



Ondieki v Kisii County Assembly Service Board & 2 others (Judicial Review E027 of 2024) [2025] KEELRC 1424 (KLR) (19 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1424 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E027 OF 2024**

**JK GAKERI, J
MAY 19, 2025**

BETWEEN

SAMUEL KEROSI ONDIEKI APPLICANT

AND

KISII COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

CLERK, KISII COUNTY ASSEMBLY 2ND RESPONDENT

KISII COUNTY GOVERNMENT 3RD RESPONDENT

RULING

1. Before the court for determination is the Applicant’s Notice of Motion dated 27th March, 2025, filed under certificate of urgency seeking orders that: -
 1. Spent.
 2. The Honourable Court reviews and set aside the orders in its Ruling dated February 2025 by correcting the apparent error and or mistake on the face of the record of its Ruling delivered on 25th February, 2025.
 3. This Honourable court be pleased to review, vary and/or set aside its Ruling dated 25th February, 2025 to the extent that it granted the respondents an additional 21 days to compute the applicant’s gratuity.
 4. This court finds that the Certificate of Order Against the Government issued in favour of the Applicant in Kisumu ERLC No. 87 of 2019 constitutes sufficient proof of the amount due and there is no requirement for further computation.
 5. This court be pleased to issue an order of mandamus compelling the 2nd respondent who is the Accounting Officer of the 1st Respondent to immediately comply with the Certificate of



order Against the Government issued on 29th July, 2024 by paying the Applicant the gratuity amount in the sum of Kshs.8,529,030.00 as stated therein.

6. The costs of this application be borne by the respondents.
7. Such further or other orders be made as the court may deem just and expedient.
2. The Notice of Motion is expressed under Section 16 of the [Employment and Labour Relations Court Act](#) and Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024 and is based on the grounds set out on its face and the Supporting Affidavit of the Applicant sworn on 27th March, 2025.
3. The affiant deposes that the court's Ruling delivered on 25th February, 2025 has a mistake or error apparent on the face of the record in that it directed the respondents to compute the applicant's gratuity within 21 days yet of Certificate of Order Against the Government was issued by this court on 29th July, 2024 confirming the amount owed as gratuity and no further computation was necessary.
4. That the court's Ruling overlooked the fact that the Certificate of Order Against the Government was sufficient proof of computation of gratuity and the decision was not appealed against and allowing further computation will delay enforcement.
5. The affiant further deposes that despite reminders, the respondents have failed to do any computation and cannot benefit from their indolence to prejudice the applicant.
6. The affiant states that he computed gratuity and filed the same on 25th January, 2024 and the same was adopted by the court on 4th March, 2024 and a Certificate of Order Against the Respondents was issued on 29th July, 2024 and the ruling delivered on 25th February, 2025 contains an apparent error on the face of the record and ought to be set aside and an Order of *mandamus* issued compelling the Accounting Officer to pay gratuity.

Response

7. By a Replying Affidavit sworn by Mr. Jacob M. Onkeo on 15th April, 2025, the affiant deposes that instant application contains untruths and misrepresentation, is frivolous, vexatious and an abuse of court process.
8. The affiant states that the applicant had already been paid full gratuity together with 5% interest totalling Kshs.307,896.65 and his application is an attempt to unjustly enrich himself to the detriment of the respondents.
9. That the applicant executed a County Assembly Clearance Certificate on 26th September, 2017 and gratuity and voluntary contributions were in LAPFUND's custody.
10. According to the affiant, the court's Ruling contains no error on the face of the record and the applicant's gratuity was paid in full.
11. That the respondent's deny the issuance of a th February, 2023 and it was the respondent to compute gratuity at 31%.
12. Certificate of Order Against the Government on decree emanating from the judgment delivered on 15
13. That the applicant's computation of gratuity disregards the salaries and Remuneration Commission Circular Ref No. SRC/TS/CE OUT/3/16 dated 27th November, 2013 which sets the calculation of gratuity at 31% of the basic salary of 60% of the set monthly remuneration package and the applicant base the gratuity on the basic salary of 100%.



14. That the respondent computed gratuity on 5th October, 2017 and the same was paid by LAPFUND pursuant to a Bilateral Agreement between LAFFUND and the Kisii Assembly Service Board dated 9th July, 2014 in respect of conversion of non-pensionable members gratuity benefits into a provident fund managed by LAPFUND as the applicant was not employed on permanent and pensionable terms.
15. That the applicant was directly involved in the agreement and executed the same on behalf of the 1st respondent.
16. That LAPFUND paid the applicant's gratuity and 5% interest on 5th October, 2017.

Applicant's submissions.

17. Counsel submitted that the court's Ruling opened a window for the respondents to compute the applicant's gratuity and a review of the same was necessary.
18. Concerning an error on the face of the record, counsel relied on the decisions in *Sardar Mohamed V Chanan Singh Nand Singh* [959] EA 791, *Republic V Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abdulahi Said Salad* [2019] eKLR and *Nairobi City Council V Thabiti Enterprises Ltd* EA No. 254 of 1996, to urge that the court had unfettered discretion to review its own decree or orders.
19. Regarding the Certificate of Order Against the Government, counsel submitted that it signifies a conclusive determination by the court as regarded gratuity and was sufficient for purposes of enforcement.
20. Reliance was placed on **Republic V Permanent Secretary Ministry of Finance [2013] eKLR**, to urge that a court order against the government is binding and must be complied with promptly and in the absence of any appeal by the respondents against the certificate, they are bound by it and no further computation is necessary as the court re-opened a settled matter.
21. On the right to enforce Judgment, counsel submitted that it is a fundamental component of access to justice and promotes the principle of finality in judicial determination as held in **Republic V Kenya Revenue Authority Ex Parte MAS [2018] eKLR**.
22. Counsel submitted that delay prejudices the applicant and the principle of estoppel by Judgment (*res judicata*) prevents re-litigation of issues that have already been adjudicated upon and cannot be re-opened save in exceptional circumstance and the respondent had not demonstrated any error in the original computation of gratuity, to urge that an Order of *mandamus* is necessary to compel the 2nd respondent to comply with court orders without delay as held in **Republic V Kenya Revenue Authority ex parte Safarilink Ltd [2015] eKLR**.
23. The respondents did not file submissions.

Analysis and determination

24. By its Ruling delivered and dated 25th February, 2025, the court directed the 1st respondent to compute the applicant's gratuity as directed by the court vide its Judgment dated 15th February, 2023 and file the same within 21 days for adoption by the court failing which an Order of *mandamus* compelling the 1st respondent to pay the applicant the sum of KShs.8,529,030.00 together with costs of KShs.133,550.00 would issue.



25. This is the Ruling the applicant seeks to be reviewed to set aside the direction on computation of the applicant's gratuity on the premises that the matter was settled by the Certificate of Order Against the Government dated 29th July, 2024.
26. It is trite law that the court has jurisdiction to review its orders, judgments and rulings.
27. Section 16 of the *Employment and Labour Relations Court Act* provides that:
- The court shall have power to review its Judgments, awards, orders or decrees in accordance with the Rules.
28. Similarly, Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024 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.
 - (2) ...
 - (3) ...
 - (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
29. As to whether the application herein was made within a reasonable time, the court is satisfied that it was because that the Ruling sought to be reviewed was delivered on 25th February, 2025 and the application was filed on 27th March, 2025.
30. Having chosen not to appeal the Ruling, the applicant has the right to pursue a review as guaranteed by the law. See **Ndithya V Total Kenya Ltd Misc. App No. E 2018 of 2021 [2022] KEHC 10080 (KLR) (Odunga J)**, **Serephene Nyasani Menge V Rispah Onsase [2018] eKLR** **Maritha Wambui V Irene Wanjiru Mwangi & Another [2015] eKLR** and **Multichoice (K) Ltd V Wananchi Group (K) Ltd & 2 Others [2022] eKLR** among others.
31. The applicant's bone of contention is that the court's Ruling delivered on 25th February, 2025 has a mistake or error apparent on the face of the record, namely, the ruling was made in disregard of the Certificate of Order Against the Government dated 29th July, 2024 which confirmed the respondents liability to the applicant, hence the issue of re-opening computation of the applicants gratuity did not arise.



32. In **National Bank of Kenya Ltd V Ndungu Njau Civil Appeal No. 211 of 1996**, the Court of Appeal held:

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”

See also **Paul Mwaniki V Naitonal Hospital Insurance Fund Board of Management [2020] eKLR**.

33. As to what a mistake or error apparent on the face of the record constitutes, the most cited rendition is that of the Court of Appeal in **Muyodi V Industrial and Commercial Development Corporation & another [2006] EA 243** as follows:

In **Nyamogo & Nyamogo V Kogo (2001) EA 174** this Court said that an error apparent on 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 real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there 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 or wrong view is certainly no ground for a review although it may be for an appeal.

34. In **Edison Kanyabwera V Pastori Tumwebaze [2005] VESC 1**, the Supreme Court of Uganda stated as follows:

It is stated that in order that an error may be a ground for review, it must be one apparent on the face of the record, i.e an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error may be one of fact, but it is not limited to matters of fact, and includes also error of law”

35. It is against this background that the court will determine whether the applicant has made out a case of an error apparent on the face of the record.
36. It is common ground that the court’s Ruling delivered on 25th February, 2025 required the 1st respondent to compute the applicant’s gratuity and file the same for adoption by the court, which direction was based on the reality that the applicant had not demonstrated how the sum of Kshs.8,529,030.00 was arrived at, bearing in mind that the trial court directed the respondents to compute and pay the applicants gratuity at 31% and the applicant had not filed a copy of the payslip or made any reference to the fact that he had the Certificate of Order Against the Government now on record.
37. The applicant’s uncontroverted deposition that he filed his computation on 25th January, 2024 and the court adopted the same on 4th March, 2024 is a material circumstance coupled with the fact that he secured a Certificate of Order Against the Government dated 29th July, 2024, having extracted the decree dated 14th April, 2023 which directed the 1st respondent to compute and pay the claimant 31% gratuity based on last basic salary.



38. Instructively, the record reveals that the court adopted the applicant's computation of gratuity because the respondent had neither appealed the decision of the court nor contested the decree.
39. From the foregoing, it is clear that the train had already left the station by the time the appellant filed the application dated 12th September, 2024 and computation of gratuity had been settled by the court and all that remained was enforcement, hence the application for *mandamus* against the Kisii County Assembly Service Board and Clerk Kisii County Assembly to pay the sum of Kshs.8,529,030.00 as directed by the court.
40. Clearly, the option for the computation of the applicant's gratuity could not arise and the Order against the 1st respondent to compute the applicant's gratuity ought not to have been made.
41. In the court's view, the applicant has made a case of an error apparent on the face of the record or mistake to justify a review of the Ruling delivered by the court on 25th February, 2015.
42. Consequently, the Ruling delivered on 25th February, 2025 is reviewed to the extent that Order number 1 directing the 1st respondent to compute the applicant's gratuity as directed by the court in its Judgment delivered on 15th February, 2023 and file the same in court within 21 days for adoption is set aside in totality and Order number (b) varied as follows:
 - a. An Order of mandamus be and is hereby issued to compel the 2nd respondent to pay the ex parte applicant the sum of Kshs.8,529,030.00 being the decretal sum awarded to the ex parte applicant in Kisumu ELRC No. 87 of 2019 together with the taxed costs of Kshs.133,550.00.
 - b. Parties shall bear own costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 19TH DAY OF MAY, 2025.

DR. JACOB GAKERI

JUDGE

