



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 232 OF 2014**

**CHRISTINA SIGOWA WADULO.....CLAIMANT**

**VERSUS**

**SOLIMPEXS AFRICA LIMITED.....RESPONDENT**

**(Before Hon. Justice Hellen S. Wasilwa on 20<sup>th</sup> June, 2016)**

**RULING**

1. Before the Court is a Notice of Motion dated 9<sup>th</sup> May 2016, brought under Section 1A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 45(1), Order 42(5) and Order 51(1) of the Civil Procedure Rules 2010 and all other enabling provisions of law, where the Applicant seeks orders that:
  1. *This Honorable Court be pleased to review the judgment and decree of the Court delivered by Honorable Lady Justice Hellen Wasilwa on 7<sup>th</sup> April 2016.*
  2. *Costs of and incidental to this application be provided for.*
2. This Application is supported by the annexed affidavit of Mbugua Kamau the Chairman of the Respondent and on the following grounds:
  1. *That the Claimant/Respondent herein instituted the suit against the Respondent/Applicant for unlawful and unfair dismissal claiming for an award of her terminal dues.*
  2. *That the Honorable Lady Justice Wasilwa delivered the judgment in the matter herein on the 7<sup>th</sup> of April 2016 in which the Court found that the Claimant's resignation was forced resignation and awarded the Claimant/ Respondent a sum of Kshs. 6,785,865/=.*
  3. *That the Honorable Court while computing the Claimant /Respondent terminal dues erroneously calculated the award based on a salary of Kshs. 750,000/= instead of the Kshs 500,000/= which was the Claimant's salary at the time of her resignation.*
  4. *That the award of damages herein arrived on the face of the record therefore it is only fair and just to grant the prayers sought herein.*
  5. *That this Honorable Court has the powers and discretion to grant the orders sought.*

6. ***That the Respondent/Applicant is willing to abide by any terms that may be imposed by Honorable Court for the granting of the said orders.***
7. ***That the Applicant has moved diligently and expeditiously in bringing this Application.***
8. ***That if the application is not certified urgent and the orders sought herein granted the Applicant's stand to suffer irreparable loss and damage.***
9. ***That it is in the interest of justice that the judgment delivered on the 7<sup>th</sup> April 2016 be reviewed, varied and or set aside.***

3. The Claimant/Respondent has filed Grounds of Opposition to the Respondent/Applicant's application dated 17<sup>th</sup> of May 2016. They oppose the application on the following grounds:

1. ***That the Application is misconceived, incompetent and is an abuse of the Court process.***
2. ***That prayer for an order of Review lacks foundation as there is no error apparent on the face of the record that it may be grounded on.***
3. ***The issue of the Claimant's salary at the time of her dismissal was raised specifically and determined by the Court and the Respondent/Applicant's application calls for the Court to re-evaluate the issue and come to a different conclusion.***
4. ***The grounds in the application are grounds for an Appeal and not a review.***

4. In their oral submissions the Respondent/Applicant states that the five year contract with the Claimant was for 500,000/- for the first quarter of contract signed on the 1<sup>st</sup> of July 2012 and subsequently 750,000/=, however, she resigned after 4 months on the 30<sup>th</sup> of November 2012. The terms were clearly stated in her letter of appointment and the Respondent/Applicant is not opposed to settling the matter.

5. The Claimant in open Court submitted that what the Respondent/ Applicant now seeks as a review of salary was an issue that had already been determined and is also confirmed in the notice of intention to amend claim filed on the 14<sup>th</sup> of June 2015 and served on the Respondent on the 15<sup>th</sup> of June 2015.

6. It was stated that a quarter is the tantamount to a quarter of the year in the Claimant's submission filed and submitted to in Court on the 10<sup>th</sup> of December 2015. It was determined in Court and it is on that basis that quarter was equated to quarter a year.

7. The Claimant submits that the current application then is an appeal and not a review of the said figures. They state that this matter has taken time as it was filed in June 2014 and judgment came in April of 2016, and should be decided as soon as possible.

8. They pray that the stay is lifted and that the application is determined as soon as possible.

9. Having considered the submissions of the parties, I note that this application was brought under the Civil Procedure Rules and not the Industrial Court (Procedure) Rules 2010. That notwithstanding, I will consider the application under the relevant law.

10. Under Rule 32 of the Industrial Court Procedure Rules 2010, this Court has power to review its judgment or decree in the following circumstances:

- 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.***

11. The Applicants seem to ask this Court to review its judgment for the reason that there is an error apparent on the face of the record.

12. The Respondents on their part deny that there is any error on the record capable of being

- reviewed. They contend that the error alleged is but apply as the issue concerns a matter also discussed in judgment and therefore are that can only be resolved through an appeal.
13. An error on the face of the record should be an error capable of being seen or perceived without recourse to any further arguments to bring forth the errors and should therefore not be contentious. It cannot be an error that the decision was not arrived at on merit. This would then be in the province of a Court of appeal.
  14. Having argued as above, it is clear that the issue of  $\frac{1}{4}$  being argued is a matter I discussed in my judgment. I determined that the salary at time Claimant left employment was 750,000/=. This is not a matter I can review given that it will involve more arguments and even evidence to determine otherwise. It is my view that this matter falls in the province of appeal. I therefore decline to allow this application and confirm my judgment.
  15. Costs to Claimant Respondents.

Read in open Court this 20<sup>th</sup> day of June, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Obura for Claimant – Present

No appearance for Respondent