



**Kenya Union of Clinical Officers & 76 others v County Government
of Vihiga & another (Employment and Labour Relations Claim
32 of 2021) [2024] KEELRC 455 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 455 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CLAIM 32 OF 2021**

JW KELL, J

FEBRUARY 29, 2024

BETWEEN

KENYA UNION OF CLINICAL OFFICERS & 76 OTHERS CLAIMANT

AND

COUNTY GOVERNMENT OF VIHIGA & ANOTHER RESPONDENT

RULING

1. Before the Court for determination is the Respondent's Notice of motion Application brought under Certificate of Urgency dated 13th December, 2023. The Applicant seeks the following Orders: -
 1. Spent
 2. Spent
 3. That this Honorable Court considers it fit and in the best interest of justice to review and do reviews the portion of its judgment dated and or delivered in court on the 26th day of May 2023 in which it ordered the Respondent/ Applicant to pay costs of the suit to the Claimant / Respondents and sets that order aside and substitutes the said order with and order that each party bears own costs and or no order as to costs.
 4. That this Honorable Court considers it fit and in the best interest of justice to review and do reviews the portion of its judgment dated and or delivered in court on the 26th May 2023 in which it ordered the Respondent/ Applicant to pay interest on the arrears of the salaries owed to the Claimant/ Respondent and sets the said order aside and substitutes it with an order in terms that there shall be no order for payment of interest to the Claimants/ Respondents on the amounts of salary arrears owing and payable to the Claimants/ Respondents.



5. That the computations undertaken by the Honorable Court of the salary arrears due to the workers in this suit in which the said Honorable Court adopted the monthly salary of each worker as Kshs. 81,780.00 together with the list of 69 workers listed in that computation dated 30th November 2023 be reviewed and set aside in whole.
6. That the list of 32 officers verified by the County Attorney and whose names are filed together with this application as annexure marked JA-5 to the affidavit of Tony Godia be admitted and adopted by this Honorable Court as genuine for payment of salary arrears to be calculated based on monthly salary of Kshs. 23,780.00 as stipulated in the appointment letters.
7. Except for Georgidis Wafula Mukhwana , Evans Oduor Owino , Millicent Obindi, and Ronoh Benard who each was absorbed in UHC with 8 months arrears, and Nancy Amadi who resigned with 6 months arrears and who shall be paid for the stated months respectively the rest of the Claimants/ Respondent shall all be paid salary arrears for twenty (20) months as verified by the office of the County Attorney.
8. Any other worker claiming salary arrears as a beneficiary of this Honorable Court's orders be at liberty to submit supporting documents to the office of the County Attorney for verification and scheduling of payment within thirty days of the ruling being delivered.
9. The computations earlier filed in court by both parties namely, the two computations dated 13th June 2023 and 19th July 2023 filed by Dr. Mary Anyindah Chief Officer Health Services and the Computation by Dr. Kamau Kuria be all expunged from the record.
10. The Respondents /Applicants be allowed to settle the ascertained salary arrears of Kshs. 14,030,200.00 in equal quarterly installments (intervals of every three months) pegged on the government's financial year.
11. The payments ascertained as due and payable to a deceased worker be forwarded to the Public Trustee in Kakamega to hold on trust for benefit of the estate of the respective deceased officer.
12. There be no other or further orders on payment of costs.

DIVISION - Grounds for the Application

2. The Applicants stated the following as the grounds of the application for review of the judgment and orders of the court:-
 1. The Honorable Court delivered its judgment in this matter on the 26th day of May 2023 in which it ordered the Respondents/Applicants to pay the Claimants/Respondents salary arrears and in addition costs and interest on the salary arrears.
 2. That on an oral application by the Office of the County Attorney which the Honorable Court allowed a vetting of the tabulations earlier availed by both the Health Services and the Claimants/Respondents to establish the veracity of the sums stated as arrears owed to the affected workers, substantial anomalies in the amounts which were found to have been inflated and exaggerated have been established.(On this ground the court record of 17th October 2023 indicates that Ms. Aresa appeared for the Applicant and orally applied for the withdrawal of the document on assessment filed by the County Attorney to be expunged from the court record. The court allowed the application and expunged the document and at same time granted the Applicant 7 days to file new computation. Further, Ms. Aresa withdrew their application dated 11th October 2023 and the same was allowed with no order as to costs. On the 31st October 2023 Ms. Aresa informed court that they had filed their computation on the 24th October 2023.



The court then issued date of delivery of computation. Considering this record there was no directions for vetting but for computation of monies payable under the judgment.)

3. The anomalies established by the Office of the County Attorney were-
 - a. Whereas the computations from the department and the Claimants/Respondents advocates was arrived at on the basis of monthly salary of Kshs.81.780.00. the letters of appointment from the files availed confirmed these workers were each hired at monthly salary of Kshs.23. 780.00
 - b. All those listed in the computations sought to be expunged have no personal files and no employment letters to support payments sought as salary arrears.
 - c. There was also an inclusion in the questioned computations. names of deceased workers and even workers who had since dropped out or taken employment elsewhere.
 - d. The Office of the County Attorney only established 32 officers as eligible for payment of salary arrears for 20(twenty) months each totaling to Kshs. 13,316,800.00 calculated at monthly salary of Kshs. 23.780.00 for 28 of them and Kshs 713,400.00 for Georgiadis Wafula Mukhwana, Evans Oduor Owino, Millicent Obindi and Ronoh Bernard who each was absorbed in UHC with 8 months arrears each and Nancy Amadi who resigned with 6 months arrears all totaling to Kshs. 14,030,200.00
 - e. That during the verification process, suspected cases of fraud and collusion on the part of some officers in the County Public Service tasked with the responsibility of carrying out tabulations in which names of persons who had since left employment and or held duplicate letters of appointment had been included amongst them those whose files and or employment records are non-existent were noted which has prompted investigations which are ongoing to establish the truth before any payment can be made.
 - f. That the employment letters copies of which are filed together with this application show that the beneficiaries were employed at salary of Kshs. 23.780.00 monthly yet the court based its tabulation at Kshs.81.780.00 which is not supported in the context of the court order which ordered payment of salary arrears only.
4. The Honorable Court lacked the required jurisdiction and or capacity to undertake the tabulations contained in the ruling of 30th November .
5. That on the issue of costs and interest the Respondent/Applicants beseech the Honorable Court to take into account the peculiar nature of the case whereby the genuine vacancies budgeted for and advertised were 149 but by through fraud out which could not be investigated exhaustively to arrive at the culpable drivers and beneficiaries due to the court cases which were instituted immediately resulting in interim court orders retaining all 528 (overshooting the initial target by 379 not budgeted for) in employment.
6. That the massive salary arrears being pursued by the Claimants/Respondents arose during the period when the Respondent/Applicant was grappling to satisfy the court order to pay 379 excess staff not budgeted for within the respective Financial Year.
7. That from the Respondent/Applicants' efforts taken in good faith and its willingness to settle the salary arrears. it is not in the interest of justice and even of good industrial relations to burden the County Government further with interest and costs in this case which shall inevitably be applied in the cases of nurses and other staff arising from the same employment



which are pending before this Honorable Court in case judgment in similar terms is entered in their favour.

8. The orders sought herein particularly with regard to review of costs, interest and computation are in the best interest of justice and public good.
 9. There is sufficient reason to warrant the review which is sought.
 10. The application has been brought without unreasonable delay.
 11. The application raises new and material matters which the applicant could not have raised because was not within the applicant's knowledge at the time the judgment and the rulings were being delivered.
3. The Application is supported by the affidavit of Tony Godia, Legal Counsel in the office of the County Attorney filed herewith which produced a copy of the judgment (TG-1), Copies of the computations by the Chief Officer Health Services and those by the lawfirm of Kamau Kuria & Company Advocates(TG 2,3 and 4), record of 46 of the claimants(TG-5), copies of appointment letters for 32 of the claimants(TG-6-37), Computation judgment (TG-38).
 4. The Application was opposed by the Claimants who filed a Notice of Preliminary Objection dated 12th January 2024 on the ground that the Notice of Motion application was defective for failure to exhibit the Decree whose review the Applicant was seeking.
 5. Further in response, the claimants filed a replying affidavit of Hawkins Aling'o, the Chairman of the Vihiga branch- Chairman of the 1st Claimant union. In a nutshell, the deponent contended that in pleadings in defence and witness of defence at trial, the claim on arrears was not contested. That their claim was supported by the Chief Officer of Health and relied on her computation on the arrears (HAI). The court notes that this document was withdrawn as per the record and the court never relied on it at the computation.

Decision

The applicable law

6. The jurisdiction of this court to review Judgment and or orders is granted by section 16 of the [Employment and Labour Relations Court Act](#) which provides as follows:-
 - “ 16. Review of orders of the Court.
The court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.”
7. Rule 33 of the Employment and Labour Relations Court (procedure) rules implements section 16 (supra) in the following manner:-
 - “(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 new and important matter or evidence which after 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) an application for review of a decree or order of the court under subparagraphs (b), (c) or (d) shall be made to the Judge who passed the decree or made the order sought to be reviewed to any other judge if that judge is not attached to the court station.
 - (3) a party seeking review of a decree or order of the Court shall apply to the court by way of notice of motion supported by an affidavit and shall file a copy of the judgment or decree or ruling or order to be reviewed.
 - (4) the court shall upon hearing an application for review, deliver a ruling allowing or dismissing the application.
 - (5) where an application for review is granted, the court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
 - (6) an order made for a review of a decree or order shall not be subject to further review”

Issues for Determination.

- 8. According to the Respondent/ Applicant and as per the written submissions drawn by the County Legal Counsel June Aresa dated 7th February 2024 there are only two issues for legal analysis and determination.
 - a. The preliminary objection to the application filed by the Claimants and
 - b. Whether the Respondents’ application is merited and whether the orders sought in the motion should be granted.
- 9. According to the Claimants/ Respondents and as per their written submissions addressed same issues as the Applicant and the court proceeds to adopt the same for the determination of the notice of preliminary objection and of the merit of the application.

Whether the Claimants’ Notice of preliminary objection is sustainable.

- 10. The Claimants filed a notice of preliminary objection dated 12th January 2024 in relation to the instant Application urging the striking out of the application by way of notice of motion with costs on the ground that the Respondents/Applicants had not exhibited the Decree who review they sought.
- 11. The Respondents/ claimants submit that the application is fatally defective for failure to exhibit the decree or order whose review is sought. That this was a mandatory requirement as held in Suleiman Murunga v Nilestar Holdings Limited & another [2015]e KLR where Justice J.M Mutungi(ELCJ) upheld decision by Visram J (as he then was) in Wilson Saina v Joshua Cherutich Company Ltd[2003] e KLR while considering whether the order sought to be reviewed ought to be attached stated:- ‘ I



respectively agree. In order to succeed on an application for review under Order XLIV of the Rules (Presently Order 45) one must show that he is aggrieved by a decree or an order. This cannot be done without annexing the decree or order for the court to determine that point. I therefore, agree with my learned sister Honourable Jessie Lesit's conclusion in *Gatimu Farmers Ltd v John Njoroge Ndungu Nakuru HCC NO. 197/ 2001* that failure to annex the order or decree sought to be reviewed renders an application for review fatally defective. On this conclusion alone, I do not see the need to consider the Defendant's application further as no useful purpose will be achieved thereby."

12. The Applicant in response to the Objection submits that there is no requirement under Order 45 of the Civil Procedure Rules for an applicant to annex an order or decree sought to be reviewed. That the requirement arose from practice. That failure to annex order or decree is a procedural requirement which is curable by Article 159 (2)(d) of *the Constitution* of Kenya 2010 and hence not fatal to the application. To buttress the foregoing submission the Applicant relied on the decision of the Court of Appeal in *Peter Kirika Githaiga & another v Betty Rashid*[2016]e KLR where the Court held:- "Of course an order or decree is the formal expression of the decision of the court. An order emanates from a ruling whereas a judgment gives rise to a decree and should ordinarily be extracted. As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court's attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective."

Decision on the preliminary Objection

13. Section 16 of the *Employment and Labour Relations Court Act* which provides as follows:-

“

“ 16. Review of orders of the Court.

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

14. Rule 33 of the Employment and Labour Relations Court (procedure) rules implements section 16 (supra) in the following manner:-

“(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”

15. My reading of the law is that it is not mandatory to annex the decree in proceedings before this court. I have taken note that authority relied on by the Claimants to effect that in the application for review it was mandatory to exhibit the decree or order relate to Order 45. The authority being *Suleiman Murunga v Nilestar Holding Limited & another* [2015]e KLR. I have also taken into consideration the authority by the Applicants in the Court of Appeal in the case of *Peter Kirika Githaiga & another v Betty Rashid* [2016] e KLR to effect that in the application for review, it was not mandatory to exhibit the decree or order sought to be reviewed.
16. I uphold the Court of Appeal decision in *Peter Kirika Githaiga & another v Betty Rashid* [2016] Eklr(Supra) to apply in the objection. The Court has its own procedural rules(Employment and



Labour Relations Court (procedure) rules)and the same does not require an applicant to exhibit the Decree or order sought to be reviewed. Rule 33 provides that a party may apply for review of judgment or ruling.

17. In the upshot the Preliminary Objection dated 12th January 2024 is held to be without merit and is dismissed with costs to the Applicant.

Issue (b) Whether the Respondent's application merited in view of the remedy sought?

