



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2051 OF 2013**

**EMILY WANJIKU GATHITU ..... CLAIMANT**

**VERSUS**

**ROSEMARY MUITA ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL MUITA ..... 2<sup>ND</sup> RESPONDENT**

**TOP TALENTS ACADEMY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. On 16<sup>th</sup> June 2015 the Respondents applied through Notice of Motion application under rule 16 of the Court rules for orders that the Court to review its award of 19<sup>th</sup> February 2015 at paragraph 34 regarding the ward for underpayment of kshs.324, 000.00 based on lower scale in the alleged applicable minimum wage for ECD teachers and a stay of taxation of the bill of costs dated 20<sup>th</sup> march 2015 pending the hearing of the application.

2. This application is supported by the affidavit of the 1<sup>st</sup> Respondent Rosemary Wanjiku Muita and on the grounds that the matter has been fixed for taxation of the claimant's bill of costs but the Respondent wishes to have the award herein reviewed in terms of paragraph 34 where the Claimant is awarded the sum of Kshs.324, 000.00 being underpayment for an ECD teacher based on wage guidelines. That there are no such guidelines that govern ECD teacher in the country and what the Claimant submitted in Court are mere proposals which have not been approved so as to apply to the respondents. The claimant's employment was guided by mutual negotiations and not by the proposed payment schedules. The award should therefore be reviewed before taxation as the Claimant will not be able to compensate the Respondent if monies are paid to her before the Court addresses this application.

3. In the affidavit of Rosemary Wanjiku Muita she avers that the Respondents were represented by Waweru Gatonye & Co. Advocates who filed the defence and then instructed the firm of Sospeter & Co Advocates to attend at the hearing but the advocates failed to inform the Respondents of the hearing dates. The Respondent was thus not in Court to defend the suit. The Court delivered judgement and considered the defence on record and arrived at the decision dismissing the claim for unfair termination, notice pay and service pay. The Claimant was however awarded underpayment of Kshs.324, 000.00 for underpayments being an ECD teacher. That she has made enquiries and confirmed that there are no such guidelines for paying ECD teachers and the government has no approved scheme of such service and had the Respondent attended court, this would have been demonstrated.

4. Ms Muita also avers that the Claimant duped the Court when she stated that there was a payment scale and minimum wage was kshs.15, 000.00 but there is nothing on record to confirm such statements. The Claimant has now submitted a bill of costs due to assessment based on erroneous award of Kshs.324, 000.00 as underpayment the basis of which is challenged. The Claimant failed to tell the Court that over and above her salary of kshs.9, 000.00 she was provided with transport to school, tea at 10 o'clock and lunch. These were benefits that should be put into account herein and the Court to review its award.

5. The Respondents also submitted that they have annexure "M" that the Claimant relied upon in her evidence but a search with the Ministry of Education and the Teachers Service Commission (TSC) has confirmed that there is no such scheme of service for ECD teachers. The document thus submitted was of no value as no such guidelines have been published. There are proposals but these have not been approved for use.

6. In the Further Affidavit by the Respondents, there are documents confirming the averments of the Respondents noting that the TSC position was confirmed by the Ministry of Education that they do not have ECD teacher's scheme in Kenya.

7. The Claimant filed a Replying Affidavit sworn on 28<sup>th</sup> July 2015 and avers that the application by the Respondents is defective, incompetent, in bad faith and meant to delay the course of justice. Proceedings herein were conducted diligently and the materials submitted were in good faith and did not mislead the court.

8. The Claimant also submitted that the application herein is defective as on 16<sup>th</sup> June 2015 the Respondents were adviced to formalise appearance which has not been done. Order 9, in the absence of an application to cease acting by the previous advocates, the current advocates cannot appear and make application as herein. Also that the application before Court has not adhered to rule 32 of the Court Rules and is defective. Also the delay herein has been inordinate, the Respondent have waited for over 4 months to file the current application and the same is only meant to frustrate the process noting the conduct of the Respondents throughout the trial.

9. The Claimant relied on the case of **national Bank of Kenya Ltd versus Njau, Court of Appeal, Case No.211 of 1996 [Nairobi]**.

### **Determination**

10. Question arose with regard to the legal representation of the respondents. That the firm of Gathaara & Co. Advocates had not regularised their appointment herein and at the time of making presentations after judgement had been entered. On 27<sup>th</sup> April 2015, Notice of Appointment of Advocate was filed by the firm of M/S G.N. Gathaara & Company Advocates. This followed a Notice to Act in Person filed by the Respondents on 17<sup>th</sup> April 2015 together with a letter from the Firm of M/S G.N. Gathaara & Company Advocates letter to the registrar seeking to have copies of documents herein noting the Respondents had issued such notice to act in person. Thus the Respondents notice to act in person came in before the firm of M/S G.N. Gathaara & Company Advocates came on record to act for the respondents. Previously, the Respondents were represented by Sospeter & Co, Advocates who were dully notified of the changes made by the respondent, and such notice is filed in court.

11. It is always a good practice for advocates to come on record procedurally, even after delivery of judgement, which is a critical point to change advocates, where a party is seeking to enjoy their right to choose which advocate to represent them due process should be put into account. In this case however, I note the Respondents filed their notices to act in person then appointed their current advocates. It is not clear whether the previous advocates had any notice of the Respondents seeking to act in person a there is no evidence of service of the Notice to Act in Person by the Respondents.

12. I will however address the substantive issues raised herein by the respondents.

13. Review of Court orders is regulated by Rule 32 of the Employment and Labour Relations Court Procedure Rules. The Rules has a set memoranda and forms that an applicant must use in making such an application. Under this application certain issues must be addressed before an applicant can concretely say they require to go on appeal or have a review of the Court orders. Rule 32 is set in clear and unambiguous manner to guide any applicant to address core issues in an application for review.

14. What I get from the affidavit of Rosemary Wanjiku Muita dated 16<sup>th</sup> June 2015 is at paragraph 4 where she avers;

*THAT my advocate did not attend all the hearing dates given by the Court and never informed me when the case was proceeding to enable me attend court.*

15. Why then is the Respondent in court? To have a second chance to be heard or have a review of the Court award? At paragraph 5 and 7 of Rosemary Wanjiku Affidavit she avers;

*THAT notwithstanding the above failures, the Court was very fair in its judgement and indeed, based on the evidence, dismissed the claimant's prayer for unlawful dismissal, notice pay and service.*

*THAT I have made enquiries and confirmed there are no guidelines for paying ECD teacher as claimed by the Claimant and awarded by the court.*

16. Such averment confirm that the Respondents failed to attend Court when hearing was due, after the hearing they have gone in search of material in support of their case and now wish to have the award herein reviewed. This is not the purpose of Rule 16 nor the purpose and context of Rule 32 as above outlined. Parties come before this Court to assert their rights, they are heard on merit and the entire record show that the Court had to adjourn severally so as to allow the Respondent avail themselves for hearing but this was ignored. Whatever misstate that was committed by the advocate on record so as to cause the Respondents not to area in Court and submit whatever evidence was available and materials they now wish to rely on these are matters overtaken by events. Where the Respondents counsel acted in negligence, there is recourse outside these proceedings. The Court award cannot be hence disturbed over matters that go outside Rule 32 as to do so would be the injustice to the party who was heard following due process and at the time of the Court making its award, there was no evidence as now submitted to controvert the evidence presented by the claimant. In this regard therefore, the application by the Respondents lacks merit.

17. The materials sourced by the Respondents from TSC and Ministry of Education and filed in the Further Affidavit on 14<sup>th</sup> July 2015 were sourced way after the close of the hearing and after judgement had been delivered. Such materials are not said to be new, not avoidable when the defence was filed or of apparent importance so as for the Court to consider them now and review its award. This is the defence that the Respondent should have submitted when proceedings were still alive. To submit now after judgment, I find no rationale, good cause or sufficient reason.

18. If parties were to be allowed to receive summons, seat on them, wait for the Court to deliver judgement and to give orders and then one morning learn of a new issue and offer to disturb the orders on this basis, there would be no end to litigation. Every new occurrence would be a matter enough to challenge any award. On the admission that indeed the Respondent failed to attend Court when hearing was due, due process demanded that the Claimant be heard on her evidence. It is clear from the proceedings and noted in the Court judgment that the Claimant was never issued with the contract of employment, such a contract would have come in handy even in the absence of the Respondent for the Court to appreciate the terms that had been mutually agreed upon. In the absence of such a written contract of employment, the word of the Claimant was then taken very seriously by the court. Such evidence was given under oath and such is not challenged here.

To allow a review of the court award and judgement as sought herein would be to circumvent due process and in essence the course of justice. It would be to invite a party to enjoy equity when such a party has not

served equity.

**Application by the respondent lacks merit. The same is dismissed with costs to the claimant.**

Delivered, dated and signed in open Court at Nairobi this 12<sup>th</sup> August 2015.

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

.....

.....