



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 3 OF 2015 [FORMERLY MISC. CIVIL CASE NO. 1278 OF 2004]**

**RUFUS NJUGUNA.....1ST PLAINTIFF**

**RURIANI MICHENI.....2ND PLAINTIFF**

**DANSON KIMAN.....3RD PLAINTIFF**

**ALLAN MIKINDIA.....4TH PLAINTIFF**

**(Suing on behalf of themselves and 63 other former employees of the Directorate of Civil Aviation, a department within the Ministry of Transport and Communications)**

**VERSUS**

**THE ATTORNEY GENERAL.....1ST DEFENDANT**

**KENYA CIVIL AVIATION AUTHORITY.....2ND DEFENDANT**

**C.A. KUTO.....3RD DEFENDANT**

**RULING**

**Introduction**

1. The application before me is the first plaintiff's Notice of motion dated 7.6.2018. It is seeking the following orders:

(a) This Honourable Court be pleased to review its judgment delivered on 27th October, 2017 and/or its decree thereof and do order for payment to the 1st Plaintiff/Applicant of interest on the decretal amount from the date of the High Court judgment on 17th November, 2005, the sum of Kshs.50,000/= and calculation of the 1st Plaintiff/Applicant's salary using salary scale of the 2nd Defendant/Respondent.

(b) The Honourable Court do adopt and be guided by the directions of the Court of Appeal for Kenya as set out in its judgment delivered on 4th April, 2014.

(c) Costs be provided for.

2. The motion is supported by the applicants' own affidavit sworn on 7.6.2018. The gist of the affidavit is that the impugned judgment failed to award him his rightful benefits as ordered by the Court of Appeal in Civil Appeal No. 67 of 2010, Kenya Civil Aviation Vs Rufus B. Njuguna & 40 others. That the Court of Appeal had awarded him Kshs.50,000 for wrongful arrest, false imprisonment and malicious prosecution, and salary arrears plus other benefits backdating to 18.4.2002 but the court left the Kshs.50,000 and the other benefits from the impugned judgment.

3. He contended that judgment omitted the interest award by Emukule J. in his judgment dated 17.11.2015, and other benefits including House Allowance of Kshs.10,00 per month, medical Allowance of Kshs.1.245 per month and miscellaneous Allowances of Kshs.7,917 per month. He annexed copy of his payslip for March 2002 to support the application.

4. He further contended that even the salary arrears awarded were erroneous because the judge based the computation on the civil service payslip instead of the directions given by the Court of Appeal that he was an employee of the 2nd respondent. He therefore prayed for the

Application to be allowed.

5. The respondent never filed any objection to the application nor did they file any submissions in opposition to the application.

6. The applicant submitted that the motion meets the threshold for review set out under Rule 33 of the procedure Rules of this Court. That the impugned judgment omitted an award of Kshs.50,000 for tortious claims plus other benefits as awarded by the Court of Appeal in the judgment which referred the suit back to this Court for computation of the exact damages payable to him among other the claimants. That the said omission constitutes an error apparent on the face of record and also a sufficient reason to warrant review of the impugned judgment. His relied on *George Ndemo Saigni Vs the Hon. Attorney General & 3 Others [2017]eKLR* to urge that the Court has a wide and unfettered jurisdiction in the exercise of powers of review.

7. The Analysis issues for determination herein are:

a) Whether the application has met the threshold for grant of review of judgment.

b) What orders should issue.

### **Threshold for Review**

8. Under Rule 33 of the ELRC Rules, review of judgment can be sought within reasonable time:

***“33(1) (a) if there is discovery of a new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of that person at the time when the decree was passed or 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.”***

9. In this case, the grounds upon which the review is sought are (b) and

(d) above. That there is a mistake or error apparent on the face of the said judgment, because it has omitted awards granted by Court of Appeal and the preliminary judgment by the High Court and that such omissions also constitute sufficient reason to warrant review of the judgment.

10. After careful consideration of the Affidavits and the submissions by the applicant, and upon perusing the impugned judgment and the other judgments by the Court of Appeal and the High Court, I find that the application has not met the threshold for review of the impugned judgment. First, the award of Kshs.50,000 as general damages was not part for the items referred to this court for computation. It is therefore part of preliminary decree by the High Court dated 7.11.2007. Second, the only items referred for computation by the court were the arrears of salary and all other benefits dating back to 18.4.2002.

11. Flowing from the High Court judgment, the applicant should count himself lucky that the impugned judgment gave him more than what the preliminary decree awarded him. The judgment by Emukule J. was for arrears backdated from the date of the judgment in 2005 to 19.4.2002 being a period of about 3 years. However, the impugned judgment computed the arrears for the period between 18.4.2002 and 2014 which is over 12 years. No appeal or review was sought by the judgment debtor and that is why I hold the view that the applicant was just lucky to get that huge pay from the tax payers through an error. I however eschew further comments because I have not been moved by the respondents.

12. Third the applicant contends that all the other benefits including House Allowance, Medical and Miscellaneous allowances were omitted in the impugned judgment. He further contends that the award was computed using the payslip for public service yet he was already employed by the respondent. The foregoing contentions in my view raise matters which are best suited for an appeal and not review. They go to question the merits of the judgment and not mere errors or mistakes apparent on the record.

13. As regards the question of interest, again I find that the court never interfered with the award by the trial court and as such it should form part of the preliminary decree

### **Orders**

14. Having found that the application does not meet the threshold for review, I decline to grant the order of review sought.

### **Disposition**

15. The Notice of Motion dated 7th June 2018 is dismissed with no costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 16th day of November, 2018**

**ONESMUS N. MAKAU**

**JUDGE**