



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NUMBER 492 OF 2012
OYANGI ZACHARY.....CLAIMANT
VERSUS
NAIROBI WEST HOSPITAL.....RESPONDENT
RULING

1. The motion dated 14th May, 2015 seeks among other orders that:-
 - (a) The firm of Messrs Arwa & Associates be allowed to come on record for the respondent.
 - (b) The Court be pleased to stay execution of the decree of the Hon. Justice Abuodha made on 6th of February 2015 pending the hearing and determination of this application.
 - (c) The Honourable Court be pleased to vary, review and or set aside decree made by the Hon. Justice Abuodha on the 6th February, 2015.
2. The application was brought on the ground among others that:-
 - (a) The Court found the respondent liable to pay to the claimant damages in terms of
 - (i) Salary for September-December 2011.....Kshs.38,000**
 - (ii) Salary for January-February 2012.....Kshs.28,662.15**
 - (iii) Public holidays for two years.....Kshs.36,478.00**
 - (b) That the said orders are erroneous and grossly excessive and are not based on any evidence.
 - (c) That as a result of the aforementioned there is no basis in law or in fact in the claimant being awarded salary for the months of November-December 2011 and January-February 2012 as he had ceased being an employee of the respondent.
3. Mr. Ataga Isaya in his affidavit in support of the application deposed among others that the hearing proceeded ex-parte as the respondent's counsel on record then had made previous

adjournment applications hence the Court declined further adjournments. These mistakes he stated were mistakes of counsel which should not be visited upon the respondent. Mr. Isaya further deposed as follows:

(a) That the claimant was awarded among others:-

(i) Salary for September-December 2011.....Kshs.38,000

(ii) Salary for January-February 2012.....Kshs.28,662.15

(iii) Public holidays for two years.....Kshs.36,478.00

(b) That according to the claimant's evidence which the Court found to be uncontroverted, the claimants services were terminated on the 11th September 2011 and the Court found that his suspension was unfair termination.

(c) That he is counselled by his advocates Messrs' Arwa & Associates that the claimant was not entitled to salary for the months of September-December 2011 and January-February 2012 as he was no longer an employee from September 2011.

(d) That he was further counselled by his advocates that the award of one month's salary in lieu of notice and 5 month's salary compensation for unfair dismissal to the claimant are sufficient.

(e) That he was also counselled by his advocates Messrs Arwa & Associates Advocates that the award of Kshs.36,478.00 as compensation for work done during public holidays for two years is an erroneous miscalculation. It should have been calculated as **Kshs.308.20 per day salary*7 (Public holidays per year)*2 years – Kshs.4,314.80.**

(f) That the claimant had already taken out warrants of execution against the Respondent.

(g) That it was in the interest of justice that the prayers prayed for in the annexed application be granted.

4. The claimant opposed the application and swore an affidavit in reply stating among others as follows:-

(a) That the application by the respondent has not been brought in good faith as it is a tactic to deny him his right to enjoy the fruits of his judgment without any justifiable reason.

(b) That the overall conduct of the Respondent in dealing with this matter had been deliberately intended to delay and frustrate his claim which explains why they kept making endless adjournments during the hearing in an attempt to cause unnecessary delays and deny him his entitlement.

(c) That the Respondent/Judgment debtor's application is an afterthought only meant to delay as it had failed to bring any evidence or matter which was not within its powers or knowledge at the time of hearing.

(d) That upon the delivery of the judgment by the Honourable Court herein the respondent's counsel was duly notified by a letter dated 9th February 2015.

(e) That by a letter dated 1st April, 2015 the respondent's advocate was served and notified of the decree and asked to advise their clients to pay the decretal sum.

5. The Court has reviewed the application and the basis upon which review is sought and is not persuaded that they meet the criteria set under rule 32 of the Court rules except on the issue of compensation for work done during public holidays which will be revised to Kshs.4,314.80 and not Kshs.36,478/= as earlier awarded.

6. This matter proceeded ex-parte after several adjournments on the part of the respondent which the Court felt were delaying tactics. As was observed, in the judgment when matters proceed undefended, the Court loses the benefit of cross-examination. This greatly impairs the decision ultimately reached since the Court as an impartial arbiter cannot assume the role of the absent party and interrogate the veracity of allegations of the party present before it. Save for obvious exaggerations or misinformation, the Court by and large goes by what such party presents provided it reasonably supports the claim.

7. In conclusion, the Court grants prayer 1 of the Motion permitting Ms. Arwa and Associates to come on record for the applicant and partially reviews its judgment delivered on 6th February, 2015 to the extent that the sum awarded for work done during public holidays for two years is revised from Kshs.36,478 to Kshs.4,314.80. The rest of the prayers stand dismissed.

8. It is so ordered.

Dated at Nairobi this 9th day of October 2015

Abuodha J. N.

Judge

Delivered this 9th day of October 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge