



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1398 OF 2014
SIMON MAKAU MUTUKU.....CLAIMANT

VERSUS

COCONUT LIMITEDRESPONDENT

Mr. Kenyatta for respondent/applicant

Mr. Nyabena for claimant/respondent

RULING

1. The respondent/applicant seeks review of the judgment by Justice Nzioki Wa Makau delivered on 2nd September 2016 on the grounds that;

a. There is discovery of new important matter of evidence in that the applicant has since found a notice of intended redundancy given to the Labour Officer in the respondent's file but "*was inadvertently not produced in court due to administrative lapses on the part of the respondent*".

b. There is also an error on the face of the record in that the court found that the claimant was paid house allowance for 31 months, yet the record show that house allowance was part of the monthly gross pay for the claimant.

2. The application is opposed vide a notice of preliminary objection dated 5th December 2016 to the effect that the respondent having filed an appeal could not turn around and seek to review the same judgment and therefore the application does not meet the criteria set out under Rule 32 of the Employment and Labour Relations Court (Procedure) Rules 2016.

3. The claimant also filed a replying affidavit sworn on the even date.

4. Advocates for the parties made oral submissions before court and the court having considered the depositions before court and the submissions by the parties has arrived at the following conclusion;

(i) The court had in its judgment captured the competing evidence with regard to remuneration of the claimant and with respect to the issue of salary had noted the evidence by the claimant that he was paid a starting salary of Kshs.15,000/= per month exclusive of house allowance.

(ii) The claimant sought to be paid house allowance calculated at the rate of 15% of basic pay

totalling Kshs.70,875/=

5. On the other hand, the respondent stated that the claimant's monthly salary was Kshs.15,000/= inclusive of house allowance.
6. The court carefully noted the evidence by Mr. Lameck Okach, the General Manager of the respondent that the claimant was paid a basic salary of Kshs.15,000/= but the same was later converted to include house allowance.
7. Two payslips one with a basic salary of Kshs.15,000/= and another with a basic salary of Kshs.13,043/= were produced.
8. The court made a considered finding of law and fact that the parties had no written agreement that provided for a consolidated salary in terms of Section 31 (1) and (2) of the Employment Act, 2007 and therefore the claimant had legitimate expectation to be paid house allowance and was entitled to recover the unpaid house allowance for the 31 months.
9. There is clearly no error on the face of the judgment. If the respondent is opposed to the finding, remedy lies in appeal and not review.
10. With regard to the issue of redundancy notice, the basis upon which the application is made does not satisfy the legal requirement for review under Rule 32 of the Employment and Labour Relations Court (Procedure) Rules 2016.
11. The respondent admits in the application that failure to produce the notice was due to inadvertence on its part. The rule require that the applicant demonstrate that there was failure to get the document in question upon exercise of due diligence on the part of the applicant which is not clearly the case here.
12. The application lacks merit and is dismissed with costs.

Dated and delivered at Nairobi this 7th day of April 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE