



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1543 OF 2013

PAUL BILLY NYAGILO.....CLAIMANT

VERSUS

EAST AFRICAN PORTLAND & CEMENT LIMITED.....RESPONDENT

RULING

Introduction

1. The application before me is the respondent's Notice of Motion dated 11.7.2018 and it is brought under section 12(3), 16 & 20 of the ELRC Act, and Rule 28 (1) & 33 of the ELRC (procedure) rules 2016. It seeks the following orders:

(a) That the court be pleased to review the judgment delivered on 26.1.2018 and the consequential orders made on 8.6.2018 on the award of gratuity.

(b) Costs of the application.

The gist of the application is that the judgment is based on error because under the CBA the claimant was disqualified from getting gratuity because he was summarily dismissed for misconduct. She further contended that the application for review has been made without undue delay. As regards the orders made on 8.6.2018, the respondent contended that they are in conflict with the primary judgment which awarded gratuity to the claimant only for the period he was a member of the union.

3. The application was opposed by the claimant vide his replying affidavit sworn on 13.7.2018. The gist of the claimant's objection is that the application is an afterthought meant to reopen the suit for hearing. He contended that the issue of his entitlement to gratuity was settled and no appeal was preferred. That the respondent was at all material time ready to pay him gratuity for 16 years save that she was basing it on the basic pay as opposed to the gross pay.

Analysis and determination

There is no dispute that this court delivered judgment on 26.1.2018 granting the claim for salary during suspension period and gratuity for the period served by the claimant as a unionizable employee before rising to a management position 2002. The said award was based on the 2009-2002 CBA and the court directed the parties to calculate the figures. No appeal was preferred and the claim for salary arrears was agreed upon and settled.

5. However the claim for gratuity was not agreed because the parties differed on whether to use gross pay or the basic pay and they asked me to interpret clause 21 of the CBA. It is common knowledge that I rendered myself on the matter on 8.6.2018 by directing that the correct components of the salary applicable under clause 21 of the CBA were the basic pay plus house allowance. The respondent never appealed against the said ruling but she instead brought this motion seeking review as set out herein above.

6. The issue for determination is whether the claimant has met the threshold for review of the judgment dated 26.1.2018 and the consequential order dated 8.6.2018. The threshold for review is provided by rule 33(1) of ELRC (procedure) rules 2016 which allows an aggrieved party to apply for review if:

a) there is discovery of a new and important matter or evidence, which after exercise of due diligence was not within the knowledge of the applicant or could not be produced by the person at the time when the decree was passed or order made, or

b) there is some mistake or error apparent on the face of the record, or

c) the award, judgment or ruling needs clarification or, d) There is sufficient reasons to warrant review.

7. The respondent has not candidly cited which of the foregoing grounds she is basing her application for review of the judgment and the consequential orders. She has however, set out on the body of the motion grounds which are best suited for an appeal. The main grounds are (c)-(g) which I have copied herein verbatim:

“.....”

8. There is no dispute that in the submission seeking for the interpretation of clause 21 of CBA the respondent admitted that the claimant is entitled to gratuity for 16 years at the rate of 72 days per year based on his monthly basic pay and even cited authorities to support her submissions.

The question that arises is whether this motion could have been filed had I returned in favour of the respondent in my impugned ruling dated 8.6.2018. In my view the answer is no.

9. In addition to the foregoing, it is worth noting that the claimant’s contract under the CBA was never terminated on account of misconduct or through summary dismissal. To say the least it was terminated on merits through promotion by the same respondent who is now vehemently objecting to payment of the earned gratuity. In my view, the right to gratuity under the CBA vested on the claimant the day the respondent terminated that contract under the CBA and gave him a fresh appointment as a management staff on different terms of service. Consequently, I am persuaded to find that the present motion is an afterthought and bereft of merits and for that reason, it falls short of meeting the threshold for this court to exercise its power of review. **Disposition**

10. In view of the foregoing finding that the application has not met the threshold for review as set out by Rule 33 (1) of this court’s rules of procedure, I dismiss the notice of motion dated 11.7.2018 with costs to the claimant.

Dated, Signed and Delivered at Nairobi this 20th day of December, 2018

ONESMUS N. MAKAU

JUDGE