



Ojiambo v Technical University of Kenya & 2 others (Cause 844 & 943 of 2015 (Consolidated)) [2024] KEELRC 245 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 245 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 844 & 943 OF 2015 (CONSOLIDATED)
MA ONYANGO, J
FEBRUARY 14, 2024**

BETWEEN

PETER WANYAMA OJIAMBO APPLICANT

AND

THE TECHNICAL UNIVERSITY OF KENYA 1ST RESPONDENT

PROF FWO ADUOL 2ND RESPONDENT

PROF JOSEPH KIPLANG'AT 3RD RESPONDENT

RULING

1. Judgment in this suit was delivered on 17th July, 2022.
2. *Vide* an application dated 10th June 2022, the Applicant who was the Claimant in Cause No. 884 of 2015 prays for review of the judgment on grounds that there is an error on the face of the record and that the Judge do make clarifications of the judgement as indicated in the affidavit in support of the application.
3. The grounds in support of the application as set out therein which I reproduce verbatim are that:
 - a. That the Honorable court made a finding that the Claimants had not proved that they were members of UASU and consequently the claimants were not entitled to the salary amount as per the Collective Bargaining Agreement. This is erroneous as the respondents did not produce any document in court to prove the above requirement (page 35 of the judgment) and that all academic staff regardless of union membership are entitled to benefit for the terms of the CBA.
 - b. That it is an admitted fact by RWI in the statement of defence and cross examination that the claimants were appointed in the position of lecturer on contract terms from January 2007 to April 2015 and that their terms of employment were governed by the Terms of Service. That the above admissions and the letters of appointment as lecturers exhibited at pages 1 to 32 of



the bundle of documents entitled the claimants to the benefits under the Terms of Service or the CBA in respect of remuneration (page 35 of judgement)

- c. That to claim for underpayment the Claimants relied on Terms of Service for Teaching Senior Technical, Senior library and Senior Administrative Staff dated 1st July 2009 as demonstrated at pages 50 to 74 and in particular page 69 of bundle which is an annexure to clause 3.1 of the TOS which provided that:

“3.1 Appointment under these terms shall be in any one of the grades as set out in Table 1 annexed hereto to be specified in the letter of appointment.

and that the non-compliance with the above provision by the respondents went contrary to Clause 3.1 of the Terms of Service leading to gross underpayment for the claimant's services performed as lecturers between the years 2007 and 2015 (page 35 of the judgement)”.

- d. That the tabulation of benefits under the Terms of Service or CBA in respect to remuneration is based on the grade of the position in which one is appointed and the scale for that position as set out in (Tables I and 2) annexed to clauses 3.1 and 6.1 of TOS respectively and as demonstrated at pages 69 and 70 of the bundle. That the claimant's remuneration should have been based on the grade and scale of the position of lecture in which they had been appointed (page 35 of the judgement).
- e. That the Claimants remuneration as set out in their contracts was not based on clauses 3.1 and 6.1 of the TOS or pages 69 and 70 of the bundle but extrinsic documents, grades and scales that did not apply to the description of their work as lecturers hence the underpayment and contravention of Clauses 3.1 and 6.1 of the TOS (page 35 of judgement)
- f. That the Honourable court made a finding that the claimants were not entitled to claim the underpayment between the years 2007 and 2012 by virtue of the claims having been defeated by the limitation period. This is a mistaken fact that would amount to a breach of Section 90 of the *Employment Act*. (page 35 of judgement).
- g. That RWI further admitted that under the terms of contract the Claimants were entitled to House to Office Allowance and House Allowance as per clause 8.10 and 20.1 of the Terms of Service and as demonstrated at paged 57 and 67 of the bundle. However, the allowances were not paid to them until February 2014 contrary to the clear provisions of the above clauses (page 34 of judgement)
- h. That the Honourable court made a finding that the claimants were governed by the Terms of Service and more specifically having been engaged under grades XI and XII upon admission by RWI (page 36 of the judgement) and that the court did not award the terms of the above grades as contained in the Terms of Service.
- i. That the Honorable court awarded gratuity at the rate of 15% of the basic salary of the renewed terms of claimants immediate past contract (page37 of judgement). However, the correct salary figures that should have applied are the salary figures as contained in the Terms of Service which governed their employment and tabulation based on 8 years as had been prayed for by the Claimants.



- j. That in view of the foregoing there is good and sufficient cause for review of the said judgement as prayed in the application filed herewith.
 - k. That this application could not have been filed earlier because the Respondent jammed the justice process with the Notice of Appeal dated 24th July 2020 and an Application for stay of execution dated 28th September, 2020.
 - l. That there is an error apparent on the face of the record.
 - m. That in the circumstances it is desirable that the application filed herewith be heard and determined by the Honorable court as soon as possible.
4. In the affidavit in support of the Application the Applicant states that he was dissatisfied with the judgment delivered on 17th July 2020 and he instructed his advocates to lodge a review application. That however when his advocate went to file the same he found that the Respondent had lodged a Notice of Appeal dated 24th July 2020. That the Respondent had also filed an application for stay of execution.
 5. That on 21st February 2021 the Court of Appeal directed the parties to file a consent and the same was signed on 12th February 2021 and listed for mention on 15th March 2021.
 6. It is the Applicant's case that there is an error apparent on the face of the record as the Claimants were not awarded underpayments of salary for their services as lecturers as prayed in their claims. That the Claimants were also not awarded house to office allowance, house allowance, gratuity, certificate of service and interest on unlawfully withheld salary from September, 2014 to the date of filing suit as prayed. It is further the Applicant's case that they were not awarded terms of Grades XI and XII as Technologists or Senior Technologists as admitted by RW1. That there is an error on the face of the record as the Claimants were not awarded all their prayers in their claims which they are entitled to all the orders sought in their claims that were not granted by the court in its judgment.
 7. The 1st Respondent filed a replying affidavit sworn on 19th October, 2022 by Ruth Kirwa, its Chief Legal Officer who deposes that the application is misconceived, incompetent and an abuse of the court process and ought to be dismissed with costs. It is her averment that after passing judgment a court becomes *functus officio* and cannot revisit its judgement on merits or purport to exercise judicial power over the same matter.
 8. It is further the averment of Ms. Ruth Kirwa that the application does not meet the threshold under Rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules](#) as the Applicant has not introduced new and important matters of evidence which were not within his knowledge or could not be produced at the time when the decree was passed and that the application has been made after unreasonable delay since the judgment was delivered on 17th July 2020.
 9. That the Applicant's explanation for the delay is farfetched and unsatisfactory. That the Respondents should not be subjected to endless injustice and suffering or wasteful litigation on account of negligence of the Applicant. That litigation must come to an end.
 10. That at the Appeal the Applicant elected not to cross appeal and voluntarily recorded a consent without proposing the issues raised in the instant application for consideration by the Court of Appeal. That the application herein is thus an afterthought and lacking in substance.
 11. That the Applicant prayed for all the items now sought in the application and there was no error in the court not awarding all reliefs that the claimants prayed for. That the said issues were canvassed during trial and the court made an informed decision not to grant the prayers due to lack of evidence.



12. That the judgment does not require clarification as it was unambiguous and succinct and that some of the grounds raised in the application are not grounds for review.
13. It is proposed in the affidavit that the application be dismissed with costs.
14. The Application was disposed of by way of written submissions. Both parties filed and exchanged written submissions.
15. I have considered the application, the grounds and affidavit in support thereof and the affidavit in opposition thereto. I have further considered the rival submissions filed by the parties. The issues arising therefrom for determination are whether the Applicant is entitled to review of the judgment of this court delivered on 17th July 2020 and if he is entitled to the prayers on the face of the application.
16. Review of judgment is provided in rule 33 of the [Employment and Labour Relations Court\(Procedure\) Rules](#) which provides that:

Rule 33. Review

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 or 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.
17. Correction of errors is provided for in rule 34 as follows:



34. The Court shall, either 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.
18. As is provided in Rule 33 quoted above, a party can only apply for review of a judgment or order where no appeal has been preferred.
19. In the instant application the decision of this court was the subject of Nairobi Civil Appeal No. 310 of 2020 where parties compromised the appeal by a consent dated 12th February 2021. The suit can therefore not be a subject of a review in this court after the matter has been referred to the Court of Appeal unless there is an order of the Court of Appeal reverting the case to this court with directions on what this court is to handle. This court became *functus officio* upon the court of Appeal admitting the appeal. In the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Other* [2013] eKLR the Supreme Court defined *functus officio* thus:
- “The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”
20. Further, the Applicant is guilty of unreasonable delay. The Civil Procedure Act provides for applications for review to be filed within 6 months. Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules* does not set a time limit for filing applications for review but states that such applications should be filed within a reasonable time. Reasonable time was defined in *Mwangi S. Kaimenyi v Attorney General and another* [2004] as cited with approval in *Nzioa Sugar Company v West Kenya Sugar Limited* 2020eKLR as follows:
- “There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case: the subject matter of the case: the nature of the case: the explanation given for the delay...”
21. In this case the Applicant filed the application for review just shy of two years after the judgment was delivered. The explanation given by the Applicant for the delay being that there was an appeal filed by the Respondents works against it as that is a ground to deny the Applicant the right to file the application. I find no valid explanation for the delay.
22. It is my finding that the application is without merit. The only reason I have not made a finding that it is misconceived, incompetent and an abuse of the court process is because it was filed by the Applicant in person.
23. For the forgoing reasons I find no merit in the application and dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF FEBRUARY 2024

MAUREEN ONYANGO

JUDGE

