



**Mayieka & 22 others v Judicial Service Commission (Civil Appeal (Application)
187 of 2019) [2023] KECA 1201 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1201 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) 187 OF 2019
FA OCHIENG, LA ACHODE & WK KORIR, JJA
OCTOBER 6, 2023**

BETWEEN

NICHOLAS MAYIEKA 1ST APPLICANT
LUCY GICHUKI 2ND APPLICANT
CAROLINE MENIN 3RD APPLICANT
RUTH KIHURIA 4TH APPLICANT
RUTH ABIR 5TH APPLICANT
CATHERINE NG'ANG'A 6TH APPLICANT
HANNAH GITHUKU 7TH APPLICANT
AGNES NDANU 8TH APPLICANT
CAROLINE KAMAU 9TH APPLICANT
ERIC WALALA 10TH APPLICANT
PERIS WANJOHI 11TH APPLICANT
PATRICIA JOSEPH 12TH APPLICANT
RUTH YATOR 13TH APPLICANT
EVLYN MUCHOKI 14TH APPLICANT
KWAMBOKA KAINGOI 15TH APPLICANT
LILIAN MUTHONI 16TH APPLICANT
JACKIE KIBOGY 17TH APPLICANT
JAMES NDUNG'U 18TH APPLICANT
KIARA CRISPUS NABASENGE 19TH APPLICANT



ANGELA OМУYA 20TH APPLICANT
CAROLINE KITUKU 21ST APPLICANT
PETER KEYA 22ND APPLICANT
SARAH WAIGWE NYOIKE 23RD APPLICANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

(An application for review of this Court's Ruling and an Order of stay of execution delivered on 3rd November, 2022 from the judgment and decree of the Employment and Labour Relations Court of Kenya at Nakuru (M. Mbaru, J.) delivered on 17th January, 2019 in ELRC Case No. 260 of 2019)

RULING

1. The application before us is dated 9th December 2022. It is an application seeking a review of the Ruling which the court granted on 3rd November 2022.
2. The Ruling in question was one that arose from an application dated 1st October 2019, pursuant to which the applicant sought the stay of execution of the judgment that was delivered by the Employment and Labour Relations Court (ELRC) on 17th January 2019.
3. This Court held that the pending appeal was arguable, and also that the said appeal would be rendered nugatory if the execution of the judgment was not stayed. In effect, the applicant got the orders which it had asked for. However, the respondents to the substantive appeal, who are the applicants in the instant application, were now telling this Court that there had arisen new facts which call for the review of the order for stay of execution.
4. The application is supported by the affidavit sworn by Elisha Zebedee Ongoya, the learned advocate for the applicants. At paragraph 5 of the affidavit, counsel informed the court thus;

“That on 29/09/2022, the Secretary of the Judicial Service Commission had written to the Director, Human Resource Management and Development requiring her to compute the amounts due to the 1st to 21st Respondents, as ordered by the Employment and Labour Relations Court at Nakuru.”

A copy of the said letter was attached to the affidavit.

5. At paragraph 6 of the said affidavit, the deponent said;

“That on 17/10/2022 I received a letter from the Advocates for the Judicial Service Commission informing us that the Commission had resolved to comply with the judgment of the ELRC dated 17/10/2022.”

A copy of the letter was attached to the affidavit.

6. In effect, whilst the Judicial Service Commission (JSC) had asked this Court to stay the execution of the judgment, it had changed its mind, and taken steps to do the very thing which it had wanted stopped.



7. The JSC wrote to the Human Resource Management and Development Office on 29th September 2022, prompting the said office to compute the amounts payable to the petitioners.
8. The JSC wrote to the petitioners advocates on 18th October 2022, notifying them that;

“The Commission had computed the sums due to the 1st to 21st Petitioners amounting to Kshs.13,671,000.00
which shall be paid through October/November 2022 payroll.”
9. On 19th October, 2022, the petitioners’ advocates wrote back to the JSC, informing it that the petitioners had agreed with the calculations computed by the JSC. It is instructive to note that the JSC had asked the petitioners to:

“... give us a confirmation in writing on whether you agree with the computation done by the Commission so that the payments can be progressed.”
10. When this Court ordered that execution be stayed it noted as follows at paragraph 23 of the ruling dated 3rd November, 2022;

“More importantly, it is our view that the place of the “Shop Floor” in the contract between the parties must be determined before the parties are ordered to subject themselves to it, to determine the decretal amount.”
11. Unbeknown to the court, the parties had already reached consensus on the amounts payable. Secondly, whilst the court had held the view that the appeal could be rendered nugatory if stay had not been ordered, the fact that it was the JSC which made an offer for the sums payable, and also promised to progress the payment of the said amounts, if the petitioner accepted the computation; is a clear indication that the JSC would no longer be interested in seeking reimbursement of any money, from the petitioners.
12. As we see it, the scenario is one in which the JSC had made a voluntary commitment to make payment of an agreed amount; however, it then says that the Commission cannot make payment because this Court had ordered that execution be stayed. Of course, provided that the order for stay of execution is in force, the petitioners cannot execute the decree. It was for that reason that the petitioners asked the court to review and set aside the ruling which ordered that execution be stayed.
13. In the light of the application, the JSC submitted that this Court lacks jurisdiction to review its decision. The Commission further submitted that, in any event, the petitioners had failed to make a case that would warrant a review of the ruling.
14. This Court is thus called upon to determine whether or not it has jurisdiction to review its earlier ruling. Secondly, in the event that the court is clothed with jurisdiction to review its ruling, we would need to determine if the petitioners have made out a case to warrant the review sought.
15. On the one hand, the finality principle is hinged on the public interest, which requires that there should be conclusiveness to litigation. On the other hand, the justice principle is pegged on the need to do justice to the parties, and thus enhance public confidence in the judicial system.
16. The issue that the court must grapple with is whether or not it ought to re-open a matter which it had determined, if it appeared that justice would be served by a review of the determination that had already been rendered.



17. As much as possible, the court shall uphold the finality principle, so as to bring litigation to an end.
18. In the case of *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR, this Court held that it had jurisdiction to review its own decision. The court expressed itself thus at paragraph 61;

“It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal, to correct errors of law that have occasioned real injustice or failure or miscarriage of justice, thus eroding public confidence in the administration of justice. This is a jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice.”

19. We are convinced that the Court of Appeal has the requisite jurisdiction to review its decisions. We so hold because Section 3(2) of the *Appellate Jurisdiction Act* provides as follows;

“For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the Jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.”

20. Pursuant to Section 80 of the *Civil Procedure Act*;

“Any person who considers himself aggrieved –

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

21. As the High Court is clothed with jurisdiction to make orders, on an application for review, so too, the Court of Appeal has the same jurisdiction as vested upon it by Section 3(2) of the *Appellate Jurisdiction Act*.

22. This position was confirmed in *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited*, (supra) where it was held that:

“57. The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction



that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).”

23. In the case of *Taylor & Another v Lawrence & Another* [2002] 2 All ER 253, the Chief Justice, Lord Woolf held that “the Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined, in order to avoid real injustice in exceptional circumstances”. Clearly therefore, the jurisdiction to review a past decision by the court which had already made its determination, is one that should be exercised sparingly, and only in exceptional circumstances.
24. The learned Chief Justice went on to explain the reasons, in the following manner;

“A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes.”
25. In the case of *Mukuru Munge v Florence Shingi Mwawana & 2 Others*, Civil Appeal No. 191 of 2011, this Court held that it has a residual jurisdiction to reopen a decided matter in exceptional cases. This is how the Court addressed the matter;

“The residue power of the court to reopen its decisions is therefore a circumscribed power to be exercised in exceptional circumstances. That power is not intended to circumvent the principle that, save in those cases where *the Constitution* allows an appeal to the Supreme Court, decisions of this Court are otherwise final.”
26. In this case the JSC had asked this Court for an order for stay of execution. Whilst that application was still pending, it would appear that the JSC had a change of mind.
27. The JSC took steps, leading to the computation of the sums deemed payable to the applicants herein. The said computation was shared with the applicants, who were asked whether or not the same was acceptable.
28. The JSC indicated that if the applicants accepted the computed amounts, it would progress payment thereof.
29. It is common ground that the applicants expressly indicated that the sums being offered by the respondent, were acceptable.
30. Ordinarily, the acceptance ought to have been followed by actions which would bring the matter to an amicable settlement. However, the respondent then indicated that it could not effect payment because, (by that time), the court had already made an order for stay of execution.
31. When a case was still pending before the court, there is no bar to the parties holding negotiations, which were intended to find an amicable resolution to the dispute which pitted them against one another.
32. Indeed, the courts do encourage willing parties to always strive to find ways and means of resolving their disputes. And when parties find a solution, they are entitled to ask the court to record the terms of their settlement as an order of the court.
33. When parties were engaged in negotiations or any other Alternative Dispute Resolution mechanisms, it would be prudent for them to keep the court informed, so that, where appropriate, the court would put the proceedings on hold.
34. In this instance, although the parties were engaged in direct contact, in an endeavour to bring the matter to a close, they also went ahead to put forward their respective cases, to the court.



- 35. In the end, the parties appear to have unlocked the deadlock. But, on the other hand, the court ordered that there be a stay of execution. Although it was the JSC which appears to have approached the applicants with an offer, it has now turned round to indicate that it cannot give effect to the offer because there was an order for stay of execution.
- 36. We have given anxious consideration to the matter. If the order for stay was the only hurdle, blocking the finalisation of the matter, it would make sense to vacate it. However, we hold the considered view that the said order was right. It has not been shown to have been made in error.
- 37. If anything, the only error appears to be that the parties, (who were aware of their agreement), failed to bring it to the attention of the court. Had the court been notified about the negotiations or the agreement, it would not have been necessary to make a determination on the application for stay of execution.
- 38. In our considered opinion, the ruling remains properly founded upon the prevailing facts and the applicable law, as at the time when it was rendered. The finality thereof, remains valid.
- 39. Whereas we may empathize with the applicants, we find that they have failed to make out a case for a review of the ruling.
- 40. However, considering that the respondent is the one that had approached the applicants with an offer, which it has now declined to honour, we find that the respondent was underserving of the costs of the application herein.
- 41. Accordingly, each party will meet his or her own costs.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

