



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 974 OF 2016

TIMOTHY STEPHEN MBOGHO.....CLAIMANT

VS

KENYA SAFARI LODGES AND HOTELS LIMITED.....RESPONDENT

RULING

1. On 1st November 2018, I delivered judgment in favour of the Claimant in the sum of Kshs. 985,542 being three (3) months' salary in compensation for unfair termination of employment.

2. Subsequently, the Claimant filed the present application seeking review of the said judgment. The application, which is brought by way of Notice of Motion dated 29th November 2018, is based on the following grounds:

a) That there is an error apparent on the face of the record borne out by the judgment dated 1st November 2018 at the last paragraph of page 10 where it is stated that the Claimant was fully paid all his dues with regard to notice and leave pay yet he was only paid a sum of Kshs. 250,000 out of the sum of Kshs. 899,472.68, leaving a balance of Kshs. 649,472.67;

b) That in its list and bundle of documents, the Respondent only attached a bank slip for the sum of Kshs. 250,000 and there was no other form of proof that it had paid the Claimant all his dues in full;

c) That it is not in dispute that the Claimant is yet to be paid the sum of 649,472.67;

d) That it is in the interest of justice and fairness that the Claimant's prayers be considered.

3. The Respondent's response is by way of replying affidavit sworn by its Human Resource Manager, Eunice Nzilani on 21st January 2019. Nzilani deposes that the Court having declined to award the Claimant his claim under notice pay as pleaded, he is not entitled to it.

4. Nzilani further sets out sums amounting to Kshs. 315,000 which the Respondent claims are owing from the Claimant.

5. The power of the Court to review its own decisions is donated by Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Procedure Rules. Rule 33(1) 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.

6. In making his application, the Claimant proceeds under Rule 33(1)(b) which empowers the Court to review its decisions on the basis of an error apparent on the record.

7. However, a reading of the grounds of the application on its face as well as in the supporting affidavit sworn by the Claimant, reveals that the Claimant is aggrieved by the finding by the Court that the prayers for notice and leave pay were spent.

8. The Claimant suggests that the Court made an error in reaching its finding on the twin prayers. If that be the case, the Court has no power to correct itself on a finding of fact. As held in ***Grace Akinyi Kemunto v Gladys Kemunto Obiri [2016] eKLR*** misapprehension of issues of fact or law is not a ground for review at the trial court. This is the preserve of the appellate court.

9. For this reason, I find and hold that the Claimant's application dated 29th November 2018 is without merit and proceed to dismiss it.

10. Each party will bear their own costs.

11. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 5TH DAY OF DECEMBER 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Kithinji for the Claimant

Mr. Munyao for the Respondent