



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.53 Of 2018

PAUL KIPKEMOI KIPTOO.....CLAIMANT

VERSUS

BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUND (NSSF).....RESPONDENT

RULING

The claimant by Notice of Motion dated 11th October, 2019 is seeking for orders that he court to review its judgement delivered on 26th September, 2019 and the decree thereof on the finding that the back wages were not claimed and such are not due which was in error as in the Amended Claim the claimant had addressed and pleaded for such payment and with the order of reinstatement these salary arrears should be paid.

The application is supported by the affidavit of the claimant on the grounds that in the judgement of the court delivered on 26th September, 2019 in the final orders the court by error failed to consider the Amended Claim dated 21st September, 2018 where prayer (b) relates to the claimant seeking for an order of reinstatement to his position with the respondent and also payment of his salaries and other benefits following an order of reinstatement.

There is good cause for amendment following the apparent error on the record.

The review of the judgement is required is with merit.

In reply the respondent filed Grounds of Opposition on the basis that the application by the claimant seeking the review of judgement on the grounds that there is an error on the record offends Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Rules requires the court to be moved where there is **discovery of new matter or mistake on the record which principles have not been addressed in the application and thus made in abuse of court process.**

Other grounds that while the claimant is seeking for a review of the judgment the court is being called to sit on appeal of its own judgement contrary to the principles laid out in **Sanitam Services (EA) limited versus Rentokil (K) Limited & another [2019] eKLR**. Section 80 of the civil procedure Act and Order 45 allow the court to review its judgement not to change the substance of the judgement or the original decree but to address any new matter which was not available to the application at the time of the hearing or on any other sufficient cause. The reasons advanced by the claimant can be addressed through an appeal as held in **Kamau James Gitutho & 3 others versus Multiple ICD (K) Limited 7 another [2019] eKLR**.

A review application should not invite court to re-open the case and thus should be applied with caution and in exceptional circumstances as held in **Jinnah Mwangi Gichanga versus the AG**. In this case the claimant has not demonstrated that the court erred in its findings save to urge a review to additional awards.

There is no error subject for review in the judgement and the application should be dismissed with costs.

Both parties made oral submissions in court.

The claimant has premised his application under the provisions of Rule 33 of the Court Rules and on the grounds that in the judgement the court made an order in error and failed to take into account he had pleaded for payment of wage arrears.

The impugned findings are in the final orders of the court that;

For clarity, no back wages were claimed and such are not due.

Effectively the claim for the payment of salary and other dues from the date of dismissal to the date of reinstatement was not addressed.

The court has gone back to the pleadings and established the claimant filed an Amended Memorandum of Claim dated 21st September, 2018 and the prayers sought under (b) relates to a claim for back wages. This matter is reiterated in his written submissions.

In the court judgement, the Amended Memorandum of Claim is not addressed in this regard and it would be an injustice not to review the court judgement on the face of the record and findings that *for clarity, no back wages were claimed and such are not due*. These finding were made and issued in apparent error and without due consideration of the pleadings.

To review a judgement or order of the court for a sufficient cause should be readily allowed. the overriding objective principle is to enable the Court achieve fair, Just, speedy, proportionate, time and cost saving disposal of cases before it; but does not operate to uproot established principles and procedures, but to embolden the Court to be guided by a broad sense of Justice and fairness as held in the case of **Nguruman Limited versus Shompole Group Ranch & Another [2014] [eKLR** and in the case of **Hunter Trading Company Limited versus ECF/011 Kenya Limited Civil Application No. Nai 6 of 2010 (UR3/2010)** for the proposition that, the overriding objective principle is intended to not only energize the process of the Court but also ensure that interpretation of any of the provisions of the law and the Rules made thereunder are compliant to the oxygen principle.

In the judgement of the court delivered on 26th September, 2019 there is a finding that the claimant be reinstated back to his employment save for the order on the payment of salary arrears made in error and this brought to the court's attention without delay and as analysed above, this award is due.

Under paragraph 5 of the Amended Memorandum of Claim the claimant pleaded that he was last earning ksh.160, 723.00 per month. There is a payment statement to confirm the due gross salary.

With termination of employment on 31st October, 2017 and reinstatement order on 26th September, 2019 the due salary arrears payable is for 22 months all at Ksh.3, 535,906.00. This amount is hereby corrected as due and judgement of the court in the final orders shall be reviewed to this extent.

Before conclusion, the respondent urged the court not to allow the application by the claimant on the basis that they seek stay of execution so as to file appeal and the claimant will have a chance to file a cross-appeal to address the alleged errors and mistake.

In this regard the court is guided under **Order 45 (2)**;

A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.

The claimant has the right to file for a review of the court judgement under the Court Rules as set out above.

Accordingly, application dated 11th October, 2019 is hereby allowed; the judgement of the court is hereby reviewed with an award of salary arrears all at ksh.3, 535,906.00. Each party shall bear own costs.

The above addressed; on the pending application filed by the respondent and dated 7th October, 2019 and seeking stay of execution of the judgement of the court; hearing directions shall issue.

Delivered at Nakuru this 14th day of November, 2019.

M. MBARU

JUDGE

In the presence of:

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