security guard and the applicable wage orders refined with regard to the daily wage. The findings thus made were applied to assess the underpayment due.

There is a reason and basis for the award of underpayment. Such is not an error or mistake as the basis for the court judgement is given. Such matter goes to the very essence of the judgement and not a matter for review or correction.

Abasi Belinda versus Frederick Kangwamu and another [1963] E.A. 557 where the court held that;

a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.

Under the applicable Rule 33 the court finds no mistake or error to justify application for review. Further, there is no sufficient cause established to justify the review. In any event, all matters stated herein to justify a review were all within the knowledge of the respondent before, during and pending judgement when submissions were filed and where the wage regulations applicable for the position held by the claimant were specific and distinct for the agricultural sector, this is a matter which should have been addressed instantly.

In the application, save for the respondent asserting that they are engaged in the agricultural sector there is no material direct or indirect submitted to confirm these assertions. In the Affidavit of Hewitt the only material produced is the Regulation of Wages in the agricultural industry. That on its own and without evidence that the respondent is engaged in such sector, the wage orders therefrom cannot be applied as there exists the general wage orders for sectors not regulated otherwise.

Under the Regulation of Wages (General) (Amendment) Order, 2013 and shall be deemed to have come into operation on 1st May, 2013 the wage due to a watchman for day is Ksh.432.40 and for night watchman is Ksh.487.90.

under the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2013 and shall be deemed to have come into operation on 1st May, 2013 there is no provision for day or night watchman. The schedule and regulation of wages attached to the affidavit of Mr Hewitt "CSH2" does not set out how much the claimant as watchman was to be paid monthly or daily. The schedule attached at "CSH4" relates to the year 2011 and the daily wage for a watchman is Ksh184.15 and for the general sector is Ksh.335.40 for day and ksh.378.40 for night watchman. The obvious differences are huge.

Where indeed the respondent was well aware during the proceedings herein and before judgement that the Regulation of Wages (Agricultural Industry) (Amendment) Order, applied to them, this was an important matter which ought to have been pleaded and urged throughout the proceedings. Without this being obvious to the court and noting the pleadings as filed by the claimant and which relied on the Regulation of Wages (General) (Amendment) Order the findings of the court on this basis cannot be reviewed.

Accordingly application dated 27th December, 2018 is found without merit and is hereby dismissed with costs to the claimant. Orders of stay granted following application dated 7th January, 2019 are hereby vacated.

Delivered at Nakuru this 21st day of March, 2019.

M. MBARU JUDGE

In the presence of:.....