



**Esakwa & 13 others v Mwendwa (Sued in His Capacity as the President of Football Kenya Federation) (Cause 1370 of 2016) [2024] KEELRC 802 (KLR) (8 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 802 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1370 OF 2016**

**B ONGAYA, J**

**APRIL 8, 2024**

**BETWEEN**

**MICHAEL ESAKWA & 13 OTHERS ..... CLAIMANT**

**AND**

**NICK MWENDWA (SUED IN HIS CAPACITY AS THE PRESIDENT OF FOOTBALL KENYA FEDERATION) ..... RESPONDENT**

**RULING**

1. The applicant filed the Notice of Motion dated 20.11.2023 through Obura Mbeche & Company Advocates under Article 159 (2) (a), (b), (d), (e) of the Constitution of Kenya 2010, Section 3 of the Employment and Labour Relations Court Act, Rule 17 & 33 of the Employment and Labour Relations Court (procedure) Rules, 2016 and any other enabling provisions of the Law seeking the following orders:
  - i. That this application be certified urgent and service be dispensed with in the first instance.
  - ii. That the Honourable Court be pleased to review/vary its judgement dated 17.10.2023 to the extent that the Honourable Court did not address prayer bb of the Applicants' further amended statement of claim dated 13.10.2022.
  - iii. That this Honourable Court be pleased to pronounce itself accordingly on prayer bb of the Applicants' further amended statement of claim dated 13.10.2022.
  - iv. That the costs be provided for.
  - v. That the Court be pleased to grant any other order in the interest of justice.
2. The application was based upon the grounds set out in the application as well as the supporting affidavit of Allan Otieno – Advocate for the Applicants- filed together with the application and sworn on 20.11.2023. The applicants' case is as follows:



- a. That the applicants filed a statement of claim dated 13.07.2016 which was subsequently amended twice having been granted leave on both occasions.
  - b. That the 2<sup>nd</sup> amendment which was the Further Amended Statement of Claim dated 13.10.2022 was filed on 17.10.2022 which introduced the prayer for maximum compensation as prayer bb. The Further amended statement of claim was annexed as exhibit.
  - c. That the matter was fixed for hearing and heard ex parte owing to the absence of the Respondent and the 1<sup>st</sup> applicant herein testified on behalf of the others.
  - d. That judgement was delivered on 13<sup>th</sup> October 2023 by Hon. Justice Byram Ongaya in favour of the applicants after finding that they were unfairly terminated.
  - e. That a perusal of the judgment reveals that this Honourable Court inadvertently considered the prayers listed in the Statement of Claim dated 13.06.2016 instead of the further amended statement of claim dated 13.10.2022 and in doing so failed to address the prayer for maximum compensation which was prayer bb.
  - f. That in so doing, the said prayer remains undetermined which is an error on the face of the record and requires further clarification.
  - g. That the affidavit is sworn in support of the application herein.
3. The respondent filed Grounds of Opposition dated 10<sup>th</sup> March 2024 through MKN & Company in which it was stated;
- a. That the claimant's application has no merit and warrants dismissals.
  - b. That the application for review is untenable and incompetent as the judgement in issue has already been appealed from and a Notice of Appeal filed and served as provided in the rules.
  - c. That the application for review has no merit as the court considered the entire claim and made comprehensive judgement on all the issues and thereby there is no outstanding issue therefrom for review.
  - d. That on the question of maximum compensation, the court pronounced itself early at paragraph 24 of the judgment where it found that the claimant had not established a justifiable basis for grant of an award for general damages and further that the claimants had failed to establish the violations alleged before the plaintiff.
  - e. That the application is essentially an appeal from the court's judgement and for which the court lacks competence and jurisdiction to determine on review. The application is therefore bad in law and incapable of being granted.
  - f. That the review jurisdiction is in any event not available in circumstances such as the present application which invites the court's interrogation of many contested allegations, facts and arguments, only fit for a full trial or an appeal on merit. No grounds for review have been established in this matter and the application lacks merit.
  - g. That no grounds for review have been made out and the application has no merit.
4. The Applicants filed a response to the Grounds of Opposition dated 18.03.2024 in which they rebutted all the issues raised in opposition and reiterated that their application be allowed.



5. Parties filed their respective final submissions. The court has considered the application, supporting affidavit, grounds of opposition and all material on record and returns as follows:
- a. There is no dispute that a notice of appeal has been filed for the respondent. Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules* state that 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 judgment or ruling. The Court returns that the filing of the notice of appeal is an undisputed manifestation that an appeal has been preferred against the judgment and decree herein with the consequence that matters are to be ventilated in the Court of Appeal and review process before the Court is unavailable. As urged for the respondent, an appeal to the Court of Appeal is initiated and commenced by a notice of appeal lodged in two copies with the registrar of the superior court per rule 77 (1) of the *Court of Appeal Rules*. Thus, under order 42 of the *Civil Procedure Rules*, a stay of execution of a decree is potentially available once the applicant shows that the notice of appeal has been filed and served as prescribed. Institution of appeal by filing a memorandum of appeal, the record of appeal, the prescribed fee and security for costs under rule 84 of the *Court of Appeal Rules* would not be the initial indicator of a party preferring an appeal for purposes of an election to appeal as opposed to a potential review.
  - b. The applicant has failed to establish a known ground for review. The applicant alleges that the Court failed to consider his amended claim particularly with respect to the claim of compensation for unfair termination. If the trial Court failed to consider the entire claim, then the matter goes as a ground of appeal and not review. In any event, at paragraph 24 of the Judgment the Court found that the dispute was plainly about payment of the contractual salary arrears. While making that finding the Court had at paragraph 20 of the Judgment found thus, "...The parties had agreed to an order at hearing that the documents are deemed produced and admitted as filed..." Further at paragraph 21 thereof the Court found that the respondent had acknowledged that the salaries were owed by the letter of 13.02.2016 signed by the respondent. That letter confirmed the liability of the respondent to the claimants in salary arrears. The salary arrears were the only demand made for the claimants in the demand letter dated 02.06.2016 by Obura Mbeche & Company Advocates. The Court therefore had found that the dispute was purely about salary arrears and once awarded, nothing else existed as a valid claim in favour of the claimants. That there was constructive dismissal because of a lock-out was an empty pleading and submission. The date of lock-out had not been pleaded at all. The many correspondence on record suggested no such lock out or grievance in that regard. Save for the letter the Court found to justify the award of arrears, not even CW offered testimony to show lock-out and all other claimants were not called to testify. CW testified that the claim was for salary arrears for 11 months for August 2015 to June 2016 and last day at work being in April. He testified elections were held on 10.02.2016. Now, with such inconsistent testimonial account, how can any reasonable person trust that there was a lockout after the elections, which constituted a constructive dismissal? The Court is not sitting on appeal of its own decision, but just to show the Court's conclusion that the dispute was purely about the salary arrears and nothing more. But for the letter acknowledging the salary arrears by the respondent, CW's oral testimony would not aid the award at all.
  - c. As submitted for the respondent, once the Judgment was delivered, the Court became functus officio with respect to the merits of the case. The omissions as alleged for the petitioner would constitute grounds for appeal. A review as prayed for constitutes the Court changing



its opinion and analysis of the case on merits. Such is not the purpose for which the review process was established to cure.

d. In the circumstances, the application is liable to dismissal with costs.

In conclusion, the application for review by the notice of motion dated 20.11.2023 is hereby dismissed with costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 8<sup>TH</sup> APRIL 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

