



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
ELRC CAUSE NO. 597 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 3rd December, 2019)

STEPHEN MUTISYA KIMOLO.....CLAIMANT

VERSUS

OUDHAY BALI

T/A BALI AUTOCRAFT.....RESPONDENT

RULING

1. Pending for determination before me is the Application dated **11th July, 2019**. The Application was filed under a Certificate of Urgency through a Notice of Motion filed Under Order 45, Rule 1 and 2 of the Civil Procedure Rules, 2010, Section 3 and 3A of the Civil Procedure Act and all enabling provisions of the Law.

2. The Application seeks the following Orders:-

1. ***THAT service of this Application be dispensed with in the first instance.***
2. ***THAT this Honourable Court do review, vary and/or set aside the Judgment and Order made by the Honourable Lady Justice Wasilwa delivered on 8th July, 2019 with regards to the award of Service Pay and House Allowance to the Claimant.***
3. ***THAT Pending hearing and determination of this Application, this Honourable Court do order a stay of execution of the Judgment and Order made by the Learned Judge.***
4. ***THAT in the alternative, this Honourable Court do make such other interlocutory orders as it may deem just and expedient pending the hearing and determination of this Application.***
5. ***THAT the Costs of this Application be provided for.***

3. This Application is premised on the grounds **THAT**:-

- a) ***In the Judgment delivered on 8th July, 2019 by the Honourable Lady Justice Wasilwa ("the said Judgment") the Claimant was awarded, inter alia, 20 years' service pay amounting to Kshs. 95,000.00 and House Allowance amounting to Kshs. 51,300.00***
- b) ***At paragraph 3 of the Statement of Claim, the Claimant admits that his salary was exclusive of house allowance because the Respondent provided him with a house.***
- c) ***At Paragraph 12 of the Statement of Claim and the evidence adduced, the Claimant admitted that he had received a sum of Kshs. 114,000/- as service pay for the 20 years served prior to the filing of this suit.***
- d) ***By awarding the said amounts, this Court is imposing a burden on the Respondent which had already been discharged prior to this suit.***
- e) ***No prejudice will befall the Claimant if the Orders sought herein are granted.***

4. The Application is further supported by the Affidavit of **JULIET M. W. KARUMBA** sworn on 11th July, 2019 in which she reiterates the averments made in the Notice of Motion Application.

5. The Claimant opposed this Application vide a Replying Affidavit filed in Court on 16th July, 2019 deposed by **STEPHEN MUTISYA KIMOLO**, in which he avers that the instant Application is floundering, defective and is an abuse to the Court process. He urged this Court that the same ought to be struck out and/or dismissed with costs.

6. The Claimant further contends that the Applicant has failed to provide sufficient grounds to warrant stay of execution. He further contended that this Honourable Court's Judgment was firmly grounded on the law and facts as presented by the parties herein.

7. He averred that he did not admit having received the sum of Kshs. 114,000/- as service pay as alleged by the Applicant herein. Further that the instant Application is misleading and fundamentally flawed and without merit.

8. He further contended that the instant Application is not merited in law as the Applicant has not discharged the requirements provided for review of an Order of this Court as provided under Rule 33 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

9. The Claimant further avers that he stands to suffer greatly if the orders sought in the instant Application are granted. He contended that litigation must come to an end and that the instant Application only seeks to delay and prolong the litigation process.

10. In conclusion, the Claimant urged this Honourable Court to dismiss the instant Application with costs.

11. In disposing of the instant Application, the parties agreed and were directed to file written submissions.

Submissions by the Parties

12. It is submitted on behalf of the Respondent/Applicant that this Honourable Court erred in its Judgment awarding the Claimant house allowance of Kshs. 51,300/- as the Claimant admitted having been provided with housing during the subsistence of his employment contract.

13. The Applicant further submitted that the amounts awarded to the Claimant needs to be reviewed and/or varied as it failed to consider several aspects such as house allowance and loans that the Claimant admitted having owed the Respondent herein.

14. The Applicant urged this Honourable Court to allow its Application as prayed.

Claimant's Submission

15. The Claimant on the other hand submitted that the instant Application fails to meet the threshold for grant of review orders as sought as provided under Rule 33 of the Employment and Labour Relations (Procedure) Rules and Order 45 (1) of the Civil Procedure Rules. To buttress his argument the Claimant relied on the cases of **Pancras T. Swai Vs Kenya Breweries Limited (2014) eKLR**, **Francis Origo & Another Vs Jacob Kumali Mungala Civil Appeal No. 149 of 2001** and **Abasi Belinda Vs Frederick Kangwamu & Another (1963) E.A 557**.

16. The Claimant further submitted that he did not admit to any debt allegedly owed to the Respondent as contended by the Respondent. He further contended that the reasons for review highlighted by the Respondent herein are not proper grounds of review as an Application for review should not be a retrial of a suit.

17. He further submitted that the Application is only meant to delay the Claimant from enjoying the fruits of the judgment entered in his favour as against the Respondent herein.

18. In conclusion, the Claimant urged this Honourable Court to dismiss the instant Application as the Applicant has failed to satisfy the requirements in law for review of a judgment. The Claimant further submitted that the instant Application is void of merit and ought to be dismissed with costs to the Claimant.

19. I have examined the averments of both Parties. I note that in the Memorandum of Claim, paragraph 3, the Claimant states as follows:-

“that on or about May 1995, the Respondent offered the Claimant employment as a gardener at the Respondent's establishment with a starting salary of Kshs.9,500/= per month exclusive of house allowance because the Respondent provided the Claimant with a house” (emphasis is mine).

20. In the proceedings in court on 23/1/2019, the Claimant also admitted he was paid for his service in 2014 December and was satisfied with it.

21. I note then that it was an error on this Court's part to award him house allowance for which he was not entitled to.

22. As for service pay, he admitted he was paid and in the judgement, this was credited. In the circumstances, the application for review has merit and I allow it and review my judgement awarding house allowance.

23. The judgement is accordingly reviewed to read 167,700/= less 51,300/= house allowance which leaves the net awarded to be 116,500/=

plus costs and interest. The rest of the judgement remains undisturbed.

Dated and delivered in open Court this **3rd day of December, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Karimba for Respondent – Present

Nyabena for Claimant – Present