



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 27 OF 2012

MARY WANGUI GAKUNJU CLAIMANT

VERSUS

CITY COUNCIL OF NAIROBI RESPONDENT

Mr. Gathogo for Petitioner

Mr. Kuria T. M. for the Respondent

RULING

1. The Application by the Claimant dated 10th December 2012 seeking to review the judgment of the Court delivered on 6th September 2013 is premised on **Rule 32** of the **Industrial Court's (Procedure) Rules, 2010**.
2. In terms of the Rule the Court may entertain such a review where;
 - a. there is discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by the Applicant at the time when the judgment was passed;
 - b. there is a mistake or error apparent on the face of record; or
 - c. the judgment is in breach of any written law;
 - d. judgment requires clarification; or
 - e. for any other sufficient reasons.
3. The Applicant wants;
 - i. the name of the respondent to be substituted by the name of Nairobi City County;
 - ii. the multiplier of the Award be substituted with five (5) instead of four (4) as the period in question is between 1st January 2009 to 31st December 2013;
 - iii. that the judgment breached the law by directing that the Applicant pay tax to Kenya Revenue Authority whereas the Applicant, being a person with disability is exempted from paying taxes by dint of **Legal Notice No. 30 of 10th March 2010**. The persons with disabilities (**Income Tax Deductions and Exemptions) Regulations**;
 - iv. that the Applicant has discovered a new and important matter of evidence which was not within the Applicant's knowledge in that, the salary and allowance tabulation was not uniform for the 5 years period and the Judgment ought to have considered promotion and all salary upward

enhancement and therefore the total salaries and benefits over the 5 years period is Kshs.2,550,300/=;

4. **Determination**

- a. with respect to the issue of a multiplier being five (5) years instead of (4), that is an apparent error on the face of record and the Award is substituted as follows; $(26,400 \times 12 \times 5)$ making the total Award Kshs.1,584,000/=;
- b. the ***Legal Notice No. 30 of 10th March 2010*** with respect to non-payment of taxes for persons with disabilities is applicable to this matter from the date it became operational and same is not applicable retroactively. Accordingly the part of the Award from 10th March 2010 is exempt from taxation and the Court directs accordingly.

5. It is trite that a party must stand or fall with its pleadings. This suit was against the City Council of Nairobi then the employer of the Claimant.

6. The new entity, Nairobi City County is the legal successor of the Respondent. This is a matter that was in the knowledge of the parties by the time this Judgment was delivered on 6th September 2013 and no amendment was sought before Judgment.

There ought to be no difficulty in executing this Judgment against the new entity and the Applicant has failed to justify a review of the Judgment in this respect.

7. Regarding the issue of escalating income, this was not part of the pleadings and the Respondent did not have opportunity to address the matter before Judgment.

The attempt to revise the pleadings after Judgment is untenable and the Court refuses to consider anticipated income for the unserved period.

8. In the final analysis the Judgment is revised as follows;

- i. the Award of the Court is revised to Kshs.1,584,000/= $(26,400 \times 12 \times 5)$; and
- ii. part of the award covering the period before 10th March 2010 remains taxable and the rest is exempt from taxation by dint of the ***Legal Notice No. 3 of 10th March 2010***.

Each party to bear their own costs of this application.

Dated and Delivered at Nairobi this 25th day of July, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE