



**Don Bosco utume Salesian Theological College v Kenya Private
Universities Workers Union (Employment and Labour Relations Cause
1347 of 2018) [2024] KEELRC 2268 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2268 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1347 OF 2018
AN MWAURE, J
SEPTEMBER 20, 2024**

**BETWEEN
DON BOSCO UTUME SALESIAN THEOLOGICAL COLLEGE CLAIMANT
AND
KENYA PRIVATE UNIVERSITIES WORKERS UNION RESPONDENT**

RULING

1. The Applicant filed a Notice of Motion dated 6th May 2024 seeking the following orders that: -
 1. spent
 2. pending the hearing and final determination of this application, there be stay of execution of the Ruling of the Honourable Court entered against the Applicant on 9/2/2024 and the subsequent orders issued by this court on 21/2/2024.
 3. this Honourable Court be pleased to review by of recalculation the amounts payable as the judgment was for 5 members only but the amounts as calculated in the ruling are for 22 members.
 4. this Honourable Court be pleased to review or vary its orders issued on 9/2/2024 to release the applicant from having to remit any deductions to the Respondent as there are no bona-fide union members presently working at the Applicant's institution.
 5. the cost of this Application be provided for.



Applicant's Case

2. The Applicant avers that this court vide its judgment and decree issued in 2019 ordered it to remit dues for 5 employees only, however, the ruling of 9/2/2024 alluded to 22 employees not the 5 whose remittance ordered by this court.
3. It's the Applicant's case that it is only fair that the amounts in the order issued on 21/12/2024 be reviewed to reflect the judgment and decree orders.
4. The Applicant avers that the events subsequent to the 2019 judgment have made the orders in the judgment and decree untenable as the said 5 employees do not exist.
5. The Applicant avers that employees are actual people with identities and not just statistics and it is essential that the Respondent provides an actual list of those employees whose remittances should be remitted going forward.
6. The Applicant avers that it is willing to comply with the court orders if the Respondent provides a list of the employees who belong to the union.

Respondent's Case

7. In opposition to the Application, the Respondent filed a preliminary objection dated 22nd May 2024 on grounds That:-
 - a. The application violates section 16 of the *Employment and Labour Relations Court Act, 2016*.
 - b. The application is in breach of Rule 33 (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

Applicant's Submissions

8. The Applicant submitted that the issue before this court is calculating the sum total due as per the judgment. The Applicant is claiming Kshs. 475,200, a figure arrived using 22 employees instead of 5 that the court ordered; this is based on all other calculations on that erroneous figure.
9. It is the Applicant's submission that the decree and order it seeks for its review flies in the face of Article 159(2) (d) of *the Constitution*. The documents are in the file and should be taken judicial notice of. The Applicant cannot rely on a procedural technicality to defeat substantive justification.
10. The Applicant's submission that the review is necessary to correct the apparent error on record.

Respondent's Submissions

11. The Respondent submitted that the application is not merited as it was filed over 5 years since the delivery of the said judgment which is out of the stipulated time frame a party should seek the court's leave before doing so.
12. It's the Respondent's submissions that its preliminary objection is merited as section 16 of the Labour Relations Court Act, 2016 makes it mandatory for any review to be done in line with the rules of the court hence the need to rely on Rule 33 (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.
13. The Respondent submitted that Rule 33 (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 makes it mandatory that a party seeking review to seek leave of the court which was not done in the current application hence the same should be dismissed.



Analysis and Determination

14. The main issue is whether Applicant's application for review of judgment is merited.
15. 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: -

“The court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.”
16. Rule 33 of the Employment and Labour Relations Court (procedure) rules implements section 16 (supra) as follows:-
 - “(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”



17. In *Pancrast Swan v Kenya Breweries Ltd* (2014) eKLR, the court observed as follows on applications for review: -

“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power.

The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of the Civil procedure rules. Thus re-assessing evidence and pointing out defects in the order of Court is not proper”

18. In *Muyodi vs Industrial and Commercial Development Corporation & Anor* (2006) 1EA 243 as quoted in *Barclays Bank of Kenya Ltd vs Abdi Abshir Warsame & Anor* (2006) eKLR, the court said the following on applications for review: -

“...an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between the mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view and is certainly no ground for a review although it may be for an appeal”

19. In *Abasi Belinda v Fredrick Kangwamu & Another* [1963] EA 557, the court made the following observations on the same subject: -

“..... a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground of appeal...”

20. In the instant application, the Applicant prays that the court review its orders of 21/2/2024 as it issued orders to pay the Respondent herein Kshs 475,200 being union dues arrears. It's the Applicant's case that this is a mistake or error apparent on the face of the record as it was a tabulation for dues of 22 employees rather than 5 employees as declared in the judgment of 29/11/2019.

21. This court in its judgment of 29/11/2019 held under page 11 that:-

“.....Based on this, it is my finding that the Respondent cannot be compelled to remit dues in respect of the 17 employees. However, the Respondent is under obligation to deduct the dues payable in respect to the remaining 5 employees at the agreed rate of 1.5% as stated in the check off form.”

22. Further, in its ruling of 9/2/2024 the court clearly noted that it allowed the deduction of 5 employees and the said judgment was neither been appealed nor disputed. Rather the Respondent/Applicant sat on its rights from 2019 until 3/10/2023 when the Claimant/Respondent filed the application therein.



23. The court is being asked by the applicant to review its ruling as there was an error in the ruling in that the court ordered the applicant to pay kshs 475,200/- to the claimant who they claim were only 5 members but the figure awarded was for 22 members. The court finds no error in that the amount awarded were the same amount contained in the application dated 3rd October 2023. The applicant did not raise any objections at that time and so the ruling of the court was in tandem with the application dated 3rd October 2023.
24. Similarly, the court holds that the preliminary objection filed by the respondent and dated 22nd May 2023 is merited as it raises a valid point of law pointing out that an application for review is not merited as there are no new mistakes that the court found or error to justify the application for review. The trite law is that if a litigant is not satisfied with a judgment or ruling of a court the prudent thing is to seek redress from the appellate court.
25. Finally, the applicant having been the employer was duty bound to produce records of its employees and to clarify in their records the employees who were members of the union and those who were not members.
26. The Court in conclusion holds that the applicant has not satisfied the threshold for grant of review orders and therefore their application vide the notice of motion dated 6th May 2024 is dismissed and costs will be paid by the applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

