



**Omanwa v National Government Constituencies Development Fund Board
(Cause 66 of 2018) [2024] KEELRC 13598 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13598 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 66 OF 2018
DN NDERITU, J
OCTOBER 24, 2024**

BETWEEN

RELFE TOM MONG'ARE OMANWA CLAIMANT

AND

**THE NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND
BOARD RESPONDENT**

RULING

I. Introduction

1. In a notice of motion dated 8th February, 2024 (the application), the claimant is seeking for the following orders –
 - i. Spent.
 - ii. That the Honourable Court be pleased to review the judgment delivered on 12th May 2022.
 - iii. That the costs of the application be provided for.
2. The application is expressed to be brought under Sections 1A, 1B, 63(e) & 80 of the *Civil Procedure Act*, Order 51 Rule (1) of the *Civil Procedure Rules*, and all other enabling provisions of the law. It is based on the grounds on the face of it.
3. The application is supported with the affidavit sworn by the claimant on even date with several annexures thereto.
4. In opposition to the application, the respondent filed grounds of opposition dated 22nd March, 2024.
5. On 28th February, 2024, when the matter came up in court for directions, the court directed that the application be canvassed by way of written submissions.



6. Counsel for the claimant filed written submissions on 6th March, 2024 and supplementary submissions dated 29th April, 2024. The respondent's counsel filed on 17th April, 2024.

II. Evidence

7. In the supporting affidavit, the claimant deposes that after the Judgement delivered on 12th May, 2020 (O. Makau J), he discovered the existence of important and material evidence, which, with all due diligence, was not available at the time of the hearing of his claim for compensation for unfair dismissal from employment.
8. It is deposed that the claimant was unfairly and unlawfully interdicted from employment for one year from 29th July, 2015 to 25th November, 2016, which amounts to unfair labour practice.
9. Vide a letter dated 25th November, 2016, the claimant deposes that he was informed that the respondent's board had resolved not to renew his contract on the grounds of alleged gross misappropriation of government funds and fraudulent activities within Mbita Constituency under his watch.
10. It is deposed that the respondent's board forwarded the allegations leveled against the claimant to a legally mandated government agency for further investigations and his culpability and the renewal of his contract were dependent upon the outcome of the said investigations.
11. It is deposed thus that the claimant's contract could not be terminated until the allegations were investigated and a decision made on the same.
12. It is deposed that the Ethics and Anti-Corruption Commission (EACC), the investigative agency, undertook investigations and the claimant was not found culpable, and hence the claimant avers that his dismissal was unfair and unlawful.
13. The claimant deposes that based on the evidence obtained and by dint of the provisions of Section 1A,1B, 63 (e) and 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*, 2010, the Court ought to review the judgment of 12th May, 2022 to avert prejudice to the claimant who will suffer loss and damage if the same is denied.
14. On the grounds of opposition, the respondent states that the alleged material evidence that was not available at the hearing has not been availed and served upon it.
15. It is stated that the alleged report from EACC, yet to be served upon the respondent, would not in any way alter the material fact that the claimant's employment contract lapsed by effluxion of time. It is stated that the court in its judgment of 12th May, 2022, dismissed the claimant's claim for unfair termination.
16. It is further stated that no grounds for review have been established as the report by EACC does not amount to new and important evidence.
17. It is asserted that the claimant vide a letter of 16th November, 2021 affirmed that EACC had indeed confirmed that no money was lost, which evidence was adduced during the hearing.
18. The respondent stresses that the purported new report is not new material evidence but merely reiterates a position within the claimant's knowledge.
19. It is stated that the claimant's contract was a fixed-term contract, and no legitimate expectation accrues to the claimant for renewal of the same. It is asserted that re-opening the case would serve no useful purpose.



20. The respondent states that the decretal sum has been paid to the claimant and the present application is frivolous and without merit and thus ripe for dismissal.

III. Submissions

20. Mr. Orina, Advocate for the claimant identified the single issue for determination in this application to be – Whether the judgment of the Honourable Court delivered on 12th May, 2022 should be reviewed.
21. It is submitted that the claimant seeks review orders based on the discovery of new and important evidence, which, after the exercise of due diligence was not within his knowledge, and could not be produced by him at the time when the judgment was passed, as envisaged under Order 45, Rule 1(b) of the *Civil Procedure Rules*.
22. It is submitted that the court has unfettered discretion in making an order allowing a review of its decision where there is sufficient reason.
23. It is submitted that a party aggrieved by a court’s judgment may apply for review where an appeal is allowed, but where none has been preferred as in the instant application.
24. Counsel cited *Dock Workers Union & 2 Others v Attorney General & another Kenya Ports Authority & 4 Others (interested party)* (2019) eKLR stating that the court before allowing a review must satisfy itself that there is discovery of new and important evidence, which was not within the knowledge of a party seeking review and which could not be produced at the time the said orders were made, even upon due diligence.
25. It is submitted that the claimant’s interdiction was grounded on allegations of misappropriation of funds which also formed the basis for non-renewal of his contract.
26. It is submitted that the court’s judgment dated 12th May, 2022 at Paragraph 58 observed that the claimant had been interdicted on 29th July, 2015 on allegations of misappropriation of funds, he had been served with a show cause letter that he responded thereto, and that although he was invited to a disciplinary hearing the hearing did not materialize. One year later, the claimant was informed that his contract had lapsed and the respondent was not considering renewal of the same.
27. It is submitted that the claimant was not accorded a fair hearing on the allegations leveled against him in violation of Article 50 of the *Constitution*.
28. It is submitted that the claimant was interdicted for over one year and was later informed that his contract had been terminated by effluxion of time. The claimant’s position is that this was in violation of Article 28 of the *Constitution* of his right to inherent dignity.
29. Counsel submits that the renewal of the claimant’s contract was forthcoming as noted in the court’s judgment in paragraph 57 that the claimant’s contract had commenced on 17th September, 2013 and lapsed on 17th September, 2016, and the respondent’s circular of 27th September, 2016 had extended the same and communicated its consideration of the claimant’s request for extension.
30. It is submitted that in allowing the claimant to continue with his duties from 17th September, 2016 to 27th September, 2016, the respondent created a legitimate expectation for renewal of the contract. Counsel cited *Cleopatra Kamau Mugenyi v Aidsplan* (2019) eKLR in support of the claim for legitimate expectation where an employer’s conduct creates an impression that an employee’s contract could be renewed.



31. It is submitted that the renewal of the claimant's contract was rejected on the basis of the allegations of misappropriation of funds and not on the basis that the renewal application was made outside six months.
32. It is submitted that the renewal of the claimant's contract was dependent on the outcome of investigations into the allegations of misappropriation of funds, thus, his contract should not have been terminated until the allegations were investigated and determined.
33. It is further submitted that investigations were finalized and a report was discovered on 1st February, 2023 attaching no culpability to the claimant and thus the claimant was unfairly terminated.
34. It is submitted that the claimant was condemned unheard as no disciplinary process was administered on him.
35. It is submitted that the claimant's conduct was not exceptional to warrant his interdiction before a disciplinary hearing, on his point counsel cited *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others* (2014) eKLR.
36. Further, counsel has relied on *Paul Masinde Simidi v National Oil Corporation of Kenya & Another* (2015) eKLR in support of the argument that an interdiction for over one-year amounts to constructive dismissal and unfair labour practice violating Article 41 of the *Constitution*.
37. It is submitted in the supplementary submissions that the claimant duly served the EACC report upon the respondent as evidenced by the Affidavit of Service dated 15th February, 2024.
38. It is submitted that the claimant was wrongfully terminated based on unlawful interdiction that extended beyond a year.
39. It is submitted that the EACC's Report vindicated the claimant from any misconduct that led to his dismissal, thus warranting a grant of review orders of the court's judgment.
40. It is submitted that the present application is merited based on the compelling new evidence that was not available during the trial but was discovered on 1st February, 2024 after the judgment had been delivered. The court is invited to find that the application merits.
41. On the other hand, the respondent's counsel submitted on a single issue – Whether the claimant is entitled to a review of the Court's judgment delivered on 12th May, 2022.
42. It is submitted that although the claimant refers to a corresponding provision of the *Civil Procedure Rules*, 2010, he relies on Rule 33 of the *Employment and Labour Relations Court(Procedure)Rules, 2016* (“ELRC Rules”)(now Repealed) which empowers the court with the power to review its judgments and rulings if there is discovery of new and important evidence that was not within the knowledge of a party or could not be produced by that person during the hearing even after exercise of due diligence.
43. It is submitted that the claimant is yet to serve upon the respondent a copy of the alleged report, but rather has only served a court order of 8th February, 2024 issued on 12th February, 2024, a certificate of urgency, a notice of motion, supporting affidavit, all dated 8th February, 2024 and partial judgment of 12th May, 2022.
44. On the issue of service of the new evidence, the respondent submits that the claimant ought to have served the evidence which he intends to rely on as a basis for seeking review and cites *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* (2013) eKLR in support of that proposition.



