



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 37 OF 2018

RACHEAL WAITHERA MWANIKI.....CLAIMANT/APPLICANT

VERSUS

CENTRAL MEMORIAL HOSPITAL LIMITED.....RESPONDENT

RULING

1. The Claimant seeks through her notice of motion application dated 15th August 2019 for a review of the judgment of the court delivered on 22nd July 2019. She asserts in the motion that there are grounds warranting a review of the judgment of the court in that there was an error apparent on the face of the record as the court failed to consider and issue a determination on the Claimant's claim for unpaid salary for October 2017, payment of one month's salary in lieu of notice, issuance of the certificate of service and interest on the monetary orders from the date of filing the claim. She states that she raised the foregoing issues in her statement of claim and list of issues but the court failed to have the same considered and determined upon its judgment. She thus urged the court to grant the orders sought to avert injustice. The motion was supported by her affidavit sworn on 15th August 2019. To it she annexed the impugned judgment.

2. The Respondent though served with the application did not file any grounds of opposition or a replying affidavit in opposition of the notice of motion application by the Claimant/Applicant. At the hearing of the motion the Respondent did not attend either and Mr. Mayende for the Claimant argued the application. He submitted that the application sought a review of the judgment of the court as there were issues that were not addressed in the judgment such as unpaid salary for the month of October 2017, salary in lieu of notice and the issuance of certificate of service nor the issue of interest addressed. He urged the court to review the judgment and address the issues.

3. The motion was expressed to be brought under the provisions of Rule 33 and 17(1) of the Employment and Court (Procedure) Rules 2016 and any other enabling provisions of the law. Rule 33 of the 2016 Rules of this Court provides as follows:-

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.

(emphasis mine)

4. The foregoing provisions of law do not envision a situation where review can arise if there is an erroneous conclusion of law or evidence. Such an eventuality is never a ground for review but may be a good ground for appeal. The Claimant asserts the court failed to consider the issues articulated as unpaid salary for October 2017, payment of one month's salary in lieu of notice, issuance of the certificate of service and interest which she prayed for and were not granted. The Court of Appeal in the case of **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** had this to say about review:-

In National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported)) this Court, with respect, correctly held:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.”

“... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”

In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-

“our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.” (underline for emphasis)

The Court of Appeal was right in the surmise that a review is available whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. An erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. I am unable to grant the motion as the grounds raised are for appeal and not review. In the premises the application for review is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 30th day of October 2019

Nzioki wa Makau

JUDGE