



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1537 OF 2014

DICKSON MATINGICLAIMANT

VS

DB SCHENKER LIMITED.....RESPONDENT

RULING

1. On 8th July 2016, I gave an award in favour of the Claimant in the following terms:

- a) 12 months’ salary in compensation.....Kshs. 212,544
- b) 1 month’s salary in lieu of notice.....17,712
- c) House allowance for 170 months.....510,000

2. The Respondent subsequently filed an application for review on the ground that new evidence to the effect that the Claimant received house allowance while in the Respondent’s employment had been discovered.

3. In the Memorandum in support of its application, the Respondent states that it had outsourced its payroll management to Comprite Kenya Limited who had produced pay slips showing that the Claimant was paid house allowance while in the service of the Respondent.

4. Regarding the rate of house allowance in the years preceding the employment contract of 2011, the Respondent states that it ought to be 15% of his basic pay of Kshs. 11,712.

5. The Claimant filed a reply on 23rd August 2016. He states that the matter herein went through a fair hearing where the parties presented their case and the Court made its decision based on the evidence that was produced.

6. The Claimant further states that the new information on which the Respondent seeks to rely has always been in the Respondent’s knowledge. Additionally no reason has been advanced as to why the subject pay slips and contract were not presented to the Court during the hearing.

7. The power of the Court to review its own decision is donated by Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Procedure Rules. Rule 33(1) provides as follows:

(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, 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; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) on account of the award, judgment or ruling being in breach of any written law; or

(d) if the award, judgment or ruling requires clarification; or

(e) for any other sufficient reasons.

8. The Claimant's application is premised on Rule 33(1)(a) which allows admission of new evidence that could not be availed to the Court even upon the exercise of due diligence. The operative phrase under this sub rule is '*the exercise of due diligence*'.

9. Counsel for the Claimant referred the Court to the decision by **Gikonyo J** in ***Salama Mahmoud Saad v Kikas Investments Limited [2014] eKLR*** in which the learned Judge held that the discovery of new and important evidence does not automatically entitle a party to an order for review. The party must show that the new evidence was not within their knowledge in the first place. I understand this to be the correct position on this matter.

10. Apart from its statement that it had outsourced its payroll management to Comprite Kenya Limited, the Respondent did not tell the Court the difficulties it had in procuring the pay slips showing that the Claimant had been paid house allowance. The provision for review is not meant to aid a party to fix their case post judgment which is what the Respondent seeks to do.

11. Regarding the rate of house allowance applied by the Court in respect of the period preceding the employment contract of 2011, the only thing I will say is that if the Court made an error, that error would fall within the realm of misapprehension of law and fact which cannot be the subject of review. Such an error can only be corrected on appeal

12. For the foregoing reasons the Respondent's application dated 15th August 2016 is dismissed with costs to the Claimant.

13. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF JANUARY 2017

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JUDGE

Appearance:

Miss Muhanda for the Claimant

Mr. Njiru for the Respondent