



**REPUBLIC OF KENYA**

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

**CAUSE NO. 34 OF 2014**

**(Formerly High Court Civil Appeal No.72 of 2008 Consolidated with High Court Civil Appeal No.30 of 2008 at Nyeri)**

**MANYA BETTARELLO..... 1<sup>ST</sup> APPLICANT/APPELLANT**

**VITTORIO BETTARELLO.....2<sup>ND</sup> APPLICANT/APPELLANT**

**VERSUS**

**ROBERT KINYUA MIGWI.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> May, 2015)

**RULING**

The applicants filed a notice of motion on 28.01.2015 under sections 3, 3A and 91 of the Civil Procedure Act and Order 45 Rule 1(1) (a) of the Civil Procedure Rules. The applicants prayed for orders that:

1. The court is pleased to review its orders of 26.09.2014 by correcting the amount of ex-gratia offer by the respondents to the plaintiff from Kshs.100,000.00 to Kshs.70,000.00.
2. A sum of Kshs.189,954.30 plus interest earned thereon out of the sum of Kshs.189,954.30 deposited at Kenya Commercial Bank Limited, Nyeri Branch in the joint names of the firms of Gathaara Mahinda and Company Advocates and Mwangi Kariuki and Company Advocates be released to the firm of Mwangi Kariuki and Company Advocates.
3. The balance of Kshs.52,700.00 plus interest earned thereon from the same account is released to the firm of Gathaara Mahinda and Company Advocates.
4. The costs of this application are paid by the respondent.

The application was further supported by the affidavit of Mwangi Kariuki Advocate filed on 28.01.2015.

The respondent opposed the application by filing grounds of opposition on 06.02.2015. The respondent raised the following grounds of opposition:

- a. That the application is an abuse of the court process.
- b. That the honourable court is now functus officio and has no jurisdiction to entertain the application.
- c. That the issues stated in the application can only be raised in an appeal.
- d. By judgment of the court the appellants owe the respondent a sum of Kshs.362,720.00 and after deduction of amount held at the bank around Kshs.242,654.00 the appellants will still be required to top up by an additional sum of around Kshs.120,066.00 to the plaintiff but subject to account.

- e. That the respondent's counsel has disagreed with the appellants' advocates on the amount payable to the respondent.
- f. That if the honourable court is inclined to review the judgment, it should go to find that the respondent was entitled to leave for year 2004 served being Kshs.20,000.00 as well as overtime which was duly admitted by the appellants' offer for payment of public holidays and Sundays in the sum of Kshs.10,000.00 as per page 62 of the record of appeal in 72 of 2001.

The applicants' main submission in this matter was that the court made an error in finding that the sum offered to the respondent as ex-gratia was Kshs.100, 000.00 instead of Kshs.70, 000.00. The applicants' further case was that the court having awarded the respondent Kshs. 132, 700.00 in place of the initially awarded Kshs.292,654.30, the applicants would be entitled to a refund from the funds deposited at the bank in the sum of Kshs.159,954.30 but consequential to the review in favour of the applicants, the refund should increase to Kshs.189,954.30 plus interest earned thereon from the date of the deposit at the bank and the balance of Kshs.52,700.00 plus proportionate interest going to the respondent in the application.

The record is clear. In the letter reproduced at paragraph 14 of the judgment delivered by this court, it is clear that the ex-gratia sum offered to the respondent was Kshs.70,000.00. Accordingly, the court finds that the applicants are entitled to a review on account of an error apparent on the record as applied for and also entitled to the consequential orders as prayed for.

The respondent urged that if the honourable court is inclined to review the judgment, it should go ahead to find that the respondent was entitled to leave for year 2004 served being Kshs.20,000.00 as well as overtime which was duly admitted by the appellants' offer for payment of public holidays and Sundays in the sum of Kshs.10,000.00 as per page 62 of the record of appeal in 72 of 2001. The court finds that there is no application for review in that regard and that submission was not justified. In any event the cited page shows that the salary for the month was Kshs.20,000.00, ex-gratia Kshs. 70,000.00 and public holidays and Sundays Kshs.10,000.00; there is no mention of admitted overtime and which the court found that the respondent was not entitled. Thus, the court finds that the respondent's submission in that respect was misconceived.

In conclusion the court makes orders in terms of prayers 1, 2, 3 and 4 of the notice of motion filed on 28.01.2015.

**Signed, dated and delivered in court at Nyeri this Friday, 29<sup>th</sup> May, 2015.**

**BYRAM ONGAYA**

**JUDGE**