



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1783 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 6th April, 2016)

MARTIN MULESHE SHIROKO.....CLAIMANT

VERSUS

WANJOHI CONSULTING ENGINEERS LIMITEDRESPONDENT

RULING

1. The application before Court is the one dated 12.11.2015 where the Applicant's order for review of this Court's Judgment dated 17.4.2015. The Applicant Claimant avers that there is an error apparent on the face of the record, the Judgment requires clarification and that there are sufficient reasons for review.

2. They aver that in paragraph 7 page 4 of the Judgment, the Court had stated as follows:

“On the 1st issue, the Claimant was indeed employed by the Respondent on 4th November 1983 as an Assistant Inspector of Works at a salary of 8,400/= per month. His salary was reviewed over time and at time of exit it was 27,048/= as per Appendix MM 3 dated 17th September 1996 though his pay slip for June 2014 reads 21,775/=. The review downwards is not explainable.

3. The Applicant avers that the review in that Applicant MM3 is dated 17.9.1990 and not 17.9.1996 as indicated by the Court.

4. Another error, the Applicant avers is that the Court stated that at exit, the salary was 27,648 whereas evidence from the pay slip Appendix MM3 (a) the actual salary was 21,775 and so he was being underpaid by 5,273/= as from 17th September 1990 when his salary was reviewed. This translates into an underpayment of 1,489,529/= as per paragraph 9(iv) of the amended Memorandum of Claim dated 15.1.2015.

5. The Applicants contention is that the Court did not refer to this amended claim and so did not make any decision on the underpayment.

6. Another error, the Applicant avers is that they had asked Court to award the Claimant 21 leave days which the Court didn't grant hence allowance not paid amounting to 146,059, but Court granted only for 36 months and not the the 30 years of service.

7. The Court also did not award any gratuity as claimed and it stated this was not payable as Claimant was a NSSF member. Also on public holidays, the Applicant avers the Court did not make any finding of 595,056/= and on overtime.

8. The Applicants want this Court review its Judgment and award the Applicant:

- **27,048/= Leave allowance**
- **House allowance for 30 years instead of 36 months awarded**
- **Underpayment of 1,439,529/=**
- **Gratuity of Kshs.2,921,184/=**
- **730,296/= compensation**
- **9,587,475.60 – overtime**
- **595,056/= public holidays**
- **2,812,992/= for rest days.**

9. The Respondents opposed this application. They filed their grounds of opposition dated 12.11.2015. Their contention is that this Court lacks jurisdiction to make orders sought as the Court is *res judicata*.

10. They also aver that the review is based on misapprehension of the burden of proof placed on the Claimant by virtue of Section 107 of Evidence Act which application failed to prove by way of going through written submissions. The Respondents state that the remedy Applicant has is to appeal to the Court of Appeal.

11. I have considered the submissions of the both parties, on issue of jurisdiction, I find that under Rule 32(1) of the Industrial Court (Procedure) Rules- this Court has jurisdiction to review its awards, judgment or Ruling in the following instances:

(a) if there is a 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, the judgment or ruling requires clarification; or

(e) for any other sufficient reasons.

12. The Applicants contend that indeed there is an error on the record and I cannot form a blind eye on this if it so proved. This is definitely a matter for this Court and not for the Court of Appeal as submitted by the Respondents.

13. Court can review its order if there is an error appearing on face of record. This error should however be obvious which a naked eye must see and cannot be analyzed by production of further evidence.

14. In this regard, I find I have jurisdiction to review my Judgment and especially the omission to grant underpayment of salary as evidenced from the pay slip MM3 (a) and Appendix MM3 – amounting to Kshs.1,439,529/=.

15. On other claims, I also note that I awarded the claim for house allowance for 36 months as prayed in paragraph 9 (iii) and there is no error on my record and omission to pray for 30 years house allowance was apple own mistake.

16. For other prayers, they would require further evidence to prove the same and for other prayers they would best be articulated by an appellate Court especially issue of gratuity.

17. I therefore allow the application of review only to the extent of allowing a further order by granting **Kshs,1,439,529/=** underpayment of salary.

18. Other orders remain the same.

Read in open Court this 6th day of April, 2016

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Muhoro holding brief Karanja for Respondent – Present

Claimant - Present