



University Academic Staff Union & 2 others v Kenyatta University (Employment and Labour Relations Cause 160 of 2009) [2024] KEELRC 1577 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1577 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 160 OF 2009**

MA ONYANGO, J

JUNE 13, 2024

BETWEEN

**UNIVERSITY ACADEMIC STAFF UNION 1ST CLAIMANT
LUCY MUGWERE 2ND CLAIMANT
ELIZABETH ATIENO MENYA AND ANDROO OTEDO MENYA
(SUING AS ADMINISTRATORS OF THE ESTATE O FJOEL MENYA
OTEDO) 3RD CLAIMANT**

AND

KENYATTA UNIVERSITY RESPONDENT

RULING

1. This Ruling is in respect of two applications. The application dated 6th May 2021 was filed by the Respondent herein and it seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. This Honorable court be pleased to review and/or set aside its ruling delivered on 10th March 2020 and any consequential decree or order
 - iv. That the costs of this application be provided for.
2. The application is founded on the grounds set out at the foot of the application and in the supporting affidavit of the Applicant. In brief the grounds are that;
 - a. By an award made on 10th September 2009 in favour of the Claimants, the Industrial Court - as it was then - reinstated the 2nd and 3rd Claimants to their previous employment with the Respondent, awarded them their salary for the period when they were suspended without pay



and ordered that each party bear their own costs. The Court however did not compute the amounts the Claimants were entitled to.

- b. By a ruling delivered on 10th March 2020 and without being moved by the Claimants, this Honourable Court computed the 2nd Claimant's dues until 10th September 2009 at Kshs. 4,797,160.69 and the 3rd Claimant's dues until 10th September 2009 at Kshs 4,856,909.00. The Court also proceeded to award the Claimants costs which had been declined in the award of 10th September 2009 and which award had not been reviewed or set aside.
 - c. It has now come to the attention of the Respondent that the 2nd Claimant was employed as an Assistant Lecturer at Kenya Methodist University with effect from 1st May 2009. The effect is that the 2nd Claimant was awarded salary of 4 months and 10 days for a period within which she was employed by another University.
 - d. The foregoing is information the 2nd Claimant had in her possession at the time the Court was computing the sum she was entitled and information which she willfully withheld from the Court. This is information which materially alters the amounts due to the 2nd Claimant and is information which was not within the Respondent's knowledge and the Respondent could not produce prior to the ruling of 10th March 2020.
 - e. Further, the Court's decision to award the Claimants costs which were previously denied without a review application is an error apparent on the fact of the record and which error this Honorable Court has the jurisdiction to review.
 - f. The Respondent is willing and ready to comply with such orders regarding security as the Court may order.
 - g. It is in the interest of justice and fairness that this Application be heard and determined on a priority basis and the orders sought herein granted.
3. In opposition, the 2nd and 3rd Claimants filed their respective grounds of opposition both dated 8th July 2021 on grounds that;
- a. The application for review of the consequential ruling dated 10th March 2020 is misconceived and intended to delay justice
 - b. The computation of the 2nd Claimant's dues, of Kshs. 4,856,909/= with costs and interest, was for the period between the time she was suspended without pay till the 10th September 2009, the date of the initial judgment/decree; the 2nd Claimant is still entitled to her dues from the 10th September 2009 to date since the decree had granted her orders of re-instatement and re-engagement without loss of benefits, which the respondent applicant has not complied with. As such, any shortfall may still be taken into consideration in computation of the 2nd Claimant's additional benefits and no injustice shall thus be suffered by the respondent/applicant if its application is disallowed.
 - c. The Respondent/ Applicant has failed to comply with the decree dated 10th September 2009, by paying the amounts computed on 10th March 2020 or by reinstating the 2nd Claimant as per the decree dated 10th September 2009, with no justifiable cause or reason whatsoever, has acted inequitably against the clean hands doctrine of equity, and its applications for stay and for review are a continuation of that inequity, which ought not to be allowed or entertained by this Court.



- d. The orders of stay of execution sought lack merit as they are unjustified and lack merit, and owing to the respondent/applicant's inequity caused by its refusal to comply with this Court's decree.
 - e. The question of costs is discretionary and the Judge had the powers to grant it upon the proceedings that concluded with the consequential ruling dated 10th March 2020.
 - f. That on a balance, more so where the decree was made on the 10th September 2009, 11 years plus ago, and has not been satisfied to date despite no pending orders of stay of execution, with no justification whatsoever, it is more just to allow the execution of the ruling dated 10th March 2020, which is a partial computation of the 2nd Claimant's dues granted by the decree dated 10th September 2009, rather than allow the orders of stay of execution and review sought.
4. On record, there is a notice of preliminary objection filed by the 2nd Claimant's against the instant application. The grounds in that preliminary objection are:
- a. That the Court of Appeal, in Civil Appeal No.222 of 2012, in a judgment delivered on the 22nd March 2019, applied S.17 Trade Disputes Act Cap 234 (Repealed) to the Award given in this cause on the 10th September 2009, and held that this Award was final, was not to be questioned or reviewed, and was not to be restrained or removed by prohibition, injunction, certiorari or otherwise, whether at the instance of the Government or otherwise. As such, this Court lacks the jurisdiction or competence to review that award, whether directly or through the ruling/ order dated 10th March 2020, which was intended ONLY to give effect to the Award without reviewing or questioning it.
 - b. That this Court's jurisdiction is therefore limited to giving effect to the Award dated 10th September 2009 by giving any consequential orders to that effect, such as the ruling or order dated 10th March 2020, and any other or further orders or directions, and to interrogate whether or not that order or ruling gave full effect to the Award, and to remedy any default by giving any further orders or directions, and does not extend to reviewing that order.
5. The second application is dated 4th February 2022 and has been filed by 2nd Claimant. It seeks for orders that;
- i. Spent
 - ii. Spent
 - iii. The Honorable Court be pleased to review the ruling of the Honorable Lady Justice Hellen Wasilwa delivered on the 10th March 2020 by computing the 2nd Claimant's salaries from the date of judgment until she is reinstated to employment by the Respondent
 - iv. In the event the Respondent is unwilling to reinstate the 2nd Claimant, the Respondent do pay the Claimant salary from 10th September 2009 to her retirement age, that is, 75 years in accordance with the University's terms of service for academic service
 - v. Costs of this application be borne by the Respondent.
6. The Applicant has brought the application under section 3 and 16 of the *Employment and Labour Relations Court Act*, Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016, Order 9 Rule 9(a) of the Civil Procedure Rules 2010.
7. The grounds upon which the application is premised are that; the relationship between the 2nd Claimant and her advocate has irretrievably broken down and the 2nd Claimant now desires to act in



person because the 2nd Claimant has not received any monies from the portion of the award paid by the Respondent in September 2021; that in an award made by the Hon Justice Isaac Mukunya on 10th September 2009, the Respondent was directed to reinstate the 2nd Claimant to her employment from the date of her wrongful termination with no loss of benefits or security and to pay the 2nd Claimant from the date of her suspension without pay; the Respondent failed, refused and/or neglected to comply with the award made by the court on 10th September 2009; that as a result of the Respondent's refusal to reinstate the 2nd Claimant herein, Wasilwa J instructed the parties herein to file submissions on the claimants' dues to enable the court assess the same; that the claimants filed their submission but the Respondent did not file any submissions. The court delivered its ruling on 10th March 2020 and assessed the 2nd Claimant's dues from the date of termination to the date of judgment on 10th September 2009 at Kshs,4,797,190.69 plus costs of the suit and interests from the date of judgment; that the Hon. Judge did not compute the 2nd Claimant's dues from the date of judgment until the date of reinstatement notwithstanding that the Respondent is yet to reinstate the 2nd Claimant as per the court's judgment; that failure by the court to compute the 2nd Claimant's dues from the date of judgment until the date of reinstatement is an error on the face of the record that the honorable court ought to review; that the 2nd Claimant has suffered loss, poverty and hardship due to the Respondent's refusal to reinstate me and/or pay my dues in lieu; and that unless this court reviews its orders of 10th March 2020, the Applicant will suffer an injustice which this Honorable Court abhors.

8. From a perusal of the record, it would appear that no response was filed by the Respondent to the application dated 4th February 2022.
9. I have considered the applications before me and the notice of preliminary objection filed by the 2nd Claimant's against the application dated 6th May 2021.
10. To begin with, it is trite that a preliminary objection is dealt with at the earliest instance when raised. Before I determine whether the objection is merited, I am required to first determine whether what has been raised amounts to a Preliminary Objection. In the classical case of *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696*, a preliminary objection was defined to mean:

“..... a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

11. In the case of *Oraro vs Mbaja (2005) 1KLR 141*, it was held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

12. The 2nd Claimant avers that the Court of Appeal in its judgment in Civil Appeal No.222 of 2012, delivered on the 22nd March 2019 applied S.17 of the Trade Disputes Act Cap 234 (Repealed) to the Award given in this cause on the 10th September 2009 and held that this Award was final, was not to be questioned or reviewed, and was not to be restrained or removed by prohibition, injunction, certiorari or otherwise whether at the instance of the Government or otherwise.



