



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 56 OF 2011

DUNCAN OBIERO OBIERO..... CLAIMANT

VERSUS

FAIRVIEW HOTEL LIMITED..... RESPONDENT

Mr. Karongo for the Respondent/Applicant

Jaoko for the Claimant/Respondent

RULING

1. The Applicant/Respondent moved an Application dated 2nd July, 2014 seeking the court to review the Judgment delivered on 20th June, 2014 in the following terms;

- a) the service gratuity should comprise 1/3 of the monthly salary
- b) the service gratuity has already been paid to the Claimant in full

2. The Application is premised on the grounds set out in the Application itself to wit,

1. there is an error on the face of the record at paragraph 23 of the Judgment where it is stated that the service gratuity to be paid to the Claimant should comprise ½ monthly salary and not 1/3 monthly salary,

2. Clause 27(b) of the Collective Bargaining Agreement dated 21st June, 2010 and registered on 30th June, 2010 was binding on the Claimant and the Respondent and provides that,

“where an employee terminates or is terminated (other than summarily dismissed) there will be a gratuity payment for long service as follows;

(i) Between 5 and 10 years’ service one-third of one monthly salary and one third of the house allowance, at the rate of pay applicable at the time of termination for every completed year of service.”

3. That the Claimant had worked for the Applicant for more than 5 years and less than 10 years and therefore the court erred in awarding him gratuity at ½ of the months’ salary

instead of 1/3. That this is sufficient ground to review the Judgment. These grounds are reiterated in the Supporting Affidavit.

3. **Replying Affidavit**

In the Replying Affidavit of the Claimant/Respondent the Application is opposed for the following reasons;

(i) The said Collective Bargaining Agreement dated 30th June, 2010 was at all material times in the possession of the Respondent/Applicant and no reason is given for failure to produce the same in court before or during the hearing of the case.

4. That the Respondent/Applicant was at all material times in court and well represented by an Advocate.

5. This ground is not available to the Applicant/Respondent to cause the court to review its decision which was based on the evidence presented before it.

6. The Claimant/Respondent relies on the case of **Chum Arap Songok Vs. David Kibiego Rotich (2001) eKLR** where the Court of Appeal at **Nakuru Civil Appeal No. 141 of 2004, Coram R.S.C Omolo, W. Onyango Otieno and W.S. Devereli JJA at P.7** held,

“the law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties.”

7. There is therefore no error apparent on the face of record. The Respondent is seeking to amend her pleadings through an application for review long after the Judgment was delivered and ready for execution.

8. **Determination**

Rule 32(1) of the Industrial Court (Procedure) Rules 2010 sets out the grounds on which the court may review its own judgment as follows;

“(a) 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 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,

9. A careful perusal of the pleadings of the parties and the evidence and submissions presented before court shows that the issue of a Collective Bargaining Agreement between the parties dealing with terms and conditions of service especially on service gratuity was not presented by either party in court.

10. The court relied on the pleadings by the Claimant under paragraph 8 of the Memorandum of

Claim to the effect that, the Claimant was entitled to service pay for 3 years at the rate of ½ months' salary. The Respondent did not contradict expressly in the Memorandum of Reply and in the oral testimony this pleading by the Claimant.

11. This was a determination based on the available evidence before court.

12. The Applicant/Respondent has not demonstrated that the alleged Collective Bargaining Agreement was not in its custody before and during the trial nor has it shown that it was after exercise of due diligence, not in its knowledge or could not produce it at the time of the hearing of the case until the time Judgment was delivered.

13. There is therefore no apparent error on the face of the record since the Judgment by the court was made on the basis of pleadings, evidence and submissions before court.

14. The Application for review is misconceived and same is dismissed with costs to the Claimant/Respondent.

Dated and Delivered at Nairobi this 4th day of March, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE