



**Kenya Unio of Pre-Primary Education Teachers v County Public Service Board  
Kakamega County Government & 2 others; Salaries and Remuneration Commission  
(Interested Party) (Cause 9 of 2023) [2025] KEELRC 1414 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1414 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
CAUSE 9 OF 2023  
DN NDERITU, J  
MAY 15, 2025**

**BETWEEN**

**KENYA UNIO OF PRE-PRIMARY EDUCATION TEACHERS ..... CLAIMANT**

**AND**

**COUNTY PUBLIC SERVICE BOARD KAKAMEGA COUNTY  
GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY KAKAMEGA COUNTY GOVERNMENT .... 2<sup>ND</sup>  
RESPONDENT**

**KAKAMEGA COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**SALARIES AND REMUNERATION COMMISSION ..... INTERESTED PARTY**

**RULING**

**I. Introduction**

1. In a notice of motion dated 25th September, 2024 the claimant/applicant sought for the following orders –
  - a. That this application be certified urgent.
  - b. That this honourable court be pleased to order the Respondents to serve the Applicant with the computation for gratuity payable in pursuance of the Judgment delivered on 16<sup>th</sup> April 2024 and for purposed of verification for correctness of details therein before actual payment is done.
  - c. That costs be borne by the Respondent.



2. The application is expressed to be brought under Section 12 of the *Employment and Labour Relations Court Act*, Sections 1A & 3A of the *Civil Procedure Act*, & Article 35 of *the Constitution*. It is based on the grounds stated on the face of it and supported with the affidavit of Samuel A. Opiyo sworn on even date with several annexures attached.
3. However, before the above application was settled down for hearing, the respondents wrote to the claimant on 8th November, 2024 forwarding the records and the information sought to be supplied in the application. The letter forwarding the said records was copied to court.
4. The court finds and holds that the above application was abandoned and or overtaken by events and shall make no findings on the same.
5. The claimant was dissatisfied with the information supplied and thus abandoned that application and filed a notice of motion (the application) dated 2nd December, 2024 seeking for the following orders –
  - a. That this honourable court be pleased to order the Respondents to compute the gratuity payable in pursuance of the Judgment delivered on 16<sup>th</sup> April 2024 based on the last basic salaries for grievants immediately before termination of contracts on July 2022.
  - b. That this hourable court be pleased to order Respondents to compute gratuity for the entire period served under contract less Ksh 200 as NSSF contributed by employer during the period covered by such contracts.
  - c. That costs be borne by the Respondents.
6. The application is expressed to be brought under Section 12 of the *Employment and Labour Relations Court Act* and Sections 1A & 3A of the *Civil Procedure Act*. It is supported with the affidavit of Samuel A. Opiyo sworn on even date with several annexures thereto.
7. In response to the application, the respondents filed a replying affidavit sworn by Dr. Boniface Okoth on 10th February, 2025 with several annexures thereto.
8. In reply to the above replying affidavit, the claimant filed a supplementary affidavit sworn by Samuel A. Opiyo on 3rd March, 2025 with several annexures attached.
9. By consent, the application was canvassed by way of written submissions. Mr. Opiyo a representative of the applicant filed written submissions dated 24th January, 2025 and supplementary submissions dated 3rd March, 2025. Miss Mbaka for the respondents filed written submissions dated 21st February, 2025.
10. The interested party did not participate in the application.

## II. The Evidence

11. In the supporting affidavit, it is deposed that the grievants represented by the claimant started off as contractual employees of the County Government of Kakamega but converted to permanent and pensionable terms as from July, 2022.
12. It is deposed that when the respondents computed the gratuity payable to the grievants it applied other or earlier salary scales instead of the final and last pay scales as per the pay-slips annexed. It is further stated that the respondents applied the wrong period in the said computation (2015 – September, 2020) instead of applying the correct period of 2015 – July, 2022. It is further deposed that the respondents erroneously and unlawfully purported to deduct NSSF contributions of Kshs400/= per



month from each grievant instead of Kshs200/= that the respondent had contributed as an employee cannot contribute to payment of his/her own gratuity.

