



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1904 OF 2011

MATHEW MUNGA MUNGAI.....CLAIMANT

VERSUS

HOMEGROWN COMPANY LIMITED.....RESPONDENT

RULING

Introduction

1. On 30.11.2018, I delivered a judgement in this matter whereby I found that the termination of the claimant's employment contract by the respondent was unlawful, unprocedural and unfair but dismissed all the prayers sought save for costs on the ground that there was lack of particulars, evidence and/or lacked basis in the law.

2. The claimant was aggrieved and brought the Notice of Motion dated 6.5.2019 seeking the following orders:-

(a) That this Honourable Court be pleased to review its judgment delivered on 30th November 2018 with regard to the finding that the claimant did not specifically plead the particulars of his claim.

(b) That the costs of this application be provided for.

3. The motion was brought under section 16 of the ELRC Act and Rule 33 and 34 of the ELRC Rules 2016 and it is supported by the claimant's affidavit sworn on 6.5.2019. The application is premised on the ground that there was a mistake or error apparent on the face of the record and prayed for the judgement to be rectified. The applicant further contended the application was made without unreasonable delay.

4. The Applicant deposed that in the impugned judgment, I dismissed the claim for commuter allowance, withheld salary, compensation for unfair dismissal, and defamation, for want of particulars and evidence or legal basis. That it was erroneous for the court to find that special damages were not specifically pleaded yet the same was pleaded under paragraph 12 of the Memorandum of Claim. That the proof of the special damages was in the exhibits marked MM-2, MM-3, MM-4(a) (b) & (c), MM5(a) & (b), MM6, 7 & 8 annexed to the claim's bundle. That it is clear that the court, never considered the said crucial evidence otherwise it could have reached a different decision.

5. The claimant contended that the impugned judgment should be reviewed because it has an error that is undisputable and self evident. He further contended that a review is necessary in order to correct the said error and enable a fair and conclusive determination of the suit.

6. The respondent never opposed the application. The claimant is also not challenging the entire judgment but only the determination that the claimant was not entitled to the reliefs sought due to lack of particulars and evidence or for lack of legal basis. The issue for determination is whether the application meets the legal threshold for review of judgment by the trial court as set out by Rule 33(1) of the ELRC Rules.

Analysis and determination

7. Under Rule 33(1) of the ELRC Rules, the application for review must be made without unreasonable delay and the applicant must prove any of the four grounds set out in the said rule. In this case, the judgment was delivered on 30.11.2018 and the application was filed on 23.5.2019 which almost 6 months thereafter. That delay in my view was

unreasonable in the circumstances and the application should be treated as an afterthought.

8. The grounds upon which the application stands is mistake or error apparent on the face of the record as envisaged under Rule 33(1) (b) of the ELRC Procedure Rules 2016. According to the applicant, the error is indisputable and self evident. He contended that the particulars of the dismissed claims are pleaded in paragraph 12 of the submissions in the Statement of Claim and the evidence is in the documents annexed to the Statement of Claim. That had the court considered the said pleading and evidence, a different decision would have been reached.

9. Paragraph 12 of the claimant's submissions in the statement of claim states as follows:-

“THAT the claimant's claims against the Respondent are that he be fully paid salary withheld for 17 days in the Month of May 2006, maximum compensation, one month in lieu of notice and damages caused by the action of the respondent for his really loss and perceived damages as required by statutes in force. The claimant herein seeks to be paid as hereunder (compound interest used where applicable at a rate of 17%):-

a) Salary unlawfully withheld

[Kshs.37,154/26 days = Kshs.174,904.44

(17 days for 5.42yrs)]

b) 1 month in lieu of notice = Kshs.40,846.00

c) Commuter Allowance

Kshs.3,000/month for 4.23 yrs =Kshs.193,424.05

d) Maximum Compensation

Kshs.40,846.00/month

(12 months) = Kshs.490,152.00

e) General Damages for Unlawful/ Unfair Dismissal

30.3 years (Ksh.37,846.00)

(12 months) = Kshs.13,477,220.10

f) Damages due to Defamation

115% of general damages = Kshs.18,900,180.00

TOTAL AMOUNT DUE = Kshs.33,235,881.59

10. The court considered the said claims against the evidence annexed to the claim, submissions by counsel, and the law and reached the finding that the claims either lacked particulars and evidence or they had no legal basis and proceeded to dismiss all of them. Firstly, the claim for withheld salary was not clear and it was not in reference to the month of May, 2006 but a period of 5.42 years. Second, the claim for salary in lieu of notice lacked legal basis because the claimant was summarily dismissed for gross misconduct under section 17 of the repealed Employment Act. Third, the claim for commuter allowance for 4.23 years was not supported by evidence since the letter of appointment never provided for that benefit to the claimant.

11. On the other hand, the claim for maximum compensation and general damages for unfair/unlawful termination of 12 months gross salary was not founded on any law since in 2006 when the unlawful termination occurred, the Employment Act in force then never provided for that benefit.

12. The claim for damages for determination of Kshs.18,900,180 calculated at 115% of general damages are vague and not clearly pleaded. It is upon consideration of the said reasons and the fact that the claimant had signed a discharge and settlement agreement after being paid his dues upon dismissal, that I dismissed the claims sought by the claimant. I may have made an error in judgment, which is a good ground for appeal and not review. An error in the court's reasoning is not the same as an error apparent on the face of the record. I therefore return that the applicant has not met the legal threshold for review of the impugned judgments and proceed to dismiss it accordingly. Each party to bear his/her own costs because the respondent never responded to the motion.

Dated, Signed and Delivered in Open Court at Nairobi this 27th day of September, 2019

ONESMUS N. MAKAU

JUDGE