



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 403 OF 2017**

*(Before Hon. Justice Mathews N. Nduma)*

**HILLARY MAKHULU.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF BUSIA.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR, BUSIA COUNTY.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Notice of Motion Application dated 21<sup>st</sup> June, 2019 and filed on 24<sup>th</sup> June 2019, seeks review of the judgment of the court delivered on 12<sup>th</sup> July, 2018 granting the Claimant Kshs.6,827,733 in that the gratuity in the sum of Kshs.5,964,400.00 was erroneously calculated and payment in lieu of 32 leave days in the sum of Kshs.493,333.00 was also wrongly computed.

2. That the court was not made aware of existence of a Circular that defines basic pay and in the instant case, the basic pay was 60% of the gross monthly pay. That the court treated the entire gross pay as the gross basic pay due to the aforesaid omission. That gratuity ought to have been Kshs.2,813,250 instead of Kshs.5,904,400.

3. That the award of Kshs.493,333 in lieu of 32 days was not pleaded nor was it supported by evidence before court. Besides the amount was contrary to Section H.14 of the County Public Service Human Resource Manual which provides for commutation and forfeiture of leave days not taken. That the commutation of leave was not authorised and ought not to have been awarded.

4. The Application is opposed by a Replying Affidavit of the Claimant in which he admits existence of gazette notice no. 6518 published under special issue Kenya Gazette Vol. CXIX – No. 89 on 7/7/2017 but deposes that the same cannot operate retrospectively to affect the rights that had accrued to the Claimant before the Gazette was promulgated.

5. That the Claimant was appointed on 7<sup>th</sup> June, 2013 and exited the County Executive Committee on 22<sup>nd</sup> September 2017 and as such the Gazette Notice No. 6518 only affects the last two months of his service. Respondent annexed the Gazette Notice and the Letter of Appointment.

6. On the issue of leave, the claimant/Respondent states that the number of 32 days leave was not disputed. That commutation of the same was not authorized by the Respondent/Applicant.

7. That this is not a matter for review but the award may only be appealed against if the Respondent/Applicant is not satisfied with the judgment of the court.

**Determination:**

8. Applications for review in E&LRC court are guided by Rule 33 of E & LRC (procedure) Rules, 2016.

9. Upon a careful evaluation of the arguments by both parties, the court is satisfied that evidence before court demonstrated that the Claimant was appointed by a letter dated 7<sup>th</sup> June, 2013 in the position of County Executive Committee member and was to serve the period of five (5) years which ended on 22<sup>nd</sup> September 2017.

10. The Claimant was in terms of the Letter of Appointment entitled to service gratuity upon termination of the contract calculated at “**a rate of 31% of annual basic pay for every year served.**”

11. The Claimant had specifically pleaded for payment of gratuity in the sum of Kshs.5,964,400 and payment in lieu of 32 leave days not taken in the sum of Kshs.493,337 in paragraph 12 of the Memorandum of Claim filed on 11/10/2017.
12. In the Replying Affidavit to the Memorandum of Claim and Application both dated 11/10/2017, the County Secretary for Busia County Government Mr. Nicodemus Onyango Muleku did not dispute specifically or at all the contents of paragraph 12 of the Memorandum of claim in which is specified quantum of gratuity and payment in lieu of 32 days leave.
13. No oral evidence was tendered by either party in this suit the parties having agreed to proceed by way of written submissions.
14. The claim by the Claimant/Respondent in this matter with respect to payment of gratuity and in lieu of leave days not taken was not contradicted at all and the two claims were proved as claimed on a balance of probabilities.
15. The issue of gazette notice no. 6518 was not raised at all by the Respondent/Applicant. It is clear that the same was in existence at the time the directions for the determination of the suit were taken.
16. The applicant has not explained why if the said gazette was relevant was not brought to the attention of the court.
17. The Respondent/Applicant has clearly failed to satisfy the requirements of grant of review of a judgment of the court in terms of Rule 33 of the Rules of this court.
18. The matters raised by the Applicant if dissatisfied by the judgment of the court are matters that ought to have been raised in an appeal.
19. The Applicant seeks to have a second bite on the cherry before the trial Judge contrary to law and procedure known to this court.
20. Accordingly, the Application lacks merit and is dismissed with costs.

**Ruling Dated, Signed and delivered this 11<sup>th</sup> day of December, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Sekwe for Respondent/Applicant

Mr. Omondi for Claimant

Chrispo – Court Clerk