



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 149 OF 2014**

**JOSEPH OWENGA ALEM.....CLAIMANT**

*VERSUS*

**DHOKIA TRANSPORTERS LIMITED.....RESPONDENT**

**RULING**

Before me for determination is an application dated 24<sup>th</sup> October 2016. The application seeks the following orders: -

1. That this Honourable Court be pleased to review its judgment order made on 27<sup>th</sup> November 2015 by awarding the claimant service pay amounting to Kshs.420,000 made up as follows (Kshs.17,500 x 24 years = Kshs.420,000)
2. That the cost of this application be provided for.

The grounds upon which the application is predicated are the following:-

- a) There is discovery of new and important evidence that has arisen which evidence after due diligence was not within the plaintiff's knowledge or could not be produced at the time the court made its order of 27<sup>th</sup> November 2015.
- b) There was an error apparent on the face of the record.
- c) Service pay, which is both a constitutional and statutory right, was left out of the workings of the dues the claimant was entitled to.
- d) This is a proper and fit case for review.
- e) This application has been brought timely and without any reasonable delay.
- f) It is in the best interests of justice and equity that the orders prayed for herein are granted.

The application is supported by the affidavit of **JOSEPH OWENGA ALEM**, the claimant sworn on 24<sup>th</sup> October 2016 in which he deposed that judgment in this case was delivered on 27<sup>th</sup> November 2015. He was awarded Kshs.227,500 being pay in lieu of notice in the sum Kshs.17,500 and maximum compensation the sum of Kshs.210,000. The court also ordered that he be issued with a certificate of service.

He deposes further that he was not awarded service pay despite the same being his statutory right, he erroneously pleaded for severance pay instead of service pay and during the hearing, he led evidence to support his entitlement to service pay.

The applicant further deposes that this was a typographical error apparent on the face of the record which is curable by the application for review and that the respondent will suffer any prejudice by payment of the service pay which is his constitutional right.

The respondent opposed the application and filed the following grounds of opposition: -

- (a) That the said application is a non-starter as it is predicated on the wrong provisions of the law hence the proper jurisdiction of this court has not been evoked;
- (b) That it is now a very trite principle of law that parties are bound by their pleadings hence the claimant's application is otherwise an afterthought, untenable, unreasonable and an abuse of the Court's process;
- (c) That the claimant has not met or established the requirements for granting the present application;
- (d) That in the circumstances, the application should be dismissed with costs to the respondent.

The application was argued in court on 19<sup>th</sup> June 2017. Mr. Odeny appearing for the applicant/claimant submitted that under Section 16 of the Employment and Labour Relations Court Act and Rule 23 of the Employment and Labour Relations Court (Procedure) Rules this court is mandated to review its judgments, awards and decrees.

He submitted that the application seeks review of the judgment of the court delivered on 27<sup>th</sup> November 2017 which did not award service pay to the claimant. He submitted the service pay is a right of the claimant by law under Section 35 (5) of the Employment Act, which provides for it in mandatory terms by using the word "shall". The review is based on discovery of new and important evidence, which was not within the knowledge of the claimant at the time of hearing. There was an error in the pleadings before the court as the claimant prayed for severance pay instead of service pay.

Mr. Odeny submitted that this is a case fit for review in the interest of justice as the finding of unlawful termination was not challenged.

For the respondent, Mr. Mweisigwa relied on the grounds of opposition. He submitted that review is a principle of law available under very specific circumstances. That the applicant had failed to explain how Section 35 of the Act can be a new and important evidence. He submitted that although the word "shall" is used in the Section it does not make service pay a right. It is an elementary principle of law that parties are bound by their pleadings. That the application is not brought in good faith but is being smuggled into a case where judgment has already been delivered based on evidence in court. He submitted that in the proceedings, no service pay was prayed for and the prayer for the same in the application is an afterthought and an abuse of court process.

Mr. Mweisigwa submitted that the principles for review had not been met by the applicant. He prayed that the application be dismissed. The respondent relied on the following authorities: -

**1. Independent Electoral and Boundaries Commission –vs– Stephen Mutinda Mule and 3 Others, Civil Appeal No. 219/2013 (eKLR).**

**2. Joseph Mbuta Nzui –vs– Kenya Orient Insurance Company Limited HCCC No. 156/2006 (eKLR).**

#### **Determination**

The applicant seeks review of judgment which was entered in his favour on 27<sup>th</sup> November 2016 by his application dated 24<sup>th</sup> October 2016 and filed on 17<sup>th</sup> March 2017. The issue for determination is whether the applicant has satisfied the principles for review as set out both in law and in judicial authorities.

Section 16 of the Employment and Labour Relations Court Act provides for review as follows: -

#### **16. Review of orders of the Court**

*The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.*

Rule 33 of the Employment and Labour Relations Court (Procedure) Rules further provides for review as follows –

**(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—**

**(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;**

**(b) on account of some mistake or error apparent on the face of the record;**

**(c) if the judgment or ruling requires clarification; or**

**(d) for any other sufficient reason.**

**2. An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.**

**3. A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.**

**4. The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.**

**5. Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.**

**6. An order made for a review of a decree or order shall not be subject to further review.**

In the affidavit supporting his application, the applicant states that the failure to plead service pay was a typographical error while on the grounds in support of the application, he pleads that it was an error apparent on the face of the record. I have checked the record. During his testimony, the claimant did not mention either service pay or severance pay.

The correct position is therefore that service pay was never prayed for nor was evidence led to prove it. There can be no error on the face of the record on evidence that has not been pleaded or proved.

As submitted by Mweisigwa on behalf of the respondent, parties are bound by their pleadings. The claimant having failed to plead service pay and having not led any evidence in support thereof, the same cannot form the basis of an application for review of judgment.

I further agree with Mr. Mweisigwa's submissions that a matter of law cannot form the basis of new discovery to qualify for review of judgment as submitted by Mr. Odeny. If the claimant made a mistake and prayed for severance pay instead of service pay, he should have amended the claim even verbally at the time of hearing to enable him benefit from such plea, and then adduce evidence in support of the prayer.

The law has very relaxed provisions for amendment of pleadings and allows amendments even orally at the time of hearing. I

therefore agree with the respondent that the application is an afterthought, having also been filed more than one year after the date of the judgment.

For the forgoing reason I find that the application lacks merit, is vexatious and abuse of court process and dismiss it with costs to the respondent.

**DATED AND SIGNED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT KISUMU ON THIS 15<sup>TH</sup> DAY OF MARCH 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**



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