



**County Government of Embu & 2 others v Kamaria (Civil Appeal
104 of 2017) [2022] KECA 877 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KECA 877 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 104 OF 2017
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA
JULY 22, 2022**

BETWEEN

COUNTY GOVERNMENT OF EMBU 1ST APPELLANT

GOVERNOR OF EMBU COUNTY GOVERNMENT 2ND APPELLANT

EMBU COUNTY PUBLIC SERVICE BOARD 3RD APPELLANT

AND

JOE KAMARIA RESPONDENT

*(An appeal against the Ruling and Order of the Employment and
Labour Relations Court at Nairobi (Ndolo, J) dated 10th March 2017
in Nyeri Employment and Labour Relations Cause No. 281 of 2016)*

JUDGMENT

1. Through a Memorandum of Claim dated December 21, 2016, the respondent herein filed suit against the appellants herein in Nyeri Employment and Labour Relations (ELRC) Cause No. 281 of 2016 seeking re-instatement to his previous position in the Embu County Government as the Economic Advisor to the Governor (2nd appellant herein); immediate payment of accrued salary and allowances from November 2016 to date and timely payment of his lawful dues, privileges, benefits, financial and other emoluments; that the appellants be barred from interviewing, considering, recommending, appointing and engaging anyone to the position of economic advisor save the respondent; that the appellants be barred from interfering with the respondent's discharge of his respective office duties with full benefits and authority; and that the appellants be restrained from terminating his services pending the hearing and determination of the suit.
2. In the alternative, the respondent sought orders that the appellants be ordered to pay the terminal benefits, compensation for wrongful/unlawful termination and compensation for psychological trauma caused by the sudden and unexpected loss of his employment without any just cause at all.



3. The respondent then filed a Notice of Motion application dated December 21, 2016 seeking an injunction barring the appellants from advertising, recruiting, interviewing, considering, recommending, appointing or replacing the respondent to the position of Economic Advisor pending the hearing and determination of the suit. The respondent also sought orders restraining the appellants from interfering with the discharge of his duties with full benefits, emoluments and authority pending the hearing and determination of the suit.
4. The appellants' response to the application was that the respondent had not been terminated from his employment, but that his salary payments were stopped pending investigation and determination of his alleged absenteeism; and that the same had been communicated to him through a letter to his advocate dated December 14, 2016. That the appellants invited the respondent to show cause why disciplinary action should not be taken against him through a letter dated January 6, 2017 but the respondent was yet to respond.
5. The court subsequently issued orders dated January 18, 2017 ordering the appellants to reinstate the respondent as an employee and accord him any benefits, privileges or emoluments conferred to him on appointment; and to remit all accrued salaries due and unpaid to the respondent within 7 days. The court also issued notices to show cause and warrants of arrest against the respondents.
6. The appellants then filed a Notice of Motion application dated February 2, 2017 seeking orders reviewing, discharging and/or setting aside the orders made on January 18, 2017 and January 27, 2017; that the Memorandum of Claim dated December 21, 2016 be struck out with costs; and that the Warrants of Arrest issued on January 30, 2017 be cancelled forthwith. In the alternative, the appellants prayed for orders that the claim against the 2nd and 3rd appellants be struck out with costs.
7. The appellants averred that the basis for the application was that the claim before the court was pre-mature as the dispute should have been referred to the Public Service Commission as provided under Section 77 of the *County Governments Act*. The court therefore lacked jurisdiction to hear and determine the claim. The respondent misled the court into granting the said orders knowing that he had not been terminated, but had absconded from employment since 20th September 2016 without lawful cause for which his employer was permitted to deduct wages for each day an employee absconds, or is absent from duty without any lawful cause as per Section 19(c) of the *Employment Act*. Further, the claim did not disclose any cause of action against the 2nd and 3rd appellants as there was no privity of contract between them and the respondent.
8. In her ruling, the learned judge noted that, since the court was not sitting as an appellate court, the only issue for determination was whether the appellants had made a case for review of the orders in contest. If the trial judge made an error on account of Section 77 of the *County Governments Act*, then the error would be a misapprehension of the law, which can only be corrected on appeal and not in an application for review. The other grounds raised could only be pursued in an appeal. The judge was persuaded by the holding in *Michael Muriuki Ngubuini v East African Building Society Limited* [2015] eKLR that, if the court misapprehends the law or facts, the remedy for the aggrieved party does not lie in review but an appeal. The judge therefore dismissed the application.
9. Aggrieved by the ruling, the appellants lodged the present appeal seeking orders to set aside the ruling and substituting therefor an order allowing the notice of motion application with costs. The grounds for the appeal are that the judge erred in law in:
 - a. Misinterpreting the review jurisdiction of the Employment and Labour Relations Court and adopting a narrow interpretation of the law.



