



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 732 OF 2015

MTENDE MKALACLAIMANT

VERSUS

COUNTY GOVERNMENT OF TAITA-TAVETA.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD2ND RESPONDENT

R U L I N G

1. On 6/10/2016, the parties herein compromised the suit herein by a consent judgment in favour of the claimant for the sum of ksh.478411 all inclusive. Thereafter the claimant brought the application dated 14/10/2016 supported by his own affidavit asking the court to review the consent judgment and increase it by ksh.288,2286. According to the applicant, the ksh.288,286 were his rightful allowances which were inevidently not factored when the parties hurriedly calculated the settlement in court on 6/10/2016. He further depones that the settlement was based on salary for 5 months one month, salary in lieu of notice plus 8 days leave.

2. The respondents have opposed the review application vide the grounds of opposition dated 10/11/2016 and the replying affidavit sworn by Mr. Stanley Madaraka Kidondi on 19/12/2016. The summary of the objection by the respondents is that the court is now *fuctus officio* in view of the consent judgment it entered on 6/1/2016. Additionally the respondents contended that the consent judgment cannot be reviewed or varied unless on account of fraud and or misrepresentation. Lastly the respondents fault the application as a request to the court to sit on appeal over its own decision. The Motion was disposed by written submissions.

Claimant's case

3. The claimant was employed by the respondents on 10/1/2014 as the first respondent's head of supply chain management job group R for a 4 year contract. His monthly pay included allowance of ksh.54000. He worked for 5 months and he was not paid the said allowances. When the parties negotiated settlement on 6/10/2016, it was in respect of salary for 5 months, notice and 8 days leave. However when they tabulated the sum payable, they failed to factor the said allowances. He therefore prays for review of the consent judgment citing mutual mistake on the part of parties which led to the failure to further material facts while calculating the quantum payable.

4. He relies on rule 33 of this courts procedure rules to urge for the review order sought. He has also relied on flora N. Wasike vs Destimo Wamboko (1982-88) KLR 625 which set out the 3 grounds for

settling aside a consent judgment on including fraud or collusion or agreement contrary to public policy's lack of sufficient material facts or misrepresentation of material facts, or any reason that would generally enable the court to set aside the agreement. He denied that the application is an appeal to the same court which passed the impugned judgment.

Respondent's case

5. The respondents have submitted that the principle of reviewing or setting aside consent orders were set out by Brook Bond Liebeg Vs Mauya 1975 E.A 226 to include fraud collusion or any reason which would enable the court to set aside any agreement. In this case, the respondent contends that none of the said reason for review of consent judgment has been demonstrated to exist in this case. That all what the claimant has deposed is that calculation was done in a hurry without factoring some allowances but has not blamed that on coercion, fraud or breach of public policy. The respondent therefore prays for the application to be dismissed

ANALYSIS AND DETERMINATION

6. There is no dispute that the claimant was employed by the respondents for 5 months before he was redeployed and then terminated for incompetence or something like that. There is also no dispute that the parties negotiated settlement of the suit herein and recorded a consent judgment on 6/10/2016 in the sum of ksh.478,411 all inclusive. The issue for determination is whether the said consent should be reviewed and or varied.

Threshold for review

7. As submitted by both parties on the basis of judicial precedent, a consent judgment cannot be reviewed or varied except on ground of fraud, collusion or for any reason that would enable the court to set aside an agreement. In this case the applicant submits that the consent judgment herein did not factor in claimants allowances amounting to ksh.54000 per month due to a mutual mistake on the part of both parties.

8. The respondents have not denied the existence of the said mutual mistake by the parties. They have also not proved that under the employment contract, the claimant was not entitled to any allowances on top of his basic salary. My perusal of the officer of appointment dated 10/1/2014 and accepted on 20/1/2014, it clear then that the claimant was entitled to house allowance of ksh.40000 plus ksh.14000 as other allowances.

9. The question that arises is whether it is the foregoing allowances which the claimant alleges that they were not factored while calculating the impugned settlement. If answer is in the affirmative, then the application and the supporting affidavit are silent on that. The only place where a sum of ksh.54000 is mentioned is in the submissions by the applicants counsel and which does not help the court in understanding how the sum of ksh.288,286 now being sought is arrived at. Whereas under the law of contract mutual mistake can vitiate a contract, in this case, the applicant has not clearly demonstrated how that mutual mistake led to the alleged loss of his allowances amounting to ksh.288,286. Additionally, the court was not told the details upon which the consent judgment was calculated. All what the parties requested the court to record as compromise judgment is contained in the decree that was extracted by the parties and signed by the Deputy Registrar of the court on 17/11/2016. I therefore do not see the basis upon which to exercise my discretion as sought by the applicant.

DISPOSITON

10. For the reason the application has not met the threshold for grant of review, I dismiss it. No order as to costs.

Dated, signed and delivered this 29th September 2017

O. N. Makau

Judge