



**REPUBLIC OF KENYA**

**IN THE IN THE EMPLOYMENT & LABOUR RELATION COURT OF KENYA**

**AT MOMBASA**

**CAUSE 294 OF 2014**

**MICHAEL ALOYO ..... CLAIMANT**

**VERSUS**

**OWL ALARMS LIMITED..... RESPONDENT**

**RULING**

**Introduction**

1. The Notice of Motion before the court is dated 13.3.2015 and it is brought by the respondent in the main suit, hereinafter called the “applicant”. The motion basically seeks for review of this court’s judgment/ decree entered on 13.2.2015 and admission of the applicant’s evidence. The motion is supported by the Affidavits sworn by the applicant’s counsel, Mr. Fred O. Adhoch on 13.3.2015. The motion is opposed by the claimant vide his undated Replying affidavit filed on 16.4.2015.

**Background**

2. On 13.2.2015, this court entered judgment in favour of the claimant declaring his dismissal from employment wrongful and awarding him kshs.137,402.90, plus costs and interests. The applicant and her counsel never attended the hearing to defend the suit and as such the hearing proceeded ex parte. The applicant’s counsel however filed written submissions after the close of the trial urging the court to enter judgment in the applicant’s favour. The court proceeded to make the impugned judgment based on the claimant’s un rebutted evidence. when the motion herein came up for hearing the parties agreed to dispose of by written submissions.

**Applicant’s case**

3. The motion is brought under order 45 rule 1(a) &(b) of the civil Procedure Rules (CPRs) and section 3A & 63(e) of civil procedure Act (CPA) and is founded on the ground that there is discovery of new documentary evidence which warrants review and setting aside of the impugned judgment. According to the applicant’s counsel the said documents were not availed to him in time because they had been misplaced while in the custody of an employee who had left employment. The evidence in issues includes a letter from the Prime Bank showing payments to the claimants and a Payroll allegedly showing that the claimant was a casual employee.

4. The applicant has contended that had the said evidence been produced during trial the court could have arrived at a different decision. The counsel submitted that the claimant has the burden of proving that the signatures on the payroll attributed to him were forgery as alluded to in the claimant’s replying

affidavit. In conclusion, the counsel relied on *HCCC No. 692 of 2004, Standard Chartered Bank Kenya Ltd- vs- Ali Noor Abid & others*, where the court granted review in allegedly similar circumstances.

### **Claimant's reply**

5. The claimant has submitted that the applicant's motion lacks merits and prayed that the same be dismissed with costs. He has contended that the application based on the alleged documents is only an afterthought and an abuse of the process of the court. He maintained that the payroll contained forged signature and that the letter from the bank had remarks showing that the payments indicated thereon had not been paid to the claimant.

### **Analysis and determination**

6. After careful consideration of the Application, affidavits and submissions, it is clear that the applicant has brought the review application on the ground that she has discovered new and important documentary evidence after judgment. The issue for determination herein is whether the application meets the threshold for review of judgment as prayed.

### **Threshold for grant of review for discovery of new evidence.**

7. The right to apply for review of this court's decisions is donated under rule 32 (1) of the Industrial Court (Procedure) Rules, 2010 (ICPRs). Among other reasons, an aggrieved party may apply for review of a judgment on the ground that he has discovered new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at the time when the decree was passed. The burden of proof is therefore upon the applicant to demonstrate that he has discovered new and important matter or evidence and that after due diligence the same did not come to his knowledge or could not be produced before the passing of the impugned judgment.

8. In this court's view the applicant has not discharged the said burden of proof. The only evidence adduced in support of the motion was an affidavit of facts sworn by counsel from the bar. The court will therefore not be moved by such evidence from the bar to exercise the discretion sought by the motion. A counsel cannot leave privileged position and descend to the arena of litigants and purport to swear affidavits on matters of facts. In any event the affidavit by counsel has not challenged the ex parte hearing or justified why he and the applicant failed to attend the hearing to tender any evidence in the first place.

9. Be that as it may, the court has on its own motion exercised the powers donated under rule 33 correct clerical errors apparent on page 5 of the impugned judgment by rectifying a mistake regarding the quantum of damages awarded. The court awarded kshs 10911 as salary in lieu of notice, kshs 11638.40 for accrued leave, kshs 70940.40 as arrears for salary underpayment and kshs 5455.53 for service pay all totaling to kshs. 98945.33. However, the court erroneously summed up the award at kshs.137,402.90 which was in excess of the actual aggregate sum awarded under the said four items. The court therefore substitutes the sum of kshs. 137,402.90 with kshs 98,945.33 as the correct award due to the claimant plus costs and interest as ordered in the judgment delivered on 13.2.2015.

### **Disposition**

10. For the reasons stated above, the applicants motion dated 13.3.2015 is dismissed with costs. The sum of kshs.137,402.90 erroneously indicated on page the judgment dated 13.2.2015 is corrected and rectified by substituting it with the sum of kshs, 98,945.33 as clarified above.

**Signed, dated and delivered at Mombasa on 21<sup>th</sup> day of September 2015.**

**ONESIMUS N.MAKAU**

**JUDGE**