



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 146 OF 2014

(Originally Kisumu High Court Civil Case No. 23 of 2009)

JORAM SIRE MALIT & 199 OTHERS.....CLAIMANTS

VERSUS

MUNICIPAL COUNCIL OF KISUMU.....1st RESPONDENT

KISUMU WATER & SEWERAGE CO LTD.....2nd RESPONDENT

RULING NO. 3

1. In a judgment delivered on 23 June 2016, the Court dismissed the Cause save for an order that the Respondents issue the Claimants with certificate(s) of service.
2. On 25 February 2021, the Claimants filed a Motion seeking orders:
 - (i) ...
 - (ii) The Honourable Court be pleased to review and or set aside the judgment and decree delivered on 23rd June 2016 and award the Plaintiffs/Claimants under the following heads as tabulated in annexure JK 2
 - (a) Payment for extension of the period of service.
 - (b) NSSF & NHIF deductions.
 - (c) Overtime.
 - (d) Leave days.
 - (e) Uniform and protective clothing claim.
 - (f) Promotion adjustments.
 - (g) Medical refunds.
 - (h) Long service award.
 - (i) Superannuation fund.
 - (iii) The costs of this application be provided for.
3. The Court declined to certify the Motion urgent and directed that it be served.
4. The Kisumu Water & Sewerage Co Ltd (Kisumu Water) caused to be filed a replying affidavit in opposition to the Motion on 24 March

2021, while the Office of the County Attorney filed a Notice of Preliminary Objection on 31 March 2021.

5. In the Preliminary Objection, it was contended:

- (1) THAT the Claimants application dated 19th February 2021 is premature and irregularly on record for want of compliance with mandatory provisions of law and should be dismissed with costs.
- (2) THAT by virtue of section 16 of the Employment and Labour Relations Court Act, 2014 and Order 33 of the Employment and Labour Relations Court (Procedure) Rule, 2016, this Honourable Court must not entertain the Claimants application.
- (3) THAT there is no discovery of new and important matter of evidence which was not within the knowledge of the Claimants at the time the judgment was made to warrant the instant application.
- (4) THAT there is no mistake or error apparent on the face of the record to warrant the instant application.
- (5) THAT the judgment made on 23rd June 2016 requires no clarification so as to warrant the instant application.
- (6) THAT the instant application is time-barred as five (5) years from the date of judgment is not reasonable time.
- (7) THAT the said Claimants application offends well-established principles of law and, in particular, the principles of res judicata.
- (8) THAT the instant application is an abuse of the court process and ought to be dismissed with costs.

6. Pursuant to Court orders, the Claimants filed their submissions on 24 May 2021, while Kisumu Water filed its submissions on 25 May 2021 (the Office of the County Attorney filed submissions for both Respondents on 16 August 2021).

7. The primary reasons advanced by the Claimants in seeking review of the judgment were that the Court had dismissed the Cause on the ground that they had not produced evidence to support the heads of the claim when the evidence was available but had been misplaced due to movement of the file from the High Court to this Court; that the Court had failed to award pension under the Local Authorities Pension Trust or Local Authorities Provident Fund despite an admission that they were applicable; that copies of payslips and account statements had been produced to support the claims for National Social Security Fund and National Hospital Insurance Fund; that the collective bargaining agreement in place provided for long service awards and that the Municipal Council had admitted the claims for accrued leave days.

8. In opposition to the Motion, the Respondents asserted that there had been inordinate delay in moving the Court (nearly 5 years after judgment); that the Claimants had not met the threshold for review as contemplated in the Rules; that any new evidence sought to be introduced was available to the Claimants at the time of the hearing; that there were no letters of administration in respect of deceased Claimants and that the grounds raised by the Claimants were appeal grounds.

9. The Court has considered the record, the Motion, affidavits and submissions and come to the view that the Motion should be dismissed for the following reasons.

10. One, the judgment sought to be reviewed was delivered on 23 June 2016. The instant Motion was filed on 25 February 2021, nearly 5 years after the judgment.

11. There has been no attempt to explain the delay, and the Court finds the delay inordinate disentitling the Claimants from the exercise of the Court's discretion.

12. Two, the Claimants did not demonstrate that they had come upon new and important matter of evidence which they could not have come across by the exercise of due diligence at the time of hearing or that there was an error apparent on the face of the record.

13. Three, despite alleging that evidence (documents) were misplaced and were therefore not considered by the Court, the record shows that the Claimants' led evidence through a witness.

14. In terms of the law and rules of evidence, it was incumbent upon the Claimants to prove the documentary evidence they had filed in Court.

15. In other words, the filing of documentary evidence by itself does not satisfy the requirement to prove the documents.

16. The Court of Appeal had occasion to elaborate on the presentation of documentary evidence in *Kenneth Nyaga Mwige v Austin Kiguta & 2 Ors* (2015) eKLR wherein it stated:

Any document filed and/or marked for identification by either party passes through three stages before it is held proved or disproved. First, when the document is filed, the document, though on file, does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved, when the court applies its judicial mind to determine the relevance and veracity

of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone, but it would take into consideration all facts and evidence on record.....

Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

17. In advancing this ground, it appears that the Claimants confused the filing of documents and the need to prove the documents. If documents were missing or misplaced, the Claimants would have realised as much during the hearing.

18. Four, the non-consideration of evidence or misapprehension of facts presented by a party is not within the province of review but rather within the jurisdiction of appeal.

19. In *Abasi Belinda vs Fredrick Kangwamu and Ar* (1963) E.A 557 the Court held that:

a point which may be a good ground of appeal may not be a good ground for review, and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal."

20. Similarly, in *Bethwel Omondi Okal v Board of Trustee Telposta Pension & 2 Ors* (2018) eKLR, the Court rendered itself thus:

Once the Court pronounced itself on the petition, any error of law or fact it may have committed is a ground the applicant can only pursue on appeal but not through a review. This is because the Court cannot sit on its own judgment; it cannot criticize its own decision and cannot determine whether or not its decision is at any rate *ultra vires* the Constitution or constitutional principles. To that extent, the Court is *functus officio*.

21. While rejecting the claims for extension of the period of service, National Social Security Fund and National Hospital Insurance Fund deductions, overtime, leave days, uniform and protective clothing claim, promotion adjustments, medical refunds, long service award and superannuation fund, the Court expressly found that the Claimants were not covered by the Pensions Act; the Claimants had not disclosed the months in respect of which the deductions for National Social Security Fund and National Hospital Insurance Fund were made and that the Funds had mechanisms for recovery of unremitted deductions; the Claimants had not provided a computation of uniform and protective clothing allowance due, despite Court directions to file the same; the Claimants had failed to prove the claims in respect of leave; the Claimants had failed to prove which Claimants had been promoted, the dates of promotion and grades promoted to; the Claimants had failed to prove they were owed salary or house allowance arrears; that the collective bargaining agreement produced in Court did not have a provision for long service awards and that there were no particulars of the individual Claimants seeking overtime and part of the claim were statute-barred.

22. In respect of medical refunds, the Court rejected the claim because it comprised special damages which were not specifically proved.

23. In sum, the Court gave considered reasons for rejecting the heads of claims which the Claimants are now seeking through the review jurisdiction, and this Court would be sitting on appeal of a judgment by a concurrent Court were it to attempt to review the findings.

24. From the foregoing, the Court finds no merit in the Motion filed in Court on 25 February 2021, and it is dismissed with costs to the Respondents.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 25TH DAY OF NOVEMBER 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

FOR CLAIMANTS CHIMEI & CO. ADVOCATES

FOR 1ST RESPONDENT OFFICE OF THE COUNTY ATTORNEY, KISUMU

FOR 2ND RESPONDENT OMONDI, ABANDE & CO. ADVOCATES

COURT ASSISTANT CHRISPO AURA