



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 6 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

EVANS KATIEZO ALIGULAHCLAIMANT

-Versus-

ELDOMATT WHOLESALE AND

SUPERMARKET LIMITEDRESPONDENT

R U L I N G

By an application dated 24th August 2016 the Applicant/Respondent seeks the following orders:-

- a) This application be certified as urgent.
- b) This application be heard ex-parte in the first instance.
- c) There be stay of execution herein pending the hearing and determination of this application.
- d) This Honourable Court do review its judgement delivered on 30th June, 2016.

The application is made under Rules 32 of the Industrial Court (Procedure) rules and other enabling provisions of the law and is supported by the affidavit of JAIDEEP S. SHAH and the following grounds:-

- a) This Honourable court delivered its judgement herein on 30th June, 2016.
- b) The Respondent is aggrieved by the award on overtime.
- c) There is an error apparent on record wherein the honourable court awarded more than was claimed.
- d) There is also an error on record in that the honourable court did not consider the fact that the Claimant was not sure for how long he worked overtime.
- e) This is an error that can be corrected by this Honourable court and on such other or further grounds to be adduced at the hearing hereof.

In the affidavit **Mr. Jaideep S. Shah** depones that Judgement in this case was delivered on 30th June, 2016 and his advocates became aware of the same on 27th July, 2016. That upon perusing the judgement the Applicant/Respondent realised that the Claimant had been awarded a sum of Shs.137,331.70 which

was more than what he had prayed for and that for this reason there is an error on the face of the record. Mr. Shah further deponed that in his evidence the Claimant had stated he was not aware of the hours he worked overtime and that the claim was controverted as is evident from the record. That on these grounds it is fair for the court to review its judgement and stay execution of the decree.

At the hearing of the application Mr. Kipyego for the Respondent submitted that the amount awarded to the claimant is higher than what was claimed and urged the court to review the award.

The claimant opposed the application and filed a replying affidavit sworn on 5th September, 2016 in which he states that Judgement in this case was delivered on 30th June, 2016 and his advocates issued to the Respondent a Judgement notice on 19th July, 2016. That the court has jurisdiction and powers to award compensation as it deems fit and can make an award higher than what is prayed for. That the application is intended to deny him the enjoyment of the judgement as there is no error on the face of the record.

Mr. Rugut on behalf of the Claimant submitted that the Applicant/Respondent is guilty of laches, that it is not possible for the court to review that judgement delivered 3 months prior to the date of the application and that the court awarded the claimant what he proved.

Determination

I have considered the application and the grounds and affidavit in support thereof as well as the replying affidavit opposing the same. I have also considered the oral submissions of the counsel for both the applicant/Respondent and the Claimant.

According to the Applicant's affidavit in support of the application the ground for review of the Judgement is that the court awarded more than was claimed and the claimant did not prove the hours he worked overtime.

In the judgement I awarded the claimant the following:-

1. Pay in lieu of notice Shs.9,372.15.
2. Pay in lieu of accrued leave shs.7,544.60.
3. Under payments Shs.33,668.30.
4. Public Holidays Shs.5,387.40.
5. Overtime Shs.137,331.70.
6. Unlawful deductions Shs.1,500.00
7. Service Pay Shs.5,364.50 and
8. Compensation Shs.10,678.15.

The Application appears to be contesting only the award on overtime. In the Memorandum of claim the Claimant prayed for overtime of Shs.91,063. However, I awarded shs.137,331.70. In the Judgement I have stated the basis of the award of shs.137,331.70. This is that the law provides the formular for calculation of overtime and it is that formular that I applied to arrive at the amount awarded which I have expressly stated in the Judgement.

Where the law provides the formular for calculation of a benefit, the court is obliged to use that formular to arrive at a just decision. The fact that the Claimant miscalculated the amount due or used a wrong formular is not a bar to the court to use the correct formular that results in a different figure. What is

important is that the Claimant prayed for overtime and that the court, using the formular provided by law and the evidence on record, arrived at the figure awarded. The Applicant has not challenged the formular used by the court in arriving at the amount awarded.

I find that there is no error apparent on the face of the record. Both section 26 of the Employment Act and section 48 of the Labour Institutions Act require the court to enforce the minimum statutory terms which are implied in every contract of employment and an employee need not prove the exact amount as the formular is provided by law. If the Applicant is dissatisfied its remedy lies in an appeal and not review.

For the foregoing reasons, I find no merit in the application and dismiss it with costs.

Ruling dated, signed and delivered this 27th October, 2016

MAUREEN ONYANGO

JUDGE