

REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 344 OF 2010

CECILIA MUTHONI NJOROGE.....CLAIMANT

VERSUS

NAIROBI STOCK EXCHANGE LTD.....RESPONDENT

RULING

1. The Court sitting in review of its earlier judgment delivered a ruling on 27th May 2015 in which it rejected to grant the Claimant/Applicant payment of Kshs 397,927.66 in lieu of leave days not taken on the ground that the same was not pleaded in the memorandum of claim.
2. The Claimant states that it had expressly pleaded for unpaid leave days in paragraph 20(b) of the memorandum of claim dated 21st March 2011.
3. That this is an incidental error on the face of the record that the court should amend in terms of Rule 33 of the Industrial Court (procedure) Rules 2010.
4. The Applicant notes that the ruling dated 27th May 2015 which forms the basis of this application having been made pursuant to an application for review cannot be subjected to further review in terms of rule 32 of the Industrial Court (procedure) Rules, 2010. In the circumstances, only a rectification/correction of the error under Rule 33 of the Industrial Court (procedure) Rules, 2010 is appropriate.
5. The application is opposed vide a replying affidavit of Stephen Muendo, Manager of the compliance and legal department of the respondent. The Respondent states that the Claimant/Applicant has exhausted all avenues for redress before the court and is now engaged in abuse of the court process.
6. That rectification under Rule 33 of the Industrial Court (procedure) Rules, 2010 can only be issued to correct incidental and clerical errors or omissions. That the error claimed by the Claimant/Applicant is neither incidental nor clerical as the court specifically addressed the issue in no uncertain terms in paragraph 6 of the ruling by stating that payment in lieu of leave had not been pleaded in the memorandum of claim.

Determination

7. An application for review under Rule 32 of the Industrial Court (Procedure) Rules 2010, cannot be based on a ruling made pursuant to an application for review. The Applicant seeks to circumvent this bar by urging the court to find that the finding in its ruling delivered on 27th May 2015 to the effect that the relief for payment in lieu of leave days not taken was an incidental or clerical error that may be rectified under rule 33 of the Industrial Court (procedure) Rules, 2010.
8. The Court is not persuaded by this submission by the Claimant/Applicant. The Court made a specific finding on the issue of payment in lieu of leave days not taken and cannot revisit the same under rule 33 of the Industrial Court (Procedure) Rules, 2010. The matter is *res judicata*.

9. Indeed the court reiterates its earlier finding that the pleading under paragraph 20 of the Memorandum of claim which merely refers to grant of 'cash equivalent for leave days due' does not suffice to allow the court to make an appropriate relief in this respect. Such a prayer must be based on a substantive pleading on the specific matter in the body of the memorandum of Claim which is not the case here.

10. The application is therefore dismissed with no order as to costs.

Dated and delivered in Nairobi this 1st day of April, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE