



**Republic of Kenya**

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

**CAUSE NO.1449 OF 2014**

**MICHAEL OPONDO WERE ..... CLAIMANT**

**VERSUS**

**MATHS TRADING COMPANY LIMITED .....RESPONDENT**

**RULING**

1. By application and Notice of Motion filed on 4<sup>th</sup> May 2016, the Claimant is seeking a review of the judgement and order of the Court delivered on 27<sup>th</sup> January 2016. The Claimant is seeking;

*a. The orders of the Court set out in paragraphs 39 and 40 of the judgement be reviewed;*

*b. The applicant be awarded prayers on notice pay and house allowance sought in the Memorandum of claim dated 26<sup>th</sup> August 2014 and filed on the 28<sup>th</sup> day of August 2014;*

*c. The applicant be awarded the costs of this application.*

2. The application supported by the affidavit of the Claimant and also based on the grounds that there was an error in law by ignoring and or overlooking the contractual terms with regard to notice pay; minimum conditions of employment; misinterpreting the provisions of section 35 and 31 of the Employment Act; that the salary paid was consolidated and therefore included house allowance; and as such the judgement should be reviewed.

3. The Respondent filed Grounds of opposition to the claimant's application and on the grounds that the application is in abuse of Court process, the matter is *res judicata* and the grounds advanced do not support the provisions of Rule 32 of the Court Rules and upon delivery of judgement matters raised ought to be at the Court of Appeal and the application should be dismissed.

**Submissions**

4. Both parties filed their written submissions. net

5. The Claimant submit that the application is not *res judicata* as rule 32 of the Court Rules allow a party to seek a review. There are innocent mistakes and or omissions in the judgement of the Court and the same can be reviewed in the interests of justice.

6. The review sought relates to the claim of two months' notice pay and by the Court error or mistake, the award was for one month only. Such is a sufficient reason for seek for review. The employment contract between the parties dated 5<sup>th</sup> April 2013 was produced in Court and clause 6 provides for 2

month notice period or payment in lieu thereof. Section 35 of the Employment Act provides that parties can set the notice terms in the contract of employment. In this case parties agreed to two months' notice.

7. The Court made a finding that the summary dismissal was flawed and on that basis, the notice pay due was two months as stipulated under the contract. Such should be awarded.

8. The Claimant also submit that section 31(1) of the Employment Act provides for house allowance or housing to be provided for by the employer. Legal Notice No.28 of 14<sup>th</sup> march 2014 provides for basic pay rights of an employee. The Claimant was not provided with accommodation or allowance in his net pay and such was not inclusive and should be awarded. Clause 2 of the contract of employment provided for a net pay of Kshs.30, 000.00 and such net pay was not with house allowance. The Respondent failed to produce pay slips to support the arrival at net pay as required under section 20 (2) of the Employment Act.

9. That paragraph 40 of the judgement should be reviewed to make provision for house allowance at 15% of the paid salary as this was not inclusive of house allowance.

10. The Claimant has relied on the cases of **Elizabeth Washeke & 62 others versus Airtel Networks [K] Ltd & Another [2013] eKLR; Khaemba Wycliff Nyongesa versus General Plastics limited [2015] eKLR; James Wainaina Guchu versus Waiganjo Investment Ltd [2016] eKLR.**

11. The Respondent submit that the application does not demonstrate an error apparent on the face of the record as required under Rule 32(1)(b) of the Court Rules as held in **Nyamongo and Nyamongo versus Kago [2001] EA.** The Court also in **Josphat Munke Ole Mpoe versus David Waiganjo Koinange & Another [2015] eKLR** held that there is a distinction between a mere erroneous decision and an error apparent on the face of the record where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. That an error that has to be addressed through a long process of reasoning and where there are two opinions if not an error apparent on the face of the record.

12. The Court analysed section 31 of the Employment Act and made a finding. Section 31(2) allow an employer to consolidate a salary as held in **John Ng'ang'a Kuria versus KBC [2016] eKLR.** On this basis a Court shall only review its judgement on good grounds and in view of any new matter or mistake apparent on the record. The judgement rendered was not in breach of the law and should be upheld.

### **Determination**

13. There are new Rules of procedure published for the Court - **Employment and Labour Relations Court (Procedure) Rules, 2016 and published vide Kenya Gazette Supplement No.129 of 5<sup>th</sup> August 2016.** Rule 33 address review of a judgement and decision of the court. The principles have not changed save for a few matters of clarity. Rule 33(a) provides that where an applicant is seeking a review of the Court orders and decision, must demonstrate that;

*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*

14. The claimant's case is that the Court made an error of fact and law in addressing notice pay and house allowances and failed to award appropriately. Reference is made to paragraphs 39 and 40 of the Judgement. I will refer verbatim;

*39. The Claimant is seeking notice pay of 2 months. Upon the finding that the summary dismissal was flawed notice pay due is pursuant to section 35 of the Employment Act at one (1) month. The basis and claim for two (2) months was not set out. The Claimant is awarded Kshs.30, 000.00.*

*40. The claim for unpaid house allowance is on the grounds that such was due under the contract*

*but was not paid. Where there is a contract of service and a salary is paid, save where the same is stated to be below the minimum wage, the contract amount is to be respected. As such, no house allowance will be allocated herein.*

15. In the Memorandum of Claim, at paragraph [V.22 (a) (ii)] the Claimant sought for two months' notice pay. In the *Letter of offer for employment* at clause 6, notice period was agreed at two (2) months.

16. Indeed, at paragraph 39 of the judgement, upon the Court making a finding that the summary dismissal was flawed, the agreed notice period of two months should have been awarded. I note the error apparent and based on the agreed terms of the contract of employment, notice period or pay in lieu thereof should have been two months of salary for two month.

17. Judgement delivered on 27<sup>th</sup> January 2016 shall be reviewed in terms of notice pay for two (2) months' pay all being kshs.60,000.00 based on the monthly wage of kshs.30,000.00.

18. With regard to house allowance, the claim is that section 31 of the Employment Act and the Legal Notice thereof requires an employer to provide for housing or an allowance thereof. In the judgment of the Court at paragraph 40 as cited above, house allowance was not awarded on the basis that the contract of service set out the salary to be paid. The claimant's interpretation of the same is that the Court made an error of judgement, fact and law in arriving at such a decision. That the net pay paid as salary was not supported by any pay slips to show what deductions were made and that the Court erred in interpretation the contract provisions to mean that the salary paid was all inclusive.

19. Indeed as submitted by the respondent, in **Jonathan Munke Ole Mpoie case**, the Court held that;

A case for review must be distinguishable from one of appeal. A review based on the grounds of an error on the face of the record literally means that. There must be an error apparent on the face of the record. This would have to be an obvious and visible error which would not require much effort to establish from the record. It does not call for elaborate analysis of law or facts to establish. This should be outright and glaring on the face of the record.

20. In this case, parties have an employment contract. It is upon this contract that the Claimant is seeking for review of the notice pay based on the agreed two months' notice or payment in lieu thereof. The same contract of employment, parties agreed to a net salary all being Kshs.30, 000.00. The Court at paragraph 40 of the judgement gave consideration to all factors and submissions of the parties and arrived at a finding. To relate to the provisions of section 31 and the Legal Notice No.28 of 14<sup>th</sup> March 2014 at this stage, would be to introduce new and extraneous matters that the Court was not seized of at that time of judgement. In any event, parties have a contract of employment that set out the terms and conditions upon which parties agreed to be bound. A review of a Court order and judgement is as set out under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules and such principles do not permit the Court going back into the merits and demerits of an award. Such would be to re-write the judgement on an arguable issue and since the Claimant has opted to file for review, the question of payment of house allowance cannot be thus be addressed. An error apparent on the face of the record must exist; a mistake or error must exist; breach of the law must exist; a clarification is required; and for any sufficient reason the same ought to be reviewed.

21. I find no sufficient cause to review the orders with regard to house allowance not awarded on the basis that the Court cannot rewrite the contract of employment between the parties unless the same is said to have been obtained through fraud, is in clear breach of the law or is forged. As this is not the case here, the basis upon which the review is sought with regard to the house allowance not awarded lacks merit.

**In conclusion therefore, the application by the Claimant and dated 21<sup>st</sup> April 2016 is allowed to the extent that Notice Pay is reviewed to reflect the sum of Kshs.60, 000.00 and the review for house allowance is declined. Each party to bear own costs.**

**Orders accordingly.**

**Delivered in open court at Nairobi this 27<sup>th</sup> day of October 2016.**

**M. MBARU**

**JUDGE**

In the presence of:

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