



Case Number:	Civil Appeal 302 of 2008
Date Delivered:	09 Jul 2015
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	David A Onyancha
Citation:	Patrick Kilonzo v Teachers Service Commission [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 302 OF 2008**

**PATRICK KILONZO.....APPELLANT/RESPONDENT**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....RESPONDENT/APPLICANT**

**RULING**

The application before the court for determination is the Notice of Motion dated 4<sup>th</sup> October 2013 seeking several orders. Perusal of the application confirms that only prayer (5) is still pending for determination, all others having been overtaken by time. The same reads: -

1. *The court be pleased to amend and rectify the decree herein.*
2. *That cost be provided for.*

The application is based on the grounds stated on the face of the application. The application is supported by the affidavit sworn by **Josephine Maundu**, the director in charge of Human Resource Management and development for the Applicant/Respondent, dated on 4<sup>th</sup> October 2013. The Respondent avers that the Respondent/Appellant was employed on contract terms of service by the Respondent as a clerical officer on or about 23<sup>rd</sup> October 1991 at an annual salary of K\$1200 p.a. The terms and conditions of service were later changed to permanent and pensionable terms of service with effect from 1<sup>st</sup> January 1993. The Applicant/ Respondent claimed that the Respondent/Appellant earned a basic salary ranging from Kshs.2,635/- to Kshs.11,388/-.

The Respondent/Appellant filed proceedings before the Chief Magistrate court at Nairobi being **Patrick Kilonzo Vs Teachers Service Commission, Civil Suit No. 4603 of 2005**, alleging wrongful termination. The suit was dismissed and that led to the filling of the current appeal which was heard and decided in Respondent/Appellant's favour. The court ordered the Respondent/Appellant to pay Kshs.331,760/- as the accrued salary, payment of one month salary in lieu of notice for termination of employment, and in the alternative, the Respondent to reinstate the Appellant and or pay a gratuity to the Applicant at a rate of 25% of basic salary earned from the first day of permanent employment until the date of filling of this suit. The Respondent/Appellant extracted a decree which according to the Applicant/Appellant's, was erroneous in terms of figures and interpretation of the court's judgment.

The Applicant/Respondent case is that the monthly salary of Kshs.30,160/-, was erroneous as the same was based on salary arrears earned in the month of February 2004 only. The Respondent maintained that the correct salary at the material time was Kshs.9,985/-.

The Applicant/Respondent avers that the Appellant was only entitled to a total sum of Kshs.699,125.50 of which the Respondent had settled a total sum payment of Kshs.558,505.70. The Respondent argues that the apparent discrepancy is of fundamental importance as it goes to the root of the execution of the decree process.

The application is opposed. The Respondent filed a replying affidavit sworn by **Patrick Kilonzo**, the Respondent. The Respondent stated that the Respondent was receiving a salary of Ksh 30,160 as reflected in the pay slip prepared by the Respondent and on the basis of which the honourable trial court rightfully arrived at the calculations it made in his favour. The Respondent alleged that the Applicant/Respondent was seeking to sneak in an issue that was not raised during the trial. The Appellant stated that by introducing the issue the Respondent will be re-opening up the trial.

On the prayer for amendments which is the only issue still standing to be resolved, the Applicant submitted that during the prosecution of the suit in the Chief Magistrate Court, the Appellant misdirected and misled the court by alleging that his salary per month was Kshs.30,160/- instead of Kshs.9,985/-. The Applicant/Respondent submitted that the Respondent/Appellant salary has never been Kshs.30,160/- at anytime from the time he was employed to the time of his dismissal.

On the issue, the Applicant/submitted that it was obliged to compute all monies in fulfillment of the aforementioned judgment in favour of the Respondent/Appellant based on the gross monthly salary of Kshs.9,985/- per month and not Kshs.30,160/-. The Applicant further submitted that as per the letter of employment an employee who makes contribution to the Teachers' Services Commission superannuation pension scheme shall not be eligible to terminal benefits in accordance with the scheme. The Appellant was to contribute 5% of the basic salary and the Respondent/Applicant 25% on monthly basis. The Applicant stated that it complied with the court order by paying the balance of his gratuity amounting to Kshs.24,712.85. The Applicant further submitted that the Respondent was only entitled to Kshs.696,908.70 and the Applicant had made payments amounting to Kshs.352,949.20.

During the highlighting of the submissions, Ms Busienei, counsel for the Applicant conceded and informed the court that prayers in the application had been spent and the only prayer remaining was no. 5 which seeks to amend and rectify the decree. I will therefore to proceed examine only the said prayer No. 5.

The law regarding amendment of judgment is found under **Section 99 of the Civil Procedure Act**. It states:

***“clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”***

A plain reading of the section shows that the court has **power both under the rules of court and inherent** powers of Court, to correct clerical or arithmetical mistakes in judgments, decree or orders arising therein from any accidental slip or omission.

The Courts have set out guidelines which govern the circumstances under which the exercise of the jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders is made. In **Vallabhdas Karsandas Raniga Vs. Mansukhlal Jivraj and Others [1965] EA 780**, the East African

Court of Appeal held:

***“Section 3(2) of the Appellate Jurisdiction Act confers on the Court of Appeal the same jurisdiction to amend judgments, decrees and orders that the High Court has under section 99 of the Civil Procedure Act, making it unnecessary to look to the inherent powers of the court. The words “at any time” in section 99 clearly allow the power of amendment to be exercised after the issue of a formal order....“Slip orders” are made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled.....A court will only apply the slip rules where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention. In the present case, if the facts had been before the court when judgment was given on appeal, the court would, on application or indeed of its own motion, have made the order for refund, now sought, which was necessarily consequential on the decision on the main issues.”***

Applying the above principles here, the Applicants contention is that the decree was calculated based on an erroneous salary of Ksh 30,160. This being a first appeal, it was the duty of this court to assess and re-evaluate the evidence before the lower court. This court considered the Respondent evidence and came to the conclusion that the evidence before the lower court was not disproved or controverted. The court stated:

***“I have considered the Appellant/plaintiff evidence. It was not controverted or disproved in any way by the Respondent/defendant. The latter’s pleadings in the statement of defence were mere allegations which were never supported by evidence and which , therefore , had no evidentiary value, as already earlier found by this court. In my view and finding, the Appellant’s evidence was clearly believable and therefore acceptable.”***

The question arises whether the alleged defect may be corrected by the court at this juncture" **A court will only correct a defect where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given. The court found the Respondent evidence to be satisfactory and awarded the prayers sought in the plaint. Again,** the defect the Applicant is seeking to have amended was never brought to the attention of the trial court. The information on the figure to be used to calculate gratuity was not before the trial court. The record clearly shows that the Applicant did not participate during the hearing or had no interest in the case. In my view the Applicant cannot therefore come late in the day to ask for an amendment of the judgment. The alleged defect cannot be said to amount to arithmetical error which can be cured by this court in exercise of its power under **Section 99 of the Civil Procedure Act.** It is a substantial question that would require a re-examination of the evidence by the court. The errors alleged, if corrected, would affect the substance of the judgment and would amount in essence to setting aside the judgment of the trial court. The court has no powers to do so, nor can it set aside its judgment on the basis of the misapprehension of the evidence. Doing so would amount to sitting on appeal against its own decision. On that basis I find the application for amending the decree lacking in merit and I hereby dismiss it with costs. Orders are made accordingly.

Dated and delivered at Nairobi this 9<sup>th</sup> day of July, 2015.

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**D A ONYANCHA**

**JUDGE**



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