Tonui & another v Kenya Union of Post Primary Education & another; Registrar of Trade Unions (Interested Party) (Petition E045 of 2024) [2025] KEELRC 773 (KLR) (11 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 773 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION E045 OF 2024

JK GAKERI, J

MARCH 11, 2025

IN THE MATTER OF ARTICLES 10, 19, 20, 22, 23, 27, 28, 36, 41(1)(2)(C) & (5), 159(1) & (2), 162(2), 165, 230(4) & (5) AND 237 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF THE KENYA UNION OF POST PRIMARY EDUCATION TEACHERS

BETWEEN

RONALD KIPROTICH TONUI ..... 1ST PETITIONER

SAMUEL ORWA ..... 2ND PETITIONER

AND

KENYA UNION OF POST PRIMARY EDUCATION ..... 1ST RESPONDENT

SECRETARY GENERAL KENYA UNION OF POST PRIMARY EDUCATION TEACHERS ..... 2ND RESPONDENT

AND

REGISTRAR OF TRADE UNIONS ..... INTERESTED PARTY

RULING

1. Before the court for determination is the 2nd Petitioner's Notice of Motion dated December, 2024 filed under Certificate of Urgency seeking Orders that: -

1. Spent.

2. Spent.

3. Spent.

4. The Honourable court be pleased to review its Ruling dated 5th December, 2024 dismissing the Petition dated 7th October, 2024 and set aside the same and in its place, an Order setting down the matter for hearing on priority basis.

5. The costs of this application be in the cause.

2. The Notice of Motion is expressed under Section 33 of the *Employment and Labour Relations Court Act*, Section 80 of the *Civil Procedure Act*, Order 9 Rule 9-10, Order 45 rule 1 and Order 51 Rule 1-3 of the Civil Procedure Rules and is based on the grounds catalogued on its face and the Supporting Affidavit of Samuel Orwa sworn on 19th December, 2024.

3. Mr. Samuel Orwa deposes that the finding of the court that there was no evidence that the Petitioners had raised their grievances was misinformed and in disregard of clear evidence on record contained in the joint sworn affidavit of the Petitioners on 7th October, 2024 and annexed letters dated 2nd October, 2024 as RT2 and responses to the said letters raising issue with the supply of all necessary documents to help the Petitioners prepare for the hearing before the committee hearing scheduled for 11th October, 2024 marked as RT3.

4. That the annextures and the Supporting Affidavit were uncontroverted by the respondents.

5. That after the respondents failed to respond to the various issues the Petitioners moved to court raising issues on violation of *the Constitution* for the court to intervene to avoid an unjust and unprocedural process.

6. That the Petition clearly demonstrated that the Petitioners right to fair hearing was being infringed by the respondents as the findings of the Secretary General had not been availed and a letter to that effect was annexed.

7. That Order 9 Rule 10 of the Civil Procedure Rules enables an advocate to combine the prayer thereunder with other prayers, as leave has been sought.

8. That under the relevant rules discovery of the fact that the Honourable Court did not peruse annexure 2 and 3 of the Supporting Affidavit sworn jointly by the Petitioners amounted to an error apparent on the face of the record and sufficient reason to warrant the court to exercise its discretion as prayed.

9. The affiant disposes that the respondent did not conduct investigations or present findings to the National Executive Board and the Board did not sit to resolve the issue.

10. Paragraphs g – n of the Affidavit comprises a treatise on the law governing review of rulings and judgments on the ground or error on the face of the record and other grounds.

11. The affiant further deposes that the court failed to consider that the Petitioners raised the issues of there being two disciplinary committees in lieu of one as envisioned by the union constitution as per the Petition.

12. That having shown that the Petitioners had written to the union raising the issues and no response was forthcoming, it was for the court to pronounce itself on the issues after hearing and considering the evidence from both sides as to do otherwise amounted to condemning the 2nd Petitioner unheard.

13. That continuation with the internal mechanism was untenable as the Secretary General did not respond to letters marked RT3 and so was the internal appellate mechanism.

14. That since the Standing Disciplinary Committee credited in 2021 was still in place there was no room for the formation of a second one as exhibited by the minutes of September, 2024.

15. That Mr. Akelo Misori admitted that having filed a complaint with DCI on the alleged forgery and the letter dated 2nd October, 2024 was premature and the Secretary General had not concluded investigations and the Notice of Preliminary Objection should have been dismissed.

16. The affiant deposes that the respondents will no loss if the application is allowed, and if any, the same may be compensated by way of damages.

17. That if the application is not allowed, the 2nd Petitioner stood to suffer irreparable loss of non-derogable constitutional right to fair hearing and fair administrative action and it behooves the Court to promote justice.

18. When the matter came up on 11th December, 2024, under certificate of urgency, the court gave directions on service and response within 14 days, inter partes hearing on 16th January, 2025 and granted prayer No. 3 of the Notice of Motion as regards the consent to change Advocates.

19. On 16th January, 2025, the only advocate in court was holding brief for the counsel of the 2nd Petitioner, the Applicant herein.