45. Further, counsel cites *Catherine Chepkemoi Mukenyang v Evanson Pkemei Lomaduny & another* (2022) eKLR arguing that failure to serve evidence that a party intends to rely on compromises the right to a fair trial as the respondent cannot respond to the question of whether the alleged evidence is new and important as to warrant the grant of review orders.
46. It is submitted that despite the alleged report by EACC exonerating the claimant from allegations of misappropriation of government funds and fraudulent activities in the Mbita Constituency, the fact remains that the claimant's contract lapsed by effluxion of time in September 2016 and was extended up to November 2016.
47. Counsel cited *Paul Mwangi Gachuru v Kamande Nguku* (2019) eKLR stating that the new evidence relied on seeking for review on the grounds of its discovery must be relevant and of such character as to alter the judgment.
48. It is submitted that even if the EACC report had been presented in court during the trial, the same could not have changed the fact that the claimant's contract lapsed by effluxion of time. It is submitted that the same can neither alter the court's finding nor meet the criteria for review of the judgment.
49. It is submitted that the court's specific finding on 12th May, 2022 is that the claimant's contract lapsed by effluxion of time, and that finding cannot change whether or not the judgment is reviewed.
50. It is submitted that contrary to Rule 33(1)(1)(a) of the ELRC Rules that new evidence, to warrant review, must not have been within the knowledge of an applicant. However, the EACC through the letter of 16th November, 2021 addressed to the Special Internal Audit commissioned by the respondent had confirmed that no money had been lost.
51. It is submitted that the claimant during the trial as outlined in paragraph 11 of the impugned judgment of 12th May, 2022, alluded to the discovery of the letter of 16th November, 2021 addressed to the Special Internal Audit which confirmed that he had been cleared of any wrongdoing as no money had been lost. A letter of 23rd November, 2021 Edwin Onyango confirmed that no money had been lost.
52. It is thus submitted that the claimant was aware that EACC had cleared him of any culpability and he had brought this information to the knowledge of the trial court. This is thus not new material evidence.
53. Citing *Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* (2019) eKLR counsel asserts that mere discovery of evidence is not a sufficient ground for review unless it can be shown that the evidence was not within the knowledge of a party and could not be produced before the court. Further the purported new material evidence should be capable of altering or affecting the outcome of the cause. Counsel further cited *Alpha Fine Foods Limited V Horeca Kenya Limited & 4 others* (2021) eKLR in support of that position. It is submitted that despite the EACC report not having been prepared earlier, the information contained in it was within the claimant's knowledge by dint of the letter of 16th November, 2021, and thus the claimant has failed to establish that the said report amounts to new material evidence.
54. It is submitted that the claimant is wrong in purporting that his contract renewal was impeded by the allegations of misappropriation of government funds, as the letter of 25th November, 2016 alluded to his renewal being dependent on the outcome of the investigations. Further, it is submitted that the claimant has misrepresented the contents of the letter dated 25th November, 2016 that his contract renewal was dependent on the outcome of investigations into the allegations of misappropriation of funds, contrary to the position that the said factors were addressed independently in that letter. It is submitted that the respondent identified misappropriation of funds and fraudulent activities under