13. For the Court to be able to ascertain whether or not this court has jurisdiction to handle the application dated 6th May 2021 as averred by the 2nd Claimant, it will have to ascertain the facts in the Court of Appeal case by a probing the said judgment of the Court of Appeal. I therefore find and hold that what has been raised by the 2nd Claimant does not amount to a Preliminary Objection.
14. Consequently, the Preliminary Objection is not merited and the same is dismissed.
15. Going back to the application dated 6th May 2021, the Respondent seeks to review the ruling of the court on the basis that the Court awarded the Claimants salary during a period when she was in employment of another employer and costs which were previously denied without a review application.
16. The second application by the 2nd Claimant also seeks to review the said ruling to have the 2nd Claimant's salaries computed from the date of judgment until she is reinstated to employment by the Respondent and in the event the Respondent is unwilling to reinstate the 2nd Claimant, the Respondent do pay the Claimant salary from 10th September 2009 to her retirement age, that is, 75 years in accordance with the University's terms of service for academic service.
17. The law on review is provided for under Rule 33 of the Employment and Labour Relations Court (Procedure) rules, 2016.
18. The Court Rules provides;
 33.
 - (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.
19. On one hand, the Respondent seeks to review the Court's ruling delivered on 10th March 2020 on the award of costs on grounds that the same was not awarded by the court in the judgment delivered in favour of the 2nd and 3rd Claimant.
20. The 2nd Claimant on her part seeks to review the said ruling to have her salaries computed from the date of judgment until she is reinstated to employment by the Respondent and that in the event the Respondent is unwilling to reinstate her, the Respondent do pay the 2nd Claimant salary from 10th September 2009 to her retirement age, that is, 75 years in accordance with the University's terms of service for academic service.



21. I have carefully perused the court's ruling delivered on 10th March 2020. The court made the following findings:

“ ...
16. The dates in question range from 5/5/2007 for Lucy Mugwere and 2nd December 2006 for Joel Otedo. The Honorable Court did not make a final computation of the figures payable hence the direction by this Court that the said amounts be computed for this Court's consideration. The Claimants did their computation but the Respondents have to done so. (sic)

17. I have considered the computation by Lucy Mugwere. She computes figures beyond 10/9/2009 when the judgement was delivered.

18. Administrators of 2nd Claimant's estate have also computed a figure beyond 2009 to 2015 when he died.

19. The judgement of the Court never awarded anything beyond the judgement date. While limiting myself to the award as at the time of judgement, I find that the Claimants are entitled to back pay as from the time of suspension to the time of the delivery of the judgement and which I find to be as follows;

2nd Claimant Lucy Mugwere

a. Period from 1/5/2006 to 30th June 2006 =156,136

b. Period from 1/7/2006 to 30th June 2007 =1,077,141.60

c). 1st July 2006 to 30th June 2008 as per CBA 2006/2008 =587,981.13

d). 1st July 2007 to 30th July 2008 Award is Industrial Court 105/2006-(LM8) =1,163,112.13

e) 1st July 2008 to September 2009 as per CBA of 2008-(LM9) =1,516,409.72

f) 1st July 2008 - September 2009 as per CBA July 2009-LM10) - 14 months =14x508,127.90/24=296,409.4

TOTAL=4,797,190.69

Less statutory deductions

20. The Respondents will pay costs of this suit plus interest at Court rates with effect from the date of the judgment on 20/9/2009.”

22. From the above ruling, it is clear that the court was cautious not to interfere with the earlier judgment delivered on 20th September 2009. Even if this court were to interfere, it would be bound by the law in force at the time of delivery of the judgment which was the Trade Disputes Act. The Act provided that the decisions of the court were not to be questioned or reviewed, or to be restrained or removed by prohibition, injunction, certiorari or otherwise whether at the instance of the Government or otherwise.

23. For these reasons the application by the 2nd Claimant would fail as it in essence seeks to review the judgment of 10th September, 2009 which was to the effect that the Claimants be reinstated to their previous positions from date of termination without loss of benefits or seniority. As observed in the



ruling of the court of 10th March, 2020, the court never awarded anything beyond the Judgment date. The recourse that was available to the Claimant if the Respondent failed to reinstate her was to file for contempt proceedings which she did not. It is now too late in the day to file the same.

24. the Respondent's prayer with regard to double payment of the 2nd Claimant's dues would also fail on the same ground that it essentially seeks to review the judgment of the court.
25. Secondly, it would be unconscionable to grant the order as the Respondent seeks to benefit from its own default. The court having directed it to reinstate the Claimants, this issue would not have arisen if it complied. The prayer is accordingly rejected.
26. With regard to the prayer of the Respondent on costs, it is true that in the judgment there was no award of costs. It is therefore my view that the award of costs in the ruling of this court of 10th March, 2020 is an error on the face of the record which this court has power to correct. The award of the court was clear that "Each party shall bear own costs in the spirit of securing and maintaining sound and good industrial relations".
27. The Respondent has submitted on some issues which were not raised in its application. The court will not make any determination in respect thereof as parties are bound by their pleadings and are not allowed to litigate by ambush.
28. In the end, I find that the application dated 6th May 2021 to be unmeritorious and dismiss the same. Th application dated 4th February 2022 is allowed only in respect of the prayer on costs. The rest of the prayers are not merited and are hereby dismiss. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 13TH DAY OF JUNE, 2024

MAUREEN ONYANGO

JUDGE

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NRB ELRC NO. 160 OF 2019 JUDGMENT