13. In the replying affidavit sworn by the County Executive Committee Member (CEC) responsible for Public Service and County Administration, it is deposed that the court is functus officio having rendered a judgment on 16th April, 2024 and what the claimant is asking the court to do is to re-open the case through this application. It is deposed that through this application the claimant is seeking for reliefs that were not the subject matter of the cause. It is proposed that the claimant ought to have applied for review or appealed the impugned judgment instead of sneaking in this camouflaged application. It is thus deposed that the court lacks jurisdiction to deal with the application for it is functus officio.
14. It is deposed that it is clear that the contestation by the claimant is the period to be covered in computation of the gratuity praying that the period be extended to July, 2022 contrary to the orders of the court in the impugned judgment. It is deposed that in the cause the claimant prayed that the said period cover up to April, 2020. It is repeated that the court is functus officio in that regard and the issue may only be canvased on review or appeal.
15. It is deposed that the judgment of 16th April, 2024 is very clear that the payment of gratuity was to be made to the grievants appearing in the amended list filed by the claimant and that the period applicable was from 2015 to September, 2020 based on the number of years served by each grievant. It is deposed that the respondent calculated the gratuity in accordance with the judgment of the court as per the document dated 8th November, 2024 a copy whereof was filed in court and annexed to the replying affidavit.
16. It is deposed that the claimant has not demonstrated how the respondent's computation as contained in the above letter goes against the judgment of the court. It is further deposed that the pay-slips attached to the supporting affidavit are for September to December, 2023 and are way outside the period that the court ordered to be applied in computation of the gratuity. As such, the said pay-slips are termed irrelevant and in any event the grievants were by then on permanent and pensionable terms and the issue is outside the subject matter of the cause as filed, presented, and prosecuted by the claimant.
17. It is deposed that the claimant has deliberately sought to mislead the court and the application is misconceived, un-procedural, unlawful, and filed in deliberate abuse of court process. The court is urged to dismiss the same with costs.

### **III. Submissions**

18. Mr. Opiyo, a representative of the claimant submitted that in the judgment of 16th April, 2024 the respondent was ordered to within 30 days tabulate and pay gratuity to the grievants at 31% based on a formula as per the affidavit of Vivien Ayuma. The gratuity payable was for the period from 2015 to September, 2020.
19. It is further submitted that gratuity was paid by the respondent for the period from November, 2020 to July, 2022. It is thus argued that gratuity for the period from 2015 to September, 2020 has not been paid. Further it is submitted that the respondents erroneously failed to apply the last salaries in calculating the said gratuity but instead applied earlier salary scales.
20. Citing Kenya Building, Timber, and Furniture Industries Employees Union V Timsales Ltd (2023) eKLR it is emphasized that the base rate in the calculation of the gratuity should be the last (current) pay.



21. For the respondents, it is submitted that prior to the hearing of the cause the parties engaged and ironed out most of the issues except for prayer 4 in the memorandum of claim which sought that –
- “ 4. That the respondents be ordered to pay the grievants herein gratuity at the rate of 31 percent of the total basic pay for the entire period between January 2015 to April 2020.”
22. It is further submitted that in the judgment of 16th April, 2024 Keli J held and concluded as follows –
- “ Conclusion
53. The court holds the claim for payment of gratuity to the ECDE teachers members of the Claimant for the period 2015 to September 2020 was proved on a balance of probabilities. The court declines to adopt the calculations in the submissions of the claimant as the grievants were engaged at different times. The claimant filed amended list of the grievants.
54. The court orders that the Respondents to within 30 days tabulate and pay the Claimant’s members/grievants their gratuity at 31% and based on the formula disclosed by Vivien Ayuma in her affidavit for the contracts of employment at varied dates from 2015 to September 2020 to wit: -
- “calculated on the basis of their pensionable emolument which was computed on the basis of sixty (60) per cent of the monthly consolidated remuneration packages of the ECDE teachers.”
55. The court considered that the respondents engaged in good faith and settled most of the issues save for one. In the circumstances the court makes no order as to costs. Each party to bear own costs.”
23. It is further submitted that a decree was issued on 2nd October, 2024 and that on 8th November, 2024 the County Government of Kakamega forwarded to the claimant a list of the tabulated gratuity payable to the grievants.
24. Counsel for the respondents identified the following issues for determination –
- Whether this Honourable court is functus officio to determine the application as filed;
  - Whether the application is meritorious; and
  - Costs of the application.
25. On the first issue it is submitted that this court is functus officio as the impugned judgment gave final substantive orders and the matter may only be revisited by way of a review or by way of an appeal to the Court of Appeal. It is further submitted that the claimant is sneaking in new issues that were neither pleaded nor interrogated during the trial. It is submitted that the final orders of the court in the judgment are clear and unambiguous and what the claimant is doing is to reopen the cause in an unlawful and un-procedural manner. It is vehemently submitted that the court ordered for payment of gratuity for the period from 2015 to July, 2020 based on a formula that was proposed by the respondent.
26. It is emphasized that the issue of payment of gratuity for the period extending to July, 2022 did not arise in the trial and the judgment did not address that issue. It is submitted that the impugned judgment



was categorical that the gratuity was payable for the period between 2015 and September, 2020 based on the number of years served by each grievant and no more.

27. On the issue of the court being functus officio counsel cited Gladys Boss Shollei V Judicial Service Commission & Another (2023) KESC 8 (KLR) and George Boke Kisiawo V Republic (2022) KEHC 1200 (KLR) amongst other decisions.
28. In regard to the second issue, it is submitted that the respondent complied with the judgment of the court as per the letter annexed to the supporting affidavit and that an order directing the respondent to use any other formula or method in calculating the gratuity payable may only be issued upon review or on appeal. It is submitted that the pay-slips attached to the application are for 2023 and the same are irrelevant and inapplicable to the express orders of the court in the judgment.
29. It is thus submitted that the application is devoid of merits and the court is urged to dismiss the same with costs.
30. In the supplementary submissions, it is argued for the claimant that the main issue raised by the claimant in the application is the salary scale that is applicable in calculation of the gratuity. It is submitted that counsel for the respondents deliberately avoided addressing the issue and instead engaged in a wild goose chase.
31. Citing Raila Odinga V IEBC & Others (2013) eKLR it is submitted that a court does not become functus officio unless and until it has perfected its judgment and rectified all errors and rendered explanations to all issues raised by the parties.
32. The court is urged to allow the application with costs.

#### **IV. Issues For Determination**

33. The court has taken time to read the evidence adduced through the affidavits and the submissions by both sides, as summarized in the foregoing parts of this ruling. In the considered view of the court, there are two issues for determination in this application – Is the court functus officio in as far in regard to the matters raised in the application? Is the application meritorious?
34. The court agrees with counsel for the respondents that the application is neither for a review of the impugned judgment nor an appeal. This is discerned from the law cited upon which the application is purportedly founded and the orders sought for as set out in the introductory part of this ruling.
35. In the judgment delivered on 16th April, 2024 Keli J ordered as follows –

##### “Conclusion

53. The court holds the claim for payment of gratuity to the ECDE teachers members of the Claimant for the period 2015 to September 2020 was proved on a balance of probabilities. The court declines to adopt the calculations in the submissions of the claimant as the grievants were engaged at different times. The claimant filed amended list of the grievants.
54. The court orders that the Respondents to within 30 days tabulate and pay the Claimant’s members/grievants their gratuity at 31% and based on the formula



disclosed by Vivien Ayuma in her affidavit for the contracts of employment at varied dates from 2015 to September 2020 to wit: -

“calculated on the basis of their pensionable emolument which was computed on the basis of sixty (60) per cent of the monthly consolidated remuneration packages of the ECDE teachers.”

55. The court considered that the respondents engaged in good faith and settled most of the issues save for one. In the circumstances the court makes no order as to costs. Each party to bear own costs.”
36. One would assume that the orders above are clear and specific. However, the claimant has come back to court by way of the application, the subject matter of this ruling, complaining that the gratuity payable ought to have been calculated based on the last salary for the grievants as at July, 2022 when the contracts were terminated and the grievants admitted to permanent and pensionable terms. Further, the claimant is urging the court to order that the gratuity payable be for the entire period served on contract up to July, 2022.
37. It is not alleged that the learned Judge made an arithmetical error apparent on the face that may be rectified without much a do under the slip rule. For sure, the application before the court is not for a review of the judgment and certainly the same is not and cannot amount to an appeal.
38. Under the Employment and Labour Relations Court (Procedure) Rules 2024, there are only two instances whereby a court may revisit its own judgment. Firstly, the court may upon an application or on its own motion rectify an obvious or arithmetical error under the slip rule. This scenario is provided for under Rule 75 in the following terms –
- The court shall, at the request of the parties or on its own motion, cause any clerical mistake, incidental error or omission to be rectified and shall notify the parties of such rectification.
39. Secondly, the court may review its own decision under Rule 74 upon an application filed by either party, where no appeal has been filed, for the reasons stated in that Rule.
40. Further, the application by the applicant is not one made in execution as provided for under the Civil Procedure Rules.
41. As correctly submitted by counsel for the respondents, the court is functus officio insofar as the matters adjudicated upon and decided in the judgment are concerned. The court may only revisit the said judgment through the two lawful ways cited above. The application by the claimant is thus filed in serious and dire misapprehension of the law and without any legal backing or foundation and the same is for dismissal in le mine.

## V. Orders

42. The court makes the following orders –
- a. The notice of motion by the claimant dated 2nd December, 2024 is hereby dismissed.
  - b. Each party to meet own costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 15TH DAY OF MAY 2025.**

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**DAVID NDERITU**  
**JUDGE**