- b. Determining that the court had jurisdiction to hear the claim instituted by the respondent and by disregarding the provisions of Section 77 (2) of the [County Governments Act](#) which provides for an appeal to the Public Service Commission.
 - c. Dismissing the appellants' notice of motion application and in determining that the grounds in support of the application for review should have instead been urged in appeal.
 - d. Disregarding the binding decision of the Court of Appeal in the case of *Speaker of the National Assembly v Karume* [1990 – 1994] EA 549 which was applicable in the circumstances of the case.
 - e. Failing to determine whether the appellants were responsible for payment of the respondent's salary and whether warrants of arrest were lawfully issued in light of the admission that the respondent had not personally served the applicants with the Notice to Show Cause order.
 - f. Failing to determine whether the respondent has any cause of action in law against the appellants and whether the claim was one within the jurisdiction of the court and the provisions of the [Employment Act](#).
 - g. That the learned judge wrongly exercised her jurisdiction and erred in dismissing the application for review and striking out the Memorandum of Claim, and in refusing to set aside the warrants of arrest irregularly issued.
10. Both the appellants and the respondent have filed written submissions to address the issues raised. On the issue of the ELRC review jurisdiction, Counsel for the appellants referred to Rule 33 (1) of the Employment and Labour Relations Act, submitting that a person aggrieved by an order or decree of the court may apply for review, if there is discovery of a new and important matter of evidence which was not within the knowledge of the person at the time the order was made; on account of some mistake or error on the face of the record; or on account of the award judgment or ruling being in breach of any written law. Counsel cited the case of [JMK v MWM](#) [2015] eKLR and [Rift Valley Railways \(Kenya\) Limited v Hawkins Wagunza Musonye & another](#) [2016] eKLR for the proposition that the Industrial Court is empowered to exercise its review jurisdiction on far broader grounds than the High Court by dint of Rule 32, particularly on the ground of the judgment or ruling being in breach of any written law.
 11. Counsel contended that the application met the requirement of new and important evidence, in that the respondent had absconded from employment since 20th September 2016 and the letter dated November 15, 2016 authored by the 1st appellant's Chief of Staff was not available at the time of issuance of the ex-parte orders. Counsel also pointed out that the orders issued were contrary to the provisions of Section 77 of the [County Governments Act](#), which provides for an appeal mechanism to be exhausted before the court's jurisdiction is invoked. The respondent's complaint fell squarely under Section 77 (2) of the [County Governments Act](#) and the respondent ought to have appealed to the Public Service Commission before filing the Statement of Claim, and that the appellants raised the preliminary objection in the Notice of Motion.
 12. On the issue of whether the respondent wrongly instituted proceedings against the 1st and 2nd appellants, Counsel submitted that proceedings should only have been brought against the 3rd appellant which is a body corporate in law, and that the learned judge erred in failing to find that the Memorandum of Claim does not disclose any cause of action against the 1st and 2nd appellants. Further, there was no privity of contract between the said appellants and the respondent as they were not responsible for the payment of the respondent's salary.



13. Regarding the arrest warrants, Counsel submitted that on 30th January 2017, the case was listed for mention and Counsel on record for the appellants informed the court that he had just come on record and requested for 3 days to file a Preliminary Objection. The court however issued warrants of arrest without inquiring whether there was personal service of the Notice to Show Cause, which had not happened. Counsel submitted that the *Contempt of Court Act* was declared unconstitutional pursuant to a judgment delivered in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR. As at 2017, Section 30 of the *Contempt of Court Act* required service of a notice to show cause of not less than 30 days on the accounting officer where a state organ is found guilty of contempt of court. No such notice was served as required.
14. On the contested review jurisdiction of the court, Counsel for the respondent submitted that the grounds forming the basis for the appellants' application for review did not meet the threshold for review as set out under Section 16 of the Employment and Labour Relations Act, and Rule 33 of the *Employment and Labour Relations Court Procedure Rules*. The issues in the application are issues of law that can only be addressed on appeal. The allegation that there was material non-disclosure by the respondent on his employment status and the allegation of the respondent absconding employment since 20th September 2016 were not new issues as they had been raised in the appellants' replying affidavit. Counsel relied on the case of *National Bank of Kenya Limited v Ndungu Njau* for the proposition that, a review may be granted where the court considers it necessary to correct an apparent error or omission of the court; but it cannot be a ground that another judge would have taken a different view, that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion, or misconstrued a statute or any other provision of law.
15. Regarding the Employment and Labour Relations Court's jurisdiction to hear the respondent's claim, Counsel submitted that Section 77 of the *County Governments Act* provides that, any person affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission. The use of the verb "may" clearly denoted that the provision of the law is directory and not mandatory, therefore the respondent opting to file a claim at the court was still within the law.
16. Counsel cited *Republic v Council of Legal Education and another Ex-parte Sabiha Kassamia & another* [2018] eKLR for the proposition that an important test to determine whether a provision is directory or mandatory in character is to consider whether the non-compliance of the provision causes inconvenience or injustice and, if it does, the court would conclude that the provision is obligatory and must be complied with. The respondent's non-compliance and opting to file a claim in the Employment and Labour Relations Court does not cause any injustice to any of the parties.
17. Counsel further relied on *Abdikadir Suleman v County Government of Isiolo & another* [2015] eKLR for the proposition that an appeal to the Public Service Commission would only deal with the substance and merits of the case and not the procedural or legal propriety of the case; while the jurisdiction of the Employment and Labour Relations Court spreads to all issues in the employment relationship and related matters including the enforcement of fundamental rights and freedoms. Counsel also referred to *Scholastica Okwaro v Taita Taveta County Government* [2016] eKLR for the proposition that Section 77 of the *County Governments Act* does not take away or adjourn the jurisdiction of the Employment and Labour Relations Court to determine employment and labour relations disputes between County Governments and their employees.
18. On the issue of whether the learned judge disregarded the finding in *Speaker of the National Assembly v Karume*, Counsel submitted that the finding only applies to a procedure for redress where the legislature intended the same to be mandatory and not directory, while in the present case, the appeal



