



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1441 OF 2013

GEORGE MUTETI.....CLAIMANT

VS

EXPRESS DDB KENYA.....RESPONDENT

RULING

1. On 13th November 2015 I delivered an award in favour of the Claimant comprising of compensation for wrongful termination and accrued dues including commission on 'below the line' jobs procured through the Claimant's marketing efforts.
2. In the said award I directed Counsels for the parties to tabulate the commission payable to the Claimant but they failed to agree on a common tabulation.
3. The Court therefore delivered a ruling on this aspect on 15th April 2016 which is the subject of the current application brought by the Claimant.
4. In the application which is dated 16th May 2016, the Claimant seeks the following orders:
 - a) That the Court be pleased to set aside and/or review its ruling dated 15th April 2016;
 - b) That the Court substitutes the commission award of Kshs. 27,626.43 with the Claimant's tabulation of Kshs. 449,513.
5. The application which is supported by the Claimant's affidavit sworn on 13th May 2016 is based on the following grounds:
 - a) That the Claimant is aggrieved by the ruling of the Court and prays for a review on merit;
 - b) That the Court adopted wholesale the Respondent's tabulations which were falsified and unsupported by evidence;
 - c) That such adoption has jeopardized the Claimant's right to a fair trial;
 - d) That there are errors on the award which need to be clarified.
6. In its grounds of opposition filed on 31st May 2016, the Respondent states that:
 - a) The application is incompetent, misconceived and an abuse of the court process;

b) The application lacks merit and is founded on wrong principles and presumptions that are not supported by law. The Claimant has not satisfied or proved the ingredients necessary for granting of a prayer for review or setting aside;

c) The Claimant has failed to demonstrate sufficient grounds to warrant review or setting aside of the ruling by the Court.

7. The power of this Court to review its own decisions is donated by Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Procedure Rules. Rule 33 provides as follows:

(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling-

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

(e) for any other sufficient reasons.

8. The gist of the Claimant's application is that in its ruling dated 15th April 2016, the Court made an error. In my understanding, there are two kinds of error that would move the Court to review its own decision under Rule 33. The first is an error apparent on the face of the record and the second has to do with breach of written law.

9. In ***Daniel Okoth v Kenya National Commission on Human Rights [2015] eKLR Marete J*** considered what constitutes an error apparent on the face of the record and rightly held that an error apparent on the face of the record should be manifest without much argument. It should be so glaring that no court would allow it to remain on the record.

10. An error arising from breach of a written law must be equally clear in that a specific written law must be shown to have been breached.

11. I have looked at the Claimant's affidavit in support of his application as well as the submissions filed by his Counsel. It seems to me that the Claimant has stuck with the position he took at the main hearing regarding the mode of tabulating the commission payable to him. He does not agree with the finding of the Court on this issue. This is however not a ground for review. As held by ***Mativo J*** in ***Michael Muriuki Ngubuini v East African Building Society Limited [2015] eKLR*** if a court misapprehends the law or facts, the remedy for the aggrieved party does not lie in review. The option available to such a party is to go on appeal.

12. It seems to me that this is what the Claimant should have done. That being the case, I find that the current application lacks merit and is dismissed with no order for costs.

13. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF SEPTEMBER 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Okemwa for the Claimant

Miss Gekone for the Respondent