20. The respondents were accorded 7 days to respond to the application, applicant had 14 days to file any response as necessary together with submissions and respondents 14 days thereafter and a mention slated for 20th February, 2025 to confirm compliance on which date all parties were absent and a ruling date was given.

21. Strangely, none of the parties had filed submissions by 20th February, 2025 or 24th February, 2025 when the court retired to prepare this ruling.

22. Intriguingly, other than the instant Application and annextures filed in December, 2024, the 2nd Petitioner's Advocate on record did not file any other document including an Affidavit of service to prove that service was effected in consonance with the court's directions issued on 11th December, 2024.

23. Mr. Dan Nuthu, who was holding brief for the 2nd Petitioners/Applicant's advocate could not confirm when service was effected or if an affidavit of service had been filed.

24. In the absence of an Affidavit of service on record, it is difficult for the court to satisfy itself that service was indeed effected as by law required.

25. Could the absence of service have been the reason why the respondents did not respond or file submissions or appear in court on 16th January, 2025 and/or 20th February, 2025?

26. Service is a foundational requirement in litigation as without it there cannot be any meaningful litigation.

28. Service of documents or suit is evidenced by an Affidavit of Service without which it is impossible to verify whether service was effected particularly in circumstances in which the respondent does not attend court or file a response as is the case here.

29. As matters stand, there is no evidence to show that service was effected upon the respondents.

30. The foregoing notwithstanding, the court will proceed to determine the 2nd Petitioners Notice of Motion on merits.

31. The applicant's bone of contention is that the court committed an error on the face of the record in that it did not consider the Petitioners' responses to the invitation by the respondent.

32. The applicant argues that the Petitioners responded vide letter dated 2nd October, 2024 raising their grievances with the respondents and the letters were annexed to the Joint Supporting Affidavit sworn on 7th October, 2024.

33. In their bound hard copy bundle presented to the court, under the title 'Certificate of Urgency', the non-paginated document contains the Notice of Motion and several Affidavits including the Joint Supporting Affidavit of Mr. Ronald Kiprotich Tonui and Mr. Samuel Orwa sworn on 7th October, 2024, (appearing twice in the bundle).

34. Attached to the Supporting Affidavit are unsigned and undated minutes of the 2nd respondent's National Executive Board meeting held on 27th September, 2024, the 2nd respondents Constitution and Rules, dated 20th November, 2017 (appearing twice in the bundle), letter dated 10th September, 2024 under reference 'Resignation as KUPPET Secretary General several unauthenticated sms or WhatsApp messages to or from +254 726 371 980, other messages have no number. Also attached is an illegible write up with a photograph of the 2nd respondent, two illegible letters under the letter head of the 1st respondent and a letter from the 1st Petitioner, Tel. 0710 956 898 to the Director Directorate of Criminal Investigations, P. O. Box 30036 Nairobi, dated 3rd October, 2024.

35. The hard copy dossier filed in court has no other attachment or annexure. It does not contain any letter from the 1st and 2nd Petitioner to the respondents dated 2nd October, 2024.

36. Significantly, other than the Notice of Motion dated 7th October, 2024 and the Supporting Affidavits of the Petitioners/Applicants of even date and Affidavits of one William Lengoyiap and 9 others sworn on 7th October, 2024 and those of Consolata Katua, Mr. Paul Kimeto and Paul Kipchumba Rotich of even date, the Petition and its Supporting Affidavit and annexures were not included.

37. In order to ensure that justice is done, the court perused the documents filed by the Petitioners advocate on 8th October, 2024 variously, in the course of preparing the previous ruling dated 5th December, 2024.

38. The CTS shows that 19 separate documents were filed on 8th October, 2024 including several annexures.

39. The court spent considerable time perusing through the 19 documents but could not trace any letter by the 1st and 2nd Petitioner or either of them dated 2nd October, 2024 addressed to the 2nd respondent or any other person save the one to the Director DCI by the 1st Petitioner.

40. The letters on record of even date, three in number, are signed by the 2nd respondent and are invitations to the disciplinary hearing.

41. Noteworthy, the Petitioners attached several annexures save for the letter allegedly dated 2nd October, 2024 requesting for details and raising the other issues.

42. However, there are many sms or WhatsApp messages to and from unnamed parties on various issues.

43. The court is left wondering whether the unauthenticated SMS or WhatsApp messages on record constitute the 2nd Petitioner/Applicant's response to the Secretary General's letter dated 2nd October, 2024.

44. If those are the materials being referred to, the court saw and perused them but ignored them for lack of authentication. In the court's view, an official letter impliedly demands a formal response.

45. The court is not surprised that the respondents did not respond to phone messages having communicated to the Petitioners formally.

46. The applicant has attached copies of the same documents the Petitioners had in the petition.

47. As adverted to earlier, the court could not trace a copy or copies of the letters dated 2nd October, 2024 by the applicant individually or with the 1st Petitioner jointly, addressed to the 2nd respondent.

48. Paragraph 21.3.0 (i) of the 2nd respondent's Constitution and Rules, 2017 states that complaints must be in writing so is communication by the National Executive Board to the offending member or official.