Analysis of submissions

18. The Applicant submits that the court has jurisdiction to review its judgment relying on section 16 of the ELRC Act and Rule 33 of its procedural rules(supra).
19. The Applicant submits that with regard to timelines, the subject application before the Honorable Court was filed on 13th December 2023 following delivery of the ruling on the 30th November 2023 after a period of less than a month and therefore without inordinate delay and relied on the decision in Francis Origo & Another v Jacob Kumali Mungala C.A C1v1l AppealNo. 149 of 2001 [2005] :2 K.L.R 3-07 in which the Court of Appeal held:-

“In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly the applicant must make the application for review without un-reasonable delay.”
20. The Respondents/ Applicants contend that its application for review is on the main ground that the Honorable Court took up the responsibility of computing salary arrears due to the Claimants as a result of which the computation based on the monthly salary of Kshs. 81,780/= used by the court as the figure for computation does not reconcile with the Respondents' figure of monthly salary of Kshs. 23,780/= which is based on the copies of appointment letters annexed to the supporting affidavit and a list of 32 employees whose records are available and can be verified. This constitutes discovery of new matters which came into the possession of the Respondent and which could not be availed as the Respondent had no access to the Judge at that particular time to bring it to her attention. It further constitutes a mistake or error on the face of the record if not a sufficient reason to warrant a review.
21. Simply put, the Respondents/ Applicants have filed evidence to prove the monthly salary each clinical officer enjoined as a party was earning which is Kshs. 23,780/= which evidence is not controverted. There is therefore no legal basis for using the figure of Kshs.81,780/= as monthly salary when there is no contrary evidence supporting that figure.
22. On the response the Applicants submit that the tabulations, by the Honorable Court has no indication that these were the tabulations used by the Honorable Court. Even if the Honorable Court used the tabulations, there would be still an error on the face of the record and a sufficient reason for review for the reasons that-
 - (a) That the Honorable Court had rejected the tabulations after the errors in which even dead workers had been included in the tabulations and were to be paid in absentia.
 - (b) The Honorable Court never awarded any allowances- to the Claimants as the same had never been sought in the Statement of Claim which fact is admitted by the Claimants from the



contents of the replying affidavit of Hawkins Alingo. Parties cannot even by consent change the judgment of the court to confer a right not legally available.

- (c) The Claimants' attempt to file other documents as they have done in an effort to induce the court to infer payment of allowances which they never pleaded in the amended Statement of Claim is untenable and should be rejected outright.
23. The Applicants in submissions draws the attention of the Honorable Court to the Claimants' statement as amended and the reliefs they sought at paragraph 22 b.:-
- “b. An order that the Respondent do pay the 2nd to 40th Claimants their salaries for the period between May, 2019 and 31st October 2019”
24. The Applicants submit that the total number of claimants were set in the pleading at 38 and not 67 and the-months of salary arrears limited to the months of May, June, July, August, September and October 2019 amounting to a total of 6 months for all. There was no other amendments introduced to seek other reliefs outside the above. Parties are bound by own pleadings. The court in its judgment sought to be reviewed awarded only salary arrears and nothing else, It is even evident from the Claimants' statement of Claim that they never pleaded allowances. Equally the parties were never heard on the issue of allowances.
25. The Applicants further submit that the rules of pleadings are that amendments introduced to pleadings overrides the pleadings earlier filed rendering them ineffective and relied on Samuel Mwehia Gitau v Elijah Kipngeno Arap Bii' & Another Civil Appeal Application 255 of 2004 where he Court relied on Dhanji Ramji v Malde Timber 919700 E.A 427 that First, as regards amended pleadings, it is clear that the court looks only to the pleadings as amended in deciding the issues. Again, where an original pleading contained an admission which was deleted in the amended pleading, that admission can no longer be relied on
26. The Applicants submit that computation of salary arrears should not be inclusive of allowances and relied on Edward Muthuri v Airfreight Forwarders Limited Civil Appeal Nb. 134 of 2009, where the Court of Appeal held that salary and allowances are two distinct and different concept whereof salary means basic salary and does not include allowances and declined to grant allowances to the Appellant. Fredrick Ngari Muchira and 99 others v Pyrethrum Board of Kenya[2013]eKLR,Where the Court held as follows:-
- “.....is the further opinion of the court that work- related expenses such as those for transport, medical care or housing that may be paid to the employee by the employer as allowances or imprests or other form of payment do not form part of the wage; such are costs that facilitate labour as a factor of production towards production and do, not constitute the consideration of price paid for labour and called wage or salary or more precisely, basic salary.....”
27. The Applicants submit that for the Honorable Court to be invited by the Claimants at this juncture to introduce an award of allowances to benefit the Claimants would amount to altering a judgment to introduce illegalities and should not be allowed. If it happened and was included in the tabulations sought to be reviewed, it is a mistake and or error on the face of record and should be a sufficient reason to review the tabulations as sought in the application,
28. The Applicants further submit that since the salary arrears sought, once tabulated, shall have to be satisfied from funds already budgeted for other activities which cannot be changed immediately, that provides the reason why the Respondent sought time, so that the process of supplementary budgets



and the approvals of the executive committee, the county assembly and controller of budget are exhausted to enable payments to be made.

29. In Conclusion the Applicants submit that the application has satisfied all the requirements and the threshold for grant of review and urge the court to grant the prayers sought in the Motion. They seek further orders that the Claimants' preliminary objection be dismissed with costs.

Claimants' submissions on the Application

30. The Claimants submit that the grounds on which the application is made are wholly lacking in merit for among others the following reasons: -
- i. The complaint that the computation is based on allegedly the wrong monthly salary Kshs. 81, 780/- instead of Kshs. 23, 780/- is based on misreading of the Claimant's letters of appointment which stated as follows: -
Your entry point shall be 23, 780 p.m.
All other allowances and benefits that accrue to this position are as per the guidelines issued by Salaries and Remuneration Commission of Kenya.
 - ii. The Applicant has fraudulently omitted allowances from its computations;
 - iii. Although it has not stated so expressly, the Applicant's claim is that there is evidence which it has allegedly discovered after Judgment which it didn't produce and now wants to do so: the alleged evidence was available at the time of the trial and, therefore, cannot be produced after Judgement:
 - iv. Ground number 6 is wholly lacking in merit because as paragraph 52 of it's Judgment shows the Court requested the parties to reach agreement failing which it made a determination;
 - v. Ground no. 7 is in attack on the exercise of discretion by the Court and that can only be done on an Appeal and not a review;
 - vi. Ground no. 8 is based on the dishonest reading of letters of appointment;
 - vii. In ground number 8, the Applicant is attacking the indemnity principle of determination of costs which is supported by South African decision referred to in paragraph 53 of the Judgment; similarly, the attack on award of interest is an attack on the exercise of discretion of the Court which cannot be taken up on a review.
31. The claimants further submit that it is undisputed that: -
- a. In May 2019, the Applicant entered into contracts of employment with the Claimants who accepted letters of appointment; each letter of appointment, which was accepted, gave the entry point salary of each Claimant and stated that the same went together with allowances determined by the Salaries and Remuneration Commission; please see, inter alia, pages 11, 17 and 21 of the bundle of documents dated 8th December, 2019. Going with the amended Memorandum of Claim;
 - b. On 30th October, 2019, the Applicant purported to terminate those contracts of Employment; please see, inter alia pages 5, 14, 15, 24 and 32 of the same bundle.
 - c. On 11th November 2019, the Claimants filed this suit and sought, among other reliefs, a declaration that the purported termination of the contract is null and void;



- d. On 8th December, 2019, the Claimants filed an amended Memorandum of Claim;
 - e. On 11th December, 2019 this Court gave directions that the parties file their pleadings and responses to the Amended Memorandum of Claim;
 - f. Pursuant to the directions, the Applicant filed two defences; the first one which is dated 20th September, 2020, denied the Claimant's claim whilst the second one, which was filed on 19th September, 2022, admitted the Claimant's claim in its entirety;
 - g. On 29th September, 2022, the Claimants filed their Reply to Defence and averred that the Applicant had admitted its entire case;
 - h. At the Trial, the Court directed that it proceeds as a test case where three Claimants would give evidence and Judgments in their case would apply to all other Claimants;
 - i. The Claimants called three witnesses whilst the Applicant called one witness;
 - j. At the trial, Dr. Kuria SC represented the Claimants whilst Mr. James Mukabi represented the Applicant;
 - k. The applicant did not take up the purported new issues of the salary and the employees who allegedly had no files but who had been working and were paid by it;
 - l. On the 12th June, 2023 and 30th June 2023 respectively, the parties filed computations of salaries in arrears and the Applicant computed the salaries in arrears on the basis that the monthly salary of each employee was Kshs. 81,780/- and that the Claimants were employees who had received from its other salaries except those in arrears;
 - m. The parties failed to agree on the Quantum of the salary in arrears and the Court made a computation on 30th November, 2023;
 - n. On 13th December, 2023, the Applicant filed the application before the Court.
32. The Claimants submit that It is settled Law that an Applicant like the Respondent in this suit, who seeks to introduce evidence after the Judgment is delivered, must show that it has discovered evidence and that the same could not have been availed to court through diligence as held by the Court of Appeal in *Pancreas T. Swai v Kenya Breweries Limited* [2014] eKLR.
33. The Claimants submit that the application is barred in Law as the Applicant is seeking to plead a different case from the one it pleaded in its defence of 19th September, 2022. It is barred from doing so as stated by the Court of Appeal in *Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others* (2014) e KLR from doing so. In that case the law was stated as follows: - "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. it is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves or at any rate one of them might well feel aggrieved; for a decision



given on claim or defence- not made or raised by or against a party is equivalent to not hearing him at all and thus be denial of Justice.....”

34. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “any other business” in the sense that points other than those specific may be raised without notice”.
35. The Claimants submit that the Application is an abuse of the process of the court as its object is to delay the payment of arrears. In its ruling of 30th November, 2023, this court held that some claimants have not received their salary for up to 20 months – over 1 year and 8 months working with no salary.
36. On whether the Applicants/ Respondents has met the requirements for granting of orders for review of the ruling delivered herein on 30th November, 2023 , the Claimants submit as follows:-
37. As stated above, Rule 33 of the ELRC Procedure Rules, 2016, which is to be read together with order 45 Rule 1 of the CPR set out the conditions required to be met by an Applicant for the review of a decision and that the Applicant has has not brought the application under any of these grounds under Rule 33 Court’s Procedural Rules and Order 45 of the Civil Procedure Rules to wit:- Discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made;
 - i. On account of some mistake or error apparent on the face of the record; or
 - ii. For any other sufficient reason.
38. In Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboyo [2019] e KLR, the High Court called out the principles pertaining to review applications and inter alia , held that an error which is not self – evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of the record justifying exercise of power under section 80; moreover, mere discovery of new or important matter or evidence is not sufficient ground for review; the party seeking review has also to show that such matter or evidence was not within his knowledge and even after the exercise of due diligence, the same could not produced before the court/tribunal earlier; further, a mistake or error apparent on the face pf the record means a mistake or an error, which is prima facie visible and does not require any detailed examination.
39. As the Replying Affidavit shows, the persons who are conversant with the issues of salaries and arrears are officers of the Applicant like Mr. Caxstone Musiega who testified and produced the Applicant’s records and the Chief Officer, Health DR. Mary Anyienda and not Mr. Tony Godia who is a legal officer. Correspondence shows that Mr. Godia gets instructions from the custodians of documents. In his supporting affidavit, he is purporting to contradict the custodians of the documents. His position is pathetic. The alleged new evidence was available from those who have talked to Mr. Godia even at the time of the trial. It is difficult to see how Mr. Godia can criticize Mr. James Mukabi’s prosecution of the defence by purporting to claim that there were documents that were not available to the latter and also to Dr. Mary Anyienda.
40. In Rose Kaiza v Angelo Mpanguiza [2009] eklr, the Court of Appeal held that before a review is allowed on the ground of discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence. It is not open to the court to admit evidence on the ground of sufficient cause. This applies to the Affidavit of Mr. Tony Godia.



41. In *E. T. v Attorney General and another* [2012] eKLR, the High Court held that the court must always be vigilant to guard against litigants evading the doctrine of Res Judicata by introducing new cause of action so as to seek the same remedy before the court; the test is whether the Plaintiff in the second suit is trying to bring before the court in another way and In a form of a new cause of action which has been resolved by a court of competent jurisdiction. It further held that parties cannot evade the doctrine of res judicata by merely adding other parties or cause of action in a subsequent suit; the Applicant is seeking to amend, through the back door, the case it plead on 19th September, 2022, which is not allowed by the Law.
42. In awarding costs and interests to a party and interest on a sum awarded, the court exercises a discretion and it is only an Appellate Court which can interfere with that discretion applying principles which were stated in *United India Co. Ltd and Kenindia General Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1982 – 1988] LKAR 639 that the review jurisdiction cannot be used to challenge the exercise of discretion.
43. The Application dated 13th December, 2023, manifests that Applicant’s wish not to adhere with the National Value of adherence to the Rule of Law set out in Article 10 of *the Constitution* which has been interpreted by Lady Justice Mary Kasango in *Methodist Church in Kenya Trustees Registered v Attorney General & 6 others* [2010] eKLR and by the US Supreme Court in *Madbury v Madison*. It was stated as follows in the latter: -
- “The very essence of civil liberty consists in the right of every individual to claim protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. The government has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right.
- In the former, the law was stated as follows: -
- The state organs such as the Respondents are required by that Article to observe the National Values and principles set in that Article. One such principle relevant to our case is the principle that this Country shall be governed by the Rule of law. Thomas Paine wrote in his pamphlet, “Common Sense” that in America, the Law is King In free Countries the law ought to be King and there ought to be no other”. *The constitution* of Kenya does provide by setting out the National Values and Principles that the Law in this Country will be the King. That being so, there is no other king above the Law.
44. The Claimants submit that the Applicant has wrongly set itself up to the new King who is not bound by the laws of the country.
45. The Claimants/Respondents further submit that *Nabro Properties Limited v Sky Structures Limited* [2002] e KLR, the Court of Appeal held that a person shall not take advantage of their own wrong to gain the favourable interpretation of the law.
46. On the Cost of the Application, the Claimants submit that costs of the suit are awarded at the discretion of the court or Judge and whilst the court has an Absolute and unfettered discretion to award or not award them, that discretion must be exercised judicially. In *Jasbir Singh Rai and 3 others vs Tarlochan Singh Rai and 4 others* (2014) eKLR, the Supreme court further held that the awarding of costs is not to penalize the losing party but is a means for the successful litigant to be recouped for the expense to which he has been put in fighting an action.
47. The Claimants further submit that other principles to be considered in the awarding of costs are as stated in *Republic v Communication Authority of Kenya and another ex – parte Legal Service Advice Centre aka Kituo cha Sheria* [2015] eKLR in which it was held as follows: -“In determining the issue



