



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 467 OF 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 30<sup>th</sup> April, 2019)**

**FRANCIS OMBORI OGISE .....CLAIMANT**

**VERSUS**

**REGAL PHARMACEUTICALS LIMITED.....RESPONDENT**

**RULING**

1. The Respondent/Applicant, Regal Pharmaceuticals Limited, filed a Notice of Motion application dated 21/01/2019 brought under *Rule 33(1) (b) and (3) of the Employment and Labour Relations Court (Procedure) Rules* against the Claimant/Respondent, Francis Ombori Mosire, seeking a stay of execution and a review of the Judgment delivered by Lady Justice Hellen Wasilwa on 20<sup>th</sup> December 2018 to pay the sum of Kshs. 113,349/= to the Claimant together with all other consequential orders.

2. The Application is made on the grounds that:-

*1. There is a glaring error on the face of the record with paragraph 14 of the Judgment indicating that the Respondent/Applicant conceded to the Claimant's entitlement to gratuity pay. Evidence led by the Respondent witness, the CBA adduced as evidence by the Respondent as well as paragraph 16 (d) of the Respondent's submissions are a clear indication of the latter's position that the Claimant was not entitled to gratuity pay. The award of Kshs. 89,060/= in favour of the Claimant is out rightly erroneous and ought to be set aside.*

*2. The learned Judge erred in interpreting the contents of the Leave Application form dated 05/11/2018 attached to the Respondent's documents, with paragraph 18 of the Judgment indicating that approval was issued by one David Mosoti, standing in for the supervisor. A perusal of the leave form clearly demonstrates that the said David Mosoti was standing in for the Claimant and not the supervisor.*

*3. The minutes of the disciplinary hearing bear testament to the lack of approval for the Claimant's absence. The shop steward who was present in the meeting as the Claimant's observer recorded that the Claimant had expressly advised him that he had left without approval. The Claimant's testimony in court confirmed that the leave application form bore no signature to indicate approval by the Supervisor/Head of Department.*

*4. From the foregoing, the award of 2 months' pay in lieu of notice is unfounded and ought to be set aside.*

*5. Unless a stay of execution of the said Judgment is issued and the said orders of this Honourable Court reviewed/ set aside, the Respondent is at imminent risk of having irregular and unlawful execution proceedings commenced against it.*

*6. In the interest of justice, the Judgment delivered on 20/12/2018 be set aside to remedy the prejudice that will be suffered in the event that the said orders are made to stand.*

3. The Application is supported by the Supporting Affidavit sworn by the Respondent's Advocate, Catherine Kiiru who avers that on the date of delivery of Judgment, the Respondent sought and was granted 30 days' stay of execution and that it only secured a typed copy of the Judgment on 17/01/2019.

4. That upon perusing the judgment, the Respondent was dissatisfied with the findings and issued instructions for filing of this instant Application. That the Honourable Court determined that the Claimant's dismissal was unfair but did not grant any damages and that the Respondent is therefore at risk of having an unlawful execution proceedings issued against it if the said Judgment is not stayed and the said

orders reviewed or set aside.

**Applicant/ Respondent's Submissions**

5. The Applicant submits that the award of Kshs. 89,060/= for gratuity pay is erroneous and that the same should be vacated as the payment was subject to the terms of CBA and that the said agreement under **paragraph 27** provides as follows:-

***“An employee who retires from the company’s employment on reaching 55 years of age on medical grounds or normally terminated shall be entitled to 20 days’ pay for each completed year of service by way of gratuity.***

***In the event of death of an employee the next of kin will be entitled to gratuity which would otherwise have been earned by the employee.”***

6. It also submits that the finding by the Court that the issue of absenteeism did not arise was erroneous because leave application form filed in Court clearly shows that his absence from work was not approved by a Supervisor/Head.

7. That the signature by David Mosoti only indicated the person who was to stand in for the Claimant during his absence and further, the Claimant’s observer in the disciplinary meeting recorded that the Claimant had expressly advised him that he had left without approval. That the award of 2 months’ pay in lieu of notice is therefore unfounded and in complete contradiction of the evidence adduced in Court and ought to be set aside/reviewed.

8. The Applicant relies in the decision in **Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) –v- Kariuki Marega & another [2018] eKLR** which affirmed the decision of the Tanzanian Courts in the case of **Chandrakant Joshibhai Patel –v- R [2004] TLR, 218** which confirmed that an error stated to be apparent on the face of the record:-

***“..must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions”.***

9. Further, that there is certainly an error apparent on the face of the record which the Court ought to review and remedy the anomaly. The Applicant seeks this Court to order a stay of execution of the judgment pending determination of the instant application seeking review of the Judgment and states that the stay will not prejudice the Claimant but ensure delivery of a fair and just determination of the suit.

10. I have examined the averments of the Applicant herein as the Claimant failed to file his submissions.

11. The Respondent has averred that there is an error on record about this Court’s findings.

12. My assessment of the alleged error relates to this Court’s findings on whether the Claimant was entitled to gratuity or not and whether he had permission to be away from duty on the day he was absent.

13. In my view, these are issues that go to the core of an appeal and not review. By asking me to review these findings, the Applicants are asking me to sit on appeal against my own judgement, which I can not do.

14. On issue of stay, the Applicants have not explained the grounds conditional to the stay. No Appeal has been filed nor any Notice of Appeal. There is therefore no reason to allow stay and the prayer is therefore denied with costs to the Claimant.

Dated and delivered in open Court this **30<sup>th</sup> day of April, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Okwe Achiada holding brief Kirwa for Respondent

Ongoto for Claimant