



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.379 OF 2010

UNIVERSITY ACADEMIC STAFF UNION.....CLAIMANT

- VERSUS -

MASINDE MULIRO UNIVERSITY

OF SCIENCE AND TECHNOLOGY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th November, 2018)

RULING

The Court delivered the judgment on 25.11.2011 (Mukunya J). The Court found that the claimant lost his employment wrongfully and unfairly. He was awarded compensation of 12 months' basic salary of Kshs.99, 700.00 per month making Kshs. 1, 196, 400.00. That was in addition to the notice pay for 6 months at Kshs. 99, 700.00 per month making Kshs. 598, 200.00. The respondent was ordered to pay the total of Kshs. 1, 794, 600.00 within 30 days. The respondent was also ordered to pay costs of the suit within 30 days of notification of taxation.

On 07.09.2018 the claimant filed a notice of motion through S.B. Otieno & Company Advocates. The application was under section 16 of the Employment and Labour Relations Court Act, 2010, rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 and all other enabling provisions of the law. The claimant prayed for orders:

- a) That the Honourable Court be pleased to enlarge time it granted on 11.07.2018 within which the application may be filed and the application be deemed filed within time.
- b) The Honourable Court be pleased to review and set aside its decree made on 25.11.2011 and replace it with another decree allowing the claimant's suit in its entirety.
- c) That in the alternative, the Honourable Court be pleased to review its award for compensation for unfair termination and recalculate the same using the grievant true basic salary at the time of termination being Kshs.120, 514.00. That costs be provided for.

The application was based upon the supporting affidavit of Professor Samuel Shimenga Kubasu and that there had been discovery of new and important matter, after exercise of due diligence, could not be produced by the claimant or the grievant when the decree was passed. Further there is an error apparent on the face of the record necessitating a review of the Court's decree given on 25.11.2011. Further the interest of justice will be met if the decree is reviewed.

The applicant has stated in the supporting affidavit that the respondent did not ordinarily issue him with the pay slips and it was after a follow up that the respondent's salaries department issued him with the September 2010 pay slip showing that the applicant's basic pay was Kshs. 120, 514.00, and gross pay was Kshs. 184, 624.00. That it was on 24.08.2018 that the pay slip was issued to him and he prayed that the decretal amount be recomputed at a basic pay of Kshs. 120, 514.00 as per the pay slip.

The respondent has opposed the application by filing on 05.11.2018 the grounds of opposition through the Federation of Kenya Employers. The respondent prays that the application should be dismissed with costs upon the following grounds:

- a) The application is grossly belated because section 10(6) of the Employment Act, 2007 provides that the Employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment. Such period of time has lapsed.
- b) The respondent will be seriously prejudiced in view of the delay in filing the application. The case was finalized and the decretal sum and costs have already been paid as was ordered in the judgment.

The Court has considered the material on record. By the letter dated 02.07.2009 the claimant was appointed on promotion to the position of Associate Professor Grade XIV effective 11.06.2009 in the salary scale Kshs. 99, 700.00 to a maximum of Kshs. 108, 000.00 per month. The pay slip exhibited is for September 2010 and showing that the applicant's basic pay was Kshs. 120, 514.00. It is unexplained how the basic salary as at September 2010 would be beyond the maximum of Kshs. 108, 000.00 that the claimant enjoyed at the material time. The termination was effective 28.09.2010. The claimant states in the supporting affidavit that he had been following up with the respondent's salary department but there is no evidence of that follow up and further, there is no evidence that the pay slip as exhibited indeed came from the respondent, belatedly after determination of the suit. It is further not clear why as at the time of the hearing of the case the claimant had not taken out the relevant discovery proceedings to get the pay slip. In any event, from the record, it does not appear that as at the hearing of the suit, there had been a dispute on the claimant's last monthly basic pay. The Court therefore returns that the purported new and important evidence is not intrinsically probable.

The Court further finds that the applicant has failed to explain the belated filing of the application several years after the judgment and satisfaction of the decree. The Court considers that the respondent will be seriously prejudiced if the application was to be allowed this belated.

The Court has considered that the respondent did not file a replying affidavit to assist the Court to answer the matters of fact that were in dispute and each party will bear own costs of the application.

In conclusion the application by the notice of motion dated 27.08.2018 and filed on 07.09.2018 is hereby dismissed with orders that each party shall bear own costs of the application.

Signed, dated and delivered in court at Nairobi this Friday 16th November, 2018.

BYRAM ONGAYA

JUDGE