



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 76 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

MICHAEL OTIENO OMITI.....1ST CLAIMANT

ONESMUS NDAMBUKI.....1ST CLAIMANT

WILLIAM MUTIA.....1ST CLAIMANT

VERSUS

WELLS FARGO LIMITED.....1ST RESPONDENT

FARGO COURIER.....2ND RESPONDENT

RULING

Before me for determination are two applications. The first is the Respondent's application dated 7th July 2017 seeking Review of the judgment delivered by this Court on 12th April 2017.

The application is based on the grounds set out on the face of the Notice of Motion to wit, *inter alia*:

1. That this Honourable Court delivered Judgment in the matter herein on the 12th April 2017, awarding the 1st Claimant a Gratuity payment of Kshs. 478,166 for 24 years worked and which amounts to an overpayment.
2. That the 1st Claimant's gratuity entitlement, taking the sum of his monthly basic pay and House allowance as the proper basis of calculation, amounts to Kshs. 290,237.53.
3. That the delay, if any, in bringing the present application is not inordinate and is excusable for the reasons that:
 - a. Counsel for the Applicants herein, who practices in Nairobi, was unfortunately unable to procure the attendance of Counsel in Kisumu to attend delivery of judgment in the matter on his behalf.
 - b. Counsel however instructed a clerk to immediately peruse the Court file and furnish him with a copy of the Judgment entered by the Court, if an.
 - c. The clerk however reported back stating that there was a letter in the file, written by the Deputy Registrar of the Honourable Court, dated 29th March, 2017, stating that judgment would not be delivered on 12th of April.
 - d. Believing this to be the position, counsel for the Respondents/Applicants awaited a Notice from the Court on the new date for delivery of the judgment.
 - e. That the Applicant's Advocates found out that judgment had in fact been delivered as scheduled on the 12th of April 2017, when they received a letter from the Claimant's Advocates on the 27th of June 2017.
4. Arising from the above, any delay in bringing the present application was not intended, is excusable, and further would not cause

any prejudice to the 1st Claimant herein.

5. That there are sufficient reasons for allowing review of the Order of the Court and it is in the interest of justice that the Judgment of the Court be reviewed as prayed.

6. The Claimant's Advocates have issued a letter threatening to execute, rendering this application most urgent.

7. The entire judgment sum, excluding the gratuity award made to the 1st Claimant, has already been paid to the Claimants' Advocates and the Applicants are ready and willing to comply with any orders as to security that the Court may direct.

The application is further supported by an affidavit of Henry Omino, the Counsel on record for the applicant sworn on 7th July 2017. He deposes that the court awarded the 1st Claimant Gratuity for 24 years worked in the sum of Kshs. 478,166 calculated on the basis of the Claimant's gross pay rather than based on the Claimant's basic pay and house allowance.

That as a result the gratuity calculation ought to have amounted to Kshs. 290,237.53, being payment for 18 days for each of the 24 years worked.

That the calculation of Gratuity in the judgment is an error on the face of the record and is further a sufficient reason upon which Review of the Judgment of the Court is warranted.

Counsel for the Applicants also avers that the delay in bringing the Application is not intended to deny the Claimants the fruits of judgment and that the reason for the delay is as elucidated in the grounds on the face of the Application

Response

The Claimants through their Advocates filed a Replying Affidavit to the application stating that the Applicants have not demonstrated grounds warranting a review of this Honourable Court's judgment as there is no mistake or error apparent on the face of its record that needs to be corrected or deleted.

Counsel contends that the gratuity payment is not an overpayment and should not be interfered with.

That the Applicant has disobeyed Court Orders by paying Kshs. 2,945,550/= instead of Kshs. 4,686,344.30 as ordered by the Court whereas the Application is challenging the gratuity of the 1st Claimant and not that of the 2nd and 3rd Claimants.

Counsel further contends that the Applicants have come to Court with unclean hands for they have disobeyed lawful Court Orders. He prays for the Application to be dismissed with costs.

The second application is filed by the claimants. It is dated 19th September 2017 and seeks the following orders –

1. That the matter be certified urgent and be heard in the first instance.
2. That the respondent be compelled to pay the balance of the decretal sum being Kshs.1,740,794.30/=.
3. That costs of the application be provided for.

It is supported by the affidavit of James Mwamu and the following grounds –

1. That the respondent has disobeyed the court by refusing to pay up the decretal sum and now seeks further orders from the same court.
2. That the respondent trespassed into the applicant's and forcing him to seek the court's intervention by filing this suit.
3. That in the interest of justice the orders sought be granted.

Submissions

The Application was canvassed orally on 20th September 2017. On behalf of the Applicants, it was submitted that under Rule 33 of this Court's Rules, 2016, there is an error apparent on the face of the Record which calls for a review. There is a miscalculation and that is sufficient to warrant the orders sought. Counsel cited the case of **Coda Consulting Group Ltd vs John Kamau Wanyonyi (2012) eKLR** in support of this position.

It was urged that there is a formula for the calculation of gratuity as was set out in the case of **George Onyango Akuti Vs G4S Security Services Kenya Limited (2013) eKLR, which** informed their calculation of the 1st claimant's gratuity of Kshs. 290,237.53.

Counsel further submitted that the basic pay and housing allowance for the 1st Claimant was Kshs. 17,468 and as such the proper gratuity is

Kshs. 280,237.53. That the Court used the gross pay of Kshs 35,000.00 which in their view is an arithmetical miscalculation.

He admitted that the Applicants paid a sum of Kshs. 2,945,550.00 to the Claimants and withheld a sum of Kshs. 478,166.40 being the amount in dispute. He stated that the Applicants deducted a sum of Kshs. 1,029,600.00 as taxes on the award and referred to annexed documentation to the Applicants' further affidavit marked as "HO2". Counsel submitted that deduction of PAYE from the Claimants' emoluments is a statutory requirement and failure to do so is an offence.

It was also submitted that the delay in bringing the application was not intentional and Counsel reiterated the grounds on the face of the Application and in his supporting affidavit. He prayed for the Application to be allowed.

Mr. Mwamu for the Claimants submitted that this is not a matter for review as the Applicants' contention is that the Court did not properly exercise the calculation of gratuity which in his view ought to be a ground of appeal.

He submitted that there are authorities that state what an error apparent on the face of the record is and even the authorities cited by the Applicants are not binding on this Court as they are from Courts of equal status.

Further that the Application is brought after undue delay which has not been reasonably explained and for that reason the Application should be disallowed as equity aids the vigilant and not the indolent.

As to the amounts deducted as tax, the counsel for the Claimants submits that this is contrary to Article 47 of the Constitution and section 4 of the Fair Administrative Actions Act. That the Court should order that the amount deducted be remitted to the Claimant as compensation is not subject to taxes. He prayed for the application to be dismissed with costs.

Determination

I have considered the application, the affidavits in support and against the same as well as arguments by counsel for the parties made orally in court. I have further perused the authorities cited by the parties.

The issues for determination are the following –

1. Whether there is an error on the face of the record in the calculation of gratuity for Michael Owiti the 1st claimant.
2. Whether the respondent is entitled to recover Income Tax (PAYE) from the benefits payable to the claimants.

The power to review decision is provided for under Section 16 of the ELRC Act and Rule 33 of the of the Employment and Labour Relations Court (Procedure) Rules as follows –

Section 16 Employment and Labour Relations Court Act

16. Review of orders of the Court

The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.

Employment and Labour Relations Court (Procedure) Rules

Rule 33 – Review

(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.

(2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.

(3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.

(4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.

(5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.

(6) An order made for a review of a decree or order shall not be subject to further review.

The Regulation of Wages (Protective Security Services) Order provides as follows under Rule 17 –

Gratuity

(1) After five years' service with an employer, the employee shall be entitled to eighteen days' pay for every completed year of service by way of gratuity based on the employee's wage at the time of termination of service.

1. Calculation of Gratuity

In the case of **GEORGE ONYANGO AKUTI -V- G45 SECURITY SERVICE KENYA LIMITED [2013] eKLR**, Radido J. stated the following in relation to the tabulation of gratuity under the Regulation of Wages (Protective Security Services) Order –

“The formula to compute the gratuity is to take the basic salary and house allowance and divide by twenty six and multiply by the number of days. The Claimant was getting a consolidated monthly pay of Kshs.25,000/-. This divided by twenty six gives Kshs.961/-.”

The court also had occasion to determine the issue of gratuity under the Protective Security Services Order in the case of **JOSHUA MBOGO ORORI -V-PINKERTONS KENYA LIMITED [2013] eKLR** in which I stated that gratuity is calculated on basic pay and house allowance (consolidated). See also the decision in **ALEX MUTHIORA KOOME -V- G4S SECURITY SERVICES LIMITED [2015] eKLR** on the same issue.

Based on the foregoing, I agree with the respondent that there was an error in the tabulation of the 1st claimant's gratuity as it was based on gross pay instead of consolidated pay. The judgment in respect of **MICHAEL OTIENO OMITI** is therefore reviewed by setting aside the award of gratuity in the sum of Kshs.478,166.40 and substituting therefore the sum of Kshs.290,237.50/=.

2. Tax Deduction

Section 49(2) of the Employment Act provides as follows –

49(2) Any payments made by the employer under this section shall be subject to statutory deductions.

In the case of **KIOKO JOSEPH [suing as the representative of JOSEPH KILINDA] -V- BAMBURI CEMENT LIMITED [2016] eKLR**, Rika J. held that the claimant had a statutory obligation to pay tax assessed on the global award and the court need not state so in the judgment. The same decision was made in the case of **HOSEA NJERU KAGONDU -V- KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKER [2014] eKLR**.

I therefore find that the respondent is under obligation to deduct and remit tax not just by virtue of Section 49(2) of the Employment Act but also under section 37 of the Income Tax Act.

Conclusion

From the foregoing, the application dated 7th July 2017 succeeds and I review the judgment delivered on 12th April 2017 by setting aside the award of gratuity in the sum of Kshs.478,166.40 in favour of **MICHAEL OTIENO OMITI** and substitute therefore the sum of **Kshs.290,237.53/=**.

The application dated 19th September 2017 is without merit and is dismissed.

Each party shall bear its costs.

DATED AND SIGNED AT NAIROBI ON THIS 20TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 12TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE