

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**OF KENYA AT MOMBASA**  
**CAUSE NO. 33 OF 2020**

**JESSE JONATHAN MUBWEKA..... CLAIMANT**

**- VERSUS -**

**SAMEER AFRICA LIMITED..... RESPONDENT**

*(Before Hon. Justice Byram Ongaya on Friday 7<sup>th</sup> July, 2023)*

**RULING**

1. The Court delivered judgment on 04.11.2022. The Court found that the termination of the contract of service was unfair or unlawful. The Court also found that the order of reinstatement as was prayed for would not issue in the circumstances of the Court. In declining to award compensation for the unfair or unlawful termination the Court stated thus, “As submitted for the respondent the claimant submits on award of 12 months’ salaries for unfair and unlawful termination without having prayed for the same. Further, in making the submission there is no guidance based on the factors in section 49 of

the Act for an award as submitted. In the circumstances, the Court finds that such award would be outside rules of pleading and an ambush to the respondent.”

2. The claimant has filed an application dated 15.12.2022 through Olando, Okello & Lusenaka Advocates. It is under Article 159 (2) (d) of the Constitution of Kenya, Section 12(3) (iv), (v), (vi) and (viii) of the Industrial Court Act, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B, and 3A of the Civil Procedure Act and all other enabling provisions of the Law. It is prayed that the Honourable Court be pleased to review its judgment delivered on 04.11.2022 and provide for damages in respect of the finding that the termination of the contract of service of the claimant was unfair and unlawful; and, the costs of the application be provided for. The application was based upon the annexed affidavit of Haron Were Olando Advocate sworn on 15.12.2022 and upon the following grounds:

- a) While the Court found that the termination was unfair or unlawful, no damages were awarded in that regard because the

claimant had not pleaded the award of damages expressly.

b) In view of a finding of unfair or unlawful termination, the issue of damages ought to have automatically arose and provided for in favour of the claimant.

c) The failure to award damages was inconsistent to Article 159(2)

(d) of the Constitution on substantive justice and section 12(3)

(iv), (v), (vi) and (viii) of the Industrial Court Act which allows

the Court to award damages in any other circumstances

contemplated under the Act or any written law and to give any

other appropriate relief as the Court may deem fit to grant. The

denial to award the compensation was prejudicial and injustice

to the claimant and in favour of procedural legal technicality.

d) The application had been filed without delay and at earliest opportunity.

3. The respondent opposed the application by filing on 09.02.2023 the

replying affidavit of Mercy Mbijiwe, the respondent's Corporation

Secretary and through Okello Kinyanjui and Company Advocate. It

was urged as follows:

- a) The application offends order 45 of the Civil Procedure Rules under which it purports to be made.
  - b) The decision by the Court was based on Court of Appeal decisions and the Court is bound by principle of Stare Decisis to follow precedents which are good in law.
  - c) There is no established new evidence, error apparent on record or any other sufficient reason to grant review within the meaning of order 45 rule 1(1) of the Civil Procedure Rules.
  - d) If aggrieved by the decision the applicant should appeal.
  - e) Justice is for both parties and not only the claimant.
  - f) The application was filed one and a half month from the date of the judgment and it was after unreasonable delay as no reason has been advanced for the delay.
4. The parties filed submissions on the application. The Court has considered parties' respective positions and returns as follows.
5. **First**, as submitted for the respondent, the applicant has not urged or demonstrated any of the prescribed grounds for review. The applicant appears to ask the Court to change its reasoning in the judgment and

substitute it with the one the claimant appears to favour. Further, even in urging the Court to change its mind and analysis, the applicant does not deny that indeed there was no prayer for damages for compensation for the unlawful or unfair termination. It is not denied that such would amount to ambush and breach of rules of natural justice as against the respondent. The Court finds that the applicant's lamentation properly goes to appeal process and not review, and, as submitted for the respondent. The application for review must therefore collapse as unjustified.

6. **Second**, as submitted for the applicant, Article 159(2) (d) states that substantive justice shall be administered without undue regard to procedural technicalities. However, the Court finds that the reason for denial of the compensatory damages in the instant case was not a mere procedural consideration, but, was based upon substantive merits of the case. First, it was clear that the claimant wanted to be reinstated but as found in the judgment, reinstatement was not found available. Second, the claimant by his submissions appeared to indeed abandon that remedy on reinstatement and instead, introduced a submission

strange to his pleadings, namely award of compensation. That submission that was inconsistent with the pleadings was a clear substantive injustice or prejudice to the respondent for whom it was submitted as such – clearly being a breach of rules of natural justice in this case where it cannot be said compensation under section 49 of the Employment Act, 2007 would follow as an obvious remedy. The claimant had elaborately pleaded and prayed for reinstatement in a silent preference as opposed to pleading and praying for an award for compensation. How then was the respondent to answer about the remedy which the applicant's pleadings appeared to have deliberately opted to omit? The Court finds that in the instant case, the silence about claim and prayer for compensation for unlawful or unfair termination was such a loud communication in the statement of claim that the claimant was pursuing an order of reinstatement and not compensation. The Court considers that the claimant must be bound accordingly. Awarding or considering to award the compensation was thus found going to the merits of the case and was denied. Needless to revisit the judgment, the Court as well found that the belated

submissions on the award of compensation offered no guidance as envisaged in the factors in section 49 of the Act.

7. While the applicant did not offer explanation for the delay of about one and half months in filing the application, no adverse consequence is established as visiting the respondent in that respect and so the Court finds that the application was filed at the earliest opportunity possible and without unreasonable delay.

For the stated findings the application filed for the claimant for review dated 15.12.2022 is hereby dismissed with costs; and, the Deputy Registrar to cause forthwith return of the Court file herein back to the Mombasa Court Registry.

**Signed, dated and delivered by video-link and in court at Nairobi this Friday 7<sup>th</sup> July, 2023.**

**BYRAM ONGAYA  
PRINCIPAL JUDGE**