of costs, the court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See Hussein Janmohamed & sons v Twentsche Overseas Trading Co. Ltd. [1967] EA 287 and Mulla (12th Edn) P. 150.”

48. That the Claimants submit that they are entitled to the costs of defending this said application.

Decision on the Application.

49. In my decision I rely on the Procedural rules of the court of 2013. Rule 33 of the Employment and Labour Relations Court (procedure) rules implements section 16 (supra) in the following manner:-

- “(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 new and important matter or evidence which after 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) an application for review of a decree or order of the court under subparagraphs (b), (c) or (d) shall be made to the Judge who passed the decree or made the order sought to be reviewed to any other judge if that judge is not attached to the court station.
- (3) a party seeking review of a decree or order of the Court shall apply to the court by way of notice of motion supported by an affidavit and shall file a copy of the judgment or decree or ruling or order to be reviewed.
- (4) the court shall upon hearing an application for review, deliver a ruling allowing or dismissing the application.
- (5) where an application for review is granted, the court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
- (6) an order made for a review of a decree or order shall not be subject to further review”

50. The Respondent contends that its application for review is on the main ground that the Honorable Court took up the responsibility of computing salary arrears due to the Claimants as a result of which the computation based on the monthly salary of Kshs. 81,780/= used by the court as the figure for computation does not reconcile with the Respondents' figure of monthly salary of Kshs. 23,780/= which is based on the copies of appointment letters annexed to the supporting affidavit and a list of 32



employees whose records are available and can be verified. This constitutes discovery of new matters which came into the possession of the Respondent and which could not be availed as the Respondent had no access to the Judge at that particular time to bring it to her attention. It further constitutes a mistake or error on the face of the record if not a sufficient reason to warrant a review.(emphasis given)

51. The court holds that the application met the first condition under rule 33 namely:- ‘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.’”
52. On the issue of discovery of new evidence, the Applicants submit that they have produced copies of appointment letters annexed to the supporting affidavit and a list of 32 employees(TG-6- 37) whose records are available and can be verified. That this constitutes discovery of new matters which came into the possession of the Respondent and which could not be availed as the Respondent had no access to the Judge at that particular time to bring it to her attention. It further constitutes a mistake or error on the face of the record if not a sufficient reason to warrant a review.
53. The Court finds this submission on the availability of the Court misplaced. The Respondent/ Applicant filed a defence and called witnesses at trial and had opportunity to produce the said letters of appointment dated 10th May 2019. The hearing took place in 2023.
54. The court further holds that there is no error on the face of the record as the employment letters referred to salary plus allowances. The court further holds that indeed the said letters of appointment are not new evidence as they were before the court at trial having been filed in court by the Claimants through amended notice of Motion dated 8th December 2019 and affidavit of 1st Claimant of 9th December 2023 which produced the said contract. The document was received in court on the 10th December 2019 and produced at the hearing.
55. The court in the computation, relied on the evidence before the court. The claimants produced before court tabulation of the salary arrears for 69 employees filed in court on the 4th October 2022. The document was admitted without any objection by the Respondent and the witnesses were cross-examined on the same. The documents stated salary arrears tabulated at monthly salary of Kshs. 81,780/-.
56. The Respondents/ Applicants further produced before the court under the Respondent’s list of documents dated 19th September 2022, the Payroll of its health care workers for July to September 2022(D-exhibit 1) The document from the department of health and prepared by Caxton Musiega HRH and approved by Dr. Mary Anyiendah, Chief Officer of Health, indicated one month salary arrears for staff recruited in 2019 and specifically the Registered clinical officers for sum of Kshs. 81,780 per month. This was the salary relied on by the Claimants and applied by the Court.
57. I have seen the authorities relied on by the Applicant and to pick one Edward Muthuri Vs Airfreight Forwarders Limited Civil Appeal Nb. 134 of 2009 where the Court of Appeal held that salary and allowances are two distinct and different concept whereof salary means basic salary and does not include allowances and declined to grant allowances to the Appellant. I do find the evidence placed before me by both parties was that the monthly salary of the 2nd to 69th claimants was Kshs. 81,780/-. The contract of employment indicated the basic salary and stated there would be allowances. The court finds the said allowances under the employment letters were reflected in the payroll under D- exhibit 1 produced by the DW as the monthly salary of the claimants.
58. On the court having computed the payable amounts I find that I need not explain the basis of the computation beyond the decision on computation challenged by the Applicant. The parties failed to



agree leaving the matter to decision of the court which decision was delivered on the 30th November 2023.