- the claimant's watch and forwarded the matter for investigation, and the letter of 25th November, 2016 does not state that the claimant was exonerated and that the respondent would renew his contract.
55. Citing *Transparency International - Kenya v Omondi* (Civil Appeal 81 of 2018) [2023] KECA 174 (KLR) (17 February 2023) (Judgment) it is submitted that the doctrine of legitimate expectation does not arise in the renewal of fixed-term contracts and non-renewal does not amount to unfair termination.
 56. It is further submitted that legitimate expectation can only arise by proof of regular practice or express promise; but cannot be based on anticipation, desire, or hope. The representation underlying the expectation must be clear and unambiguous as elucidated in *Keen Kleeners Limited v Kenya Plantation and Agricultural Workers Union* (Civil Appeal 101 of 2019) (2021) KECA 352(KLR) (KLR) (17 December 2021) (Judgment).
 57. It is submitted that contrary to the claimant's submission, that the extension of his contract presented a legitimate expectation of renewal, the same was merely intended to persist during consideration of the possibility of renewal. It is submitted that this is buttressed by the decision in *Makworo v Oshwal Academy Nairobi* (Cause E331 of 2023) [2023] KEELRC 3342 (KLR) (20 December 2023) (Judgment).
 58. It is further submitted that the claimant has failed to discharge the evidentiary burden of proof that the renewal of his contract was conditional on his vindication on the allegations of misappropriation of funds. It is submitted that the respondent's letter of 25th November, 2016, did not promise to renew the claimant's contract at all. It is submitted that upon the expiry of the contract by effluxion of time, the claim of unfair termination became inapplicable and a review of judgment would not suffice to breach life into the expired contract.
 59. It is submitted that the claimant has married his interdiction to the new EACC report yet the court addressed itself in its finding of 12th May, 2022 on the issue of interdiction that the same did not amount to termination since the claimant was earning half salary. It is submitted that the claimant was compensated for the half salary since he was not terminated for misconduct but rather his contract lapsed. It is submitted that the issue interdiction in his present submissions is an attempt to relitigate rather than seeking review.
 60. It is submitted that the respondent has settled the decretal sum as awarded and nothing more can be gained from a review. It is submitted that the claimant's application is geared towards seeking further damages for alleged unfair termination, contrary to the finding that his contract lapsed through effluxion of time.
 61. The court is urged to find that the application does not meet the threshold in Rule 33(1)(a) of the ELRC Rules, 2016(now Repealed by ELRC Rules 2024) or Order 45 Rule 1(b) of the *Civil Procedure Rules*,2010 and dismiss the application with costs.

IV. Analysis & Determination

62. The court has considered the application, the affidavit in support, the grounds of opposition, and the written submissions by counsel for both parties, alongside all the cited authorities. The following issues commend themselves to the court for determination – Whether the claimant has met the threshold for granting of review of the judgment delivered on 12th May, 2022; and, Who should meet the costs of this application.



V. The Threshold

63. As far as the court understands the import and the context of the application, the claimant is seeking for review of the judgment delivered on 12th May, 2022. The court is now urged to find that he was unfairly terminated on unproved allegations of misappropriation of funds contrary to the finding that his contract lapsed through effluxion of time. The application is allegedly based on the discovery of the EACC report dated 3rd April, 2022.
64. The application is premised on the provision of Sections 1A, 1B, 63(e) & 80 of the *Civil Procedure Act* and Order 51 Rule (1) of the *Civil Procedure Rules* has jurisdiction. However, the applicable law is Rule 74 of the *Employment and Labour Relations Court (Procedure) Rules, 2024*(ELRC Rules, 2024) to which provides that–

“74.

- (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 a new and important matter or evidence which, despite 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 sub-rule (1) 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....”

65. The above rule mirrors the provisions of Order 45(1) of the *Civil Procedure Rules, 2010* which provides the conditions under which a court can allow an application for review.
66. The Court of Appeal in *Pancras T. Swai v Kenya Breweries Limited* (2014) eKLR reiterated the conditions set out under Order 45 and held that for an applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three main grounds: -
- a. That there is discovery of new and important evidence which was not available to the Applicant when the Judgment or order was passed despite having exercised due diligence; or
 - b. That there was a mistake or error apparent on the face of the record; or
 - c. That sufficient reasons exist to warrant the review sought.



- d. In addition to proving the existence of the above grounds, the Applicant must also demonstrate that the application was filed without unreasonable delay.
67. In *Pancras T. Swai v Kenya Breweries Limited* (*supra*) the court stated that – “The power to review decisions on appeal is vested in appellate courts. Order 44 rule 1 (now Order 45 rule 1 in the 2010 [Civil Procedure Rules](#)) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.” The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted”.
68. Flowing from the above, it is clear that the prayer for review in the instant application is premised on the first condition – That there is discovery of new and important evidence which was not available to the applicant when the Judgment or order was passed despite having exercised due diligence.
69. In [Turbo Highway Eldoret Limited v Synergy Industrial Credit Limited](#) [2016] eKLR the judge cited [Rose Kaiza v Angelo Mpanjuiza](#) [2009] eKLR wherein the Court of Appeal considered an application for review on the ground of new evidence and held that –
- “Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a 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. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”
70. The discovery alleged by the claimant in seeking review ought to be of new and important evidence which after due diligence was not within knowledge or could not have been produced during the trial. On page 5 of the impugned judgment, by Makau J. the court observed in Paragraph 11 that the claimant stated that he had not been questioned by EACC. He had in fact discovered that EACC had cleared him of any wrongdoing vide the letter dated 16th November, 2021, and that indeed one Edwin Onyango had confirmed that no money had been lost in Mbita Constituency. On that basis, the claimant had maintained that the non-renewal of his contract was without basis as there was no proof of misappropriation of funds.
71. The application by the claimant addresses the same issue that indeed EACC finalized investigations and prepared a report to the effect that the claimant was not found culpable of the allegations of misappropriation of funds. In my considered view, the evidence relating to the claimant’s culpability had already been pleaded based on the assertion that the claimant had seen the letter of 16th November, 2021 confirming that he was not culpable. The court indeed considered the issue in page 24, paragraph 64 of the impugned Judgment finding that – “it is therefore clear that the alleged misappropriation of funds by the claimant was never established. Without any conviction or dismissal for the alleged misconduct, it means that the claimant is entitled to the salary withheld”
72. The only difference now is that instead of an alleged letter, which is not available on record, a draft report dated 3rd April, 2022 was prepared into the alleged misappropriation of funds in Mbita Constituency. This information was already pleaded by the claimant as stated by the trial court in the judgment.



73. On page 7, paragraph 17 of the judgment, the court indicated that indeed the alleged misappropriation was never established and thus the claimant was entitled to gratuity as he was not terminated.
74. There is no debate that the report by EACC dated 3rd April, 2022, which the claimant relied on in seeking review, addresses the same issue canvassed by the court in the judgment of 12th May, 2022. The claimant confirmed that he was aware of the said letter and its contents by dint of the letter of 16th November, 2021 to which he alluded to. He had been cleared of charges of misappropriation of funds and that was a none issue in the trial as both sides were aware of that fact.
75. In *Paul Mwangi Gachuru v Kamande Nguku* (2019) eKLR it was held that the nature of new evidence must be that it can alter the judgment. As noted above the aspect of misappropriation of funds was addressed in the judgment and for this court to reconsider the same shall amount to this court sitting on an appeal on a judge of equal jurisdiction and status.
76. A review cannot be founded merely on the basis that the claimant has received further confirmation on a fact that he pleaded, and to which he seeks further affirmation, as he is not happy with the remedy given to him. If the claimant is not satisfied with the reliefs that were awarded the right and proper channel is for him to appeal.

VI. Order

77. The court has said enough in demonstrating that the claimant has failed to satisfy the conditions upon which an order for review may issue. The application is devoid of merits and the same is hereby dismissed with no order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 24TH DAY OF OCTOBER, 2024.

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DAVID NDERITU

JUDGE