- to the Public Service Commission under Section 77 of the *County Governments Act* is not couched in mandatory terms. Article 260 of *the Constitution* defines Public Service as the collectivity of all individuals, other than state officers performing a function within a State Organ; therefore, an appeal to the Public Service Commission could only be lodged if filed by a collective group of public officers.
19. On whether the appeal had any merit, Counsel submitted that the appellant’s advocate had admitted in submissions that the respondent is still in employment and that the respondent was issued a notice to show cause to explain why he absented himself from work. The respondent had never absented himself from work during October and November 2016, and the alleged notice to show cause was an afterthought to legalize an already illegal process. The abrupt stoppage of the respondent’s salary without notice and or lawful cause by the appellants was in violation of Article 41(2) of *the Constitution*, Section 17 of the *Employment Act* and Article 23 (3) of the *Universal Declaration of Human Rights*. After a reshuffle of senior officer of the appellants, the respondent’s position was taken by one Mary Mercy Wanja Munene and, despite the respondent severally reporting to work to be allocated duties, he has never been allocated any tasks, and his salary was un procedurally and unlawfully stopped after October 2016.
 20. The learned judge correctly held that the court’s power to review its decisions is donated by Section 16 of the *Employment and Labour Relations Court Act* and Rule 33 of the ELRC’s Procedure Rules.
 21. Rule 33 (1) provides that:

A person who is aggrieved by a decree or an order from which an appeal

 - (a) if there is discharge or discovery of new and important matter or evidence
 - (b) on account of some mistake or error apparent of the fact if the judgment or ruling requires clarification; or for a
 - (c)
 - (d)
 22. The appellants erroneously relied on the provisions of Rule 32 (1) of the Industrial Court Procedure Rules, which were only applicable to the Industrial Court pursuant to Part III of the *Labour Institutions Act*, which has since been repealed vide Section 31 of the *Employment and Labour Relations Court Act*. Rule 33 of the ELRC Procedure Rules is similar to Order 45 Rule 1 of the Civil Procedure Rules that provides for the review jurisdiction of the High Court. Therefore, effectively, the review jurisdiction of the ELRC is the same as that of the High Court, and the authorities cited in regard to the review jurisdiction of the High Court are equally applicable to the ELRC.
 23. This Court in *National Bank of Kenya Limited vs Ndungu Njau* [1997] eKLR held that :

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
 24. The grounds forming the basis of the appellant’s application revolved around the court’s alleged misapprehension of the law or facts, including the assertion that the respondent ought to have approached the Public Service Board at first instance as provided under Section 77 of the *County*



Governments Act. We reiterate the position of the Court in the Ndungu Njau decision that the only forum fit to hear and determine issues of alleged apprehension of the law would have been in an appeal and not in an application for review.

25. The appellants' argument that the respondent having allegedly absconded from employment constituted a new and important matter of evidence, does not hold any water as this issue was canvassed through the replying affidavit of the Acting County Secretary, Josephat Ndwiga dated 16th January 2017 and filed the next day. The record of proceedings clearly shows that when the respondent's application came up for hearing, the appellants' advocate made reference to the replying affidavit and the notice to show cause letter issued to the respondent. This was not a new issue discovered later by the appellants after the orders were issued on January 18, 2017.
26. The question as to whether the warrant of arrest were properly issued also rested on the question of law as to whether personal service on the appellants was required as per Section 30 of the Contempt of Court Act. The appellant's assertion is that the approach adopted by the court ignored this procedural requirement. This is another issue of alleged misapprehension of the law and not a straightforward apparent error or omission on the part of the court. The appellants should have pursued this ground in an appeal and not in this application for review.
27. The learned judge cannot therefore be faulted for finding that the appellants' application did not meet the requirements for review. Having so found, we come to the irresistible conclusion that this appeal is lacking on merit and the same is therefore dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