59. On the question of Costs and Interest the court exercised its judicial discretion and explained award of costs and interests under paragraphs 53 and 54 of judgment herein of 26th May 2023. The court cannot sit on review on the issue of award of costs and interest for grounds stated. It is an issue proper for appeal by any aggrieved party.
60. In the submissions, the Applicants address an issue not raised in the application namely:-“The applicants in submissions draws the attention of the Honorable Court to the Claimants’ statement as amended and the reliefs they sought in paragraph 22 b:-

“b. An order that the Respondent do pay the 2nd to 40th Claimants their salaries for the period between May, 2019 and 31st October 2019. The total number of claimants were set in the pleading at 38 and not 67 and the months of salary arrears limited to the months of May, June, July, August, September and October 2019. that's a total of 6 months for all. There was no other amendments introduced to seek other reliefs outside the above. Parties are bound by own pleadings. The court in its judgment sought to be reviewed awarded only salary arrears and nothing else. “The court holds that submissions are not pleadings. The Respondent had no opportunity to address this submission.

61. Nevertheless, the court returns that the parties placed before it at the trial the claim by 69 claimants through the tabulation produced by the Claimants without any objection. That was the case before the court and both parties produced evidence as can be seen from cross-examination of the claimant’s witnesses. Even in this application prayer no.7 admits period of 20 months in arrears as determined by the court. Prayer No. 7 reads:- “Except for Georgidis Wafula Mukhwana , Evans Oduor Owino , Millicent Obindi, and Ronoh Benard who each was absorbed in UHC with 8 months arrears, and Nancy Amadi who resigned with 6 months arrears and who shall be paid for the stated months respectively the rest of the Claimants/ Respondent shall all be paid salary arrears for twenty (20) months as verified by the office of the County Attorney.” The issue in contestation being that the County Attorney after the hearing undertook some verification and found the claimants to be paid to be 32 contrary to what the Chief officer of health head established and produced in court. The Court finds that the alleged verification occurred after determination hence was of no use at this stage. The other issue in the review was what was the salary. The court determined the salary as per contracts before court included the allowances as evidenced from the payroll(D-exhibit 1), In the circumstances, the submissions on what was pleaded as six months is an afterthought even in the application and outside evidence and case by the parties before the court. The court was obliged to focus on substantive justice.
62. In disregarding the afterthought submissions on the prayers in the amended claim as the submissions contradict the application before me, I am guided by the fact that the submissions on the amended claim prayers was not a ground of the application for review or raised in defence or in cross-examination. The case placed before me by the parties at the trial was for the determination of salary arrears by 68 employees one of whom was indicated as deceased. I am guided by the Supreme Court decision in In The Supreme Court of Kenya At Nairobi (Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) Petition 15(E022) of 2021 -Between- Evans Muriuki Muthuuri and others v Attorney General and others where the Court observed: “[48] The short answer to the first question regarding the jurisdiction of the ELRC to entertain the dispute is that, apart from the fact that the respondents have not cross-appealed this issue, we note that this question is being introduced for the first time before



us. It was neither raised in the ELRC nor determined by the Court of Appeal. The general rule is that parties are bound by their pleadings. However, a court may make a determination on an unpleaded issue where in the course of the hearing, parties have canvassed the issue and left it to the court to determine. See *Odd Jobs v. Mubia* [1970] EA 476. (emphasis given as this was the case before the court)

63. In the upshot, the Notice of preliminary objection by the Claimants dated 12th January 2024 is dismissed.
64. The Application by way of notice of motion dated 13th December 2023 is dismissed.
65. None of the parties was successful in their quest. The Court orders each party will bear own costs in the notice or preliminary objection and in the Application.
66. It is so Ordered

DATED, SIGNED AND DELIVERED THIS 29TH FEBRUARY 2024 IN OPEN COURT AT KAKAMEGA.

J.W. Keli

JUDGE

In the presence of

C/A Lucy Macheso

For Claimants: Dr. Kamau Kuria , SC

For Respondent: Ms. Areso