49. The pith and substance of the applicant's case is that the court's Ruling dated 5th December, 2024 has an error on the face of the record as it disregarded clear evidence contained in the Joint Supporting Affidavit of the Petitioners which had annexed their response letters dated 2nd October, 2024.

50. Although the applicant expresses his application for review under the provisions of Section 33 of the *Employment and Labour Relations Court Act*, the more relevant provision is Section 16 of the Act which provides:

> The court shall have power to review its judgments, awards, orders or decrees in accordance with the rules.

51. Under Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024, which reproduces the rules under the now repealed 2016 edition, provides –

(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

(a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.

52. The applicant relies on the Rule 33(1)(b) of the Rules.

53. In his Supporting Affidavit, the applicant cited numerous decisions such as Nyamongo & Nyamongo V Kogo [2001] EA 173, Republic V Cabinet Secretary for Interior and Co-ordination of National Government Ex Parte Abdulahi Said Salad [2019] eKLR, Omote and Another V Ogutu [2022] KEHC 16441 KLR, Geoffrey Muthinja & Robert Banda Ngomber V Samuel Muguna Henry and Others and Wachira Karani V Bildad Wachira [2016] eKLR, among others to argue that since the court did not consider RT2 and RT3, there was a mistake or error apparent on the face of the record or sufficient reason for review under Rule 339(1)(d) of the Rules.

54. As to whether the instant application was made within reasonable time, the court is satisfied that it was as it was filed less than 7 days after the impugned ruling.

55. According to the applicant there was an error on the face of the record or mistake.

56. It is trite law that for a mistake or error on the face of the record to be sustained, for purposes of review, the mistake or error must be self-evident and requires no elaborate argumentation. See for example, Paul Mwaniki V NHIF Board of Management [2020] eKLR.

57. In Muyodi V Industrial and Commercial Development Corporation & Another [2006] EA 243, the Court of Appeal held as follows:

> In Nyamongo and Nyamongo V Kogo [2001] EA this court said that an error apparent of the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be left to be determined judicially on the facts of each case.
>
> There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could possibly be no two options, a clear case of error apparent on the face of the record would be made out.
>
> An error which has to be established by a long drawn process of reasoning or on points where there are may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.
>
> Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record and even though another view was also possible.

Mere error or wrong view is certainly nor ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable on the matter before us".

58. See James Kiiru Mwangi V Gibson Kimani Mwangi & Another [2021] eKLR where the court stated –

> "From the foregoing, it is clear that an error apparent on the face of the record must be a self-evident error which need not require elaborate arguments to support it".

59. Flowing from the foregoing it is clear that the applicant is challenging the non-consideration of its evidence by the court in its Ruling delivered on 5th December, 2024.

60. Is non-consideration of a piece or pieces of evidence by the court, should that be the case, a mistake or error apparent on the face of the record for purposes of review under the provisions of Rule 74(i) of the Employment and Labour Relations Court (Procedure Rules) 2024?

61. In the court's view, it is not a ground for review on account that it requires an evaluation of the evidence adduced by the party in its entirety so as to isolate the piece or pieces of evidence not taken into account or considered by the court.

62. It requires an elaborate and detailed analysis of all pieces of evidence and in the court's view cannot be apparent on the face of the record.

63. The court's view is fortified by the decision in National Bank of Kenya Ltd V Ndung'u Njau [1997] eKLR where the court stated:

> ...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.

Misconstruing a statute or other provision of law cannot be a ground for review"

64. Similarly, in Abasi Belinda V Frederick Kagwamu and another [1963] 557, cited with approval by the Court of Appeal in Solacher V Romantic Hotels Ltd & Another [2022] KECA 771 (KLR), it was held that:

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

65. The court is bound by these sentiments.

66. Since the applicants case is that a reconsideration of the Petitioners evidence could or may yield a different outcome, it follows that that cannot, in the court's view, be a mistake or error apparent on the face of the record or sufficient reason for review of the Ruling delivered on 5th December, 2024.

67. Before concluding this ruling, it is important to state that on 10th December, 2024, when the instant application was filed, the previous counsel for the Petitioners filed a Notice of Appeal, a fact the 2nd Petitioner did not advert to notwithstanding the fact that it was filed a few hours after the application.

68. The court will proceed on the premise that a Notice of Appeal is not the appeal. Filing of the record of appeal is, as held in Yani Haryanto V E. D. & F Man (Sugar) Ltd, Civil Appeal No. 122 of 1992.

69. In HAVLB [2022] eKLR Odunga J. (as he then was) stated as follows:

> "In my view, the Haryanto case reflects the true legal position. A Notice of Appeal is not an appeal but just a formal notification of an intended appeal...
>
> Accordingly, that mere fact that a party has given a notice of intention to appeal does not amount to an appeal for purposes of review".

70. From the foregoing, it is clear that, the applicant's Notice of Motion dated 9th December, 2024 seeking a review of the court's ruling delivered on 5th December, 2024 was not served on the respondents in the first instance, is unmerited, and it is accordingly dismissed with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 11TH DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE