



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1446'B' OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 24th June, 2019)

PATRICK OMUTIA OTULIA.....1ST CLAIMANT

PETER GACHIE KAROGI AS LEGAL REPRESENTATIVE OF GRACE

NZOMO (DECEASED).....2ND CLAIMANT

VERSUS

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED..RESPONDEDNT

JUDGEMENT

1. The Application before Court is the one dated 27/9/2018 in which the Applicants seek review of this Court's judgement delivered on 22.5.2018 in favour of the Claimant's herein in the sum of Kshs.1,579,698.44 and 4,823,598.50 respectively.
2. The Applicants seek review of this judgement on the grounds that there is a arithmetical mistake or error apparent and omissions on the face of the Judgement in calculating the Claimants' entitlements.
3. The Applicants aver that in calculating the Claimants' gross salary the Court failed to include telephone allowance 15,000/=, entertainment allowance 25,000/=, fuel allowance 85,000 and security guard allowance of Kshs.54,921.35/= for 1st Claimant and Kshs.5,000/= for 2nd Claimant which were unlawfully removed from the pay roll after September 2010 for a duration of 22.5 months for the 3 allowance and 23.5 months for the 4th allowance.
4. The Applicants also aver that tax of Kshs.16,475.10 was also deducted from the 1st Claimant yet the services had been withdrawn. The 1st Applicant aver that his salary had been raised to 634,374.35 and not 515,000/= as calculated by Court.
5. The Applicants also aver that leave days and related allowances for both Claimants provided for under Clause 8 and 9 of the contract were also omitted.
6. The Applicants further aver that the 1st Claimant was also not paid his allowances for duties performed in Acting capacity in the horizontal appointment in the position of Director Human Resource & Administration Services as per Appendix (P004).
7. The Respondent opposed this application on the grounds that it is wholly misconceived, fatally defective and amounts to an abuse of the Court process.
8. The Respondent aver that the Application falls short of the primary requirements sanctioned in Rule 33 of the Employment and Labour Relations Court Rules on the premise that there is no new material presented before Court capable of moving the Court to review its judgement, that the Applicant has not demonstrated the mistake apparent on the face of the judgment and that the purported arithmetical error goes to the root of the judgment as it seeks to have the Court reconsider what ought to be deducted from the Claimant's salary.
9. The Respondent also aver that the issues raised by the Claimant are extremely technical and were not raised during the hearing and are arguable and fit for an appeal and cannot be canvassed through review.
10. The Respondents further argue that the application is res judicata, the matters being raised now having been raised in another suit already

determined by a Court of competent jurisdiction.

11. I have considered the averments of both parties. Rule 33 of the Employment and Labour Relations Court Rules state as follows:-

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".

12. The Applicants have submitted that in the judgement delivered by this Court, there is an error apparent on the face of the judgment and which calls for review.

13. The Applicant contends that this Court used the figure of 515,000/= in calculating his dues instead of 624,174.35 and Kshs.574,453/= for the 2nd Claimant.

14. The Applicant avers that the change in his salary was made in the contract dated 19.6.2007. In his evidence in chief delivered in Court on 26/10/2016, the 1st Claimant indeed told Court that his gross salary at exit was 634,374.35 on principal job and 96,735.35 on the Acting appointment.

15. The contract under reference is found at page 107 of the Claimant's documents as pointed out by the 1st Claimant in court. Paragraph 4 of the contract (page 109) set out the remuneration payable as:

425,000- salary, house allowance 50,000/=, entertainment allowance 25,000/= and telephone allowance at 15,000/= - total is 515,000/=.

16. The Claimant was also entitled to other benefits.

17. In my judgement of 22.5.2018 at paragraph 33 is stated as follows:-

"I agree with the Respondents to a certain extent as per the holding of the Court of Appeal. I do not think the Claimant should be entitled to non-remunerative allowances such as entertainment club subscription, professional subscriptions, acting allowance, airtime allowance, fuel allowance, security entitlement and security tax refund".

18. It is on this basis that I settled to the position that the Claimant's monthly pay was 515,000 in calculating his dues.

19. The Claimants want this Court to review this position which I already addressed myself to. I do not therefore find that there is any mistake on the face of the record warranting review. The only recourse the Applicants have in my view is appeal and not review as the Applicants seek to have this Court sit on appeal on its own judgment, which it is incapable of doing.

20. I therefore do not find the application meritorious and I dismiss it accordingly.

Dated and delivered in open Court this 24th day of June, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Limo for Respondent – Present

Applicant – Absent