



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 222 OF 2014

BRUNO EDU AMUNGA AYAYA.....CLAIMANT

- VERSUS -

EAST AFRICA BREWERIES LIMITED.....1ST RESPONDENT

KENYA BRWERIES LIMITED.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th June, 2019)

RULING

The Court delivered judgment in the suit on 14.12.2018 for the claimant against the respondent for:

- a) Payment of **Kshs.176, 560.00** by 31.01.2019 failing interest to be payable thereon at Court rates from the date of termination 16.09.2013 till full payment.
- a) The declaration that the claimant is entitled to provident fund subject to completion of the relevant forms and compliance with the applicable rules.
- b) Each party to bear own costs of the suit.

The respondent filed an application on 22.01.2019 through Iseme Kamau & Maema Advocates. The application was under sections 12(3) (viii) and 16 of the Employment and Labour Relations Court Act, Cap 20 of 2011, Rules 28 and 33 of the Employment and Labour Relations (Procedure) Rules, 2016. The substantive prayer is for review and setting aside the order in the judgment for payment of **Kshs.176, 560.00** by 31.01.2019 failing interest to be payable thereon at Court rates from the date of termination 16.09.2013 till full payment; and costs of the application be provided for.

The application was based on the supporting affidavit of Lynette Gitobu, the respondent's Human Resources Manager attached on the application and upon the following grounds:

- a) The awarded sum comprises Kshs.77, 895.00 being salary up to 16.09.2013 and Kshs.99, 655.00 being 19 leave days due and not taken. The computation of the dues as applied is exhibited on the supporting affidavit and the respondent at paragraphs 22, 24, and 26 of the replying memorandum pleaded that any outstanding dues would be paid upon the respondent undertaking a clearance process and settling any outstanding indebtedness. That at the hearing the respondent's witness also the maker of the supporting affidavit recalled testifying that the claimant was not entitled to any dues as the same were applied to offset his indebtedness to the respondent
- b) The sum of Kshs.176, 560.00 was applied to set off outstanding loans owed to the respondent. The claimant authorised such application of the amount and therefore there is an error apparent on record.
- c) The application is made promptly and without undue delay.
- d) The claimant will not suffer prejudice if the review is allowed.

The claimant opposed the application by filing on 03.04.2019 his replying affidavit through Wamwayi & Company Advocates. The claimant stated that he did not undertake any clearance process that involved his determining or ascertaining the alleged indebtedness to the

respondents. The computation of terminal dues exhibited on the supporting affidavit was never produced at the hearing and the evidence on how the alleged indebtedness arose and how it could be deducted from his terminal dues. Thus, the claimant stated that the respondents were relying on the alleged terminal dues statement as an afterthought and as a means of defeating justice after the Honourable Court rendering its judgment based on the evidence that was adduced during the trial. Thus, there was no error apparent on record and the application should fail. The claimant urged the Court to uphold the judgment because the judgment had been reached correctly. The claimant urged that the respondents should not be allowed to introduce evidence after trial.

The Court has considered the parties' respective positions and makes findings as follows:

- a) The exhibit LG1 being the computation of terminal dues shows that it was prepared on 13.03.2014 and approved on 19.03.2014 and no reason has been advanced to establish that with due diligence, the same could not be adduced as evidence at the trial. The Court finds that reliance on the exhibit is unjustified attempt to introduce evidence after the trial.
- b) The Court returns that the exhibit LG 1 is unilateral document by the applicants and there was no evidence to establish that the claimant owed as alleged and that the claimant authorised the deductions from his final dues.

b) The Court holds that in a dispute like was in the present suit, the employer should counterclaim or seek a set-off as appropriate to recover such amounts of money as may be due from the employee and after judgment and without such order on set-off or counterclaim, the employer is thereby precluded from alleging liability on account of an administrative clearance falling outside the terms of the judgment. In the present suit, the Court returned thus, **“f). The claimant is entitled to Kshs. 77, 895.00 for salary up to 16.09.2013; Kshs. 98, 665.00 for 19 days' leave due; and in absence of a counterclaim, the same will be paid forthwith at a sum of Kshs.176, 560.00.”** The Court finds that its finding has not been established to have been an error at all.
- c) The statement in the judgment thus, **“The dues were to be payable but less monies the claimant owed to the company and upon clearance”** was clearly a statement in the termination letter dated 16.09.2013 and not a finding by the Court.

In conclusion the Court returns that the applicants have not established an error apparent on the record or such fresh evidence as would justify the review as prayed for. The application for review filed for the respondents on 22.01.2019 is hereby dismissed with costs.

Signed, dated and delivered in court at Nairobi this Friday 28th June, 2019.

BYRAM ONGAYA

JUDGE