



Songole v Nariional City Water and Sewerage Company (Employment and Labour Relations Petition E103 of 2022) [2024] KEELRC 2452 (KLR) (4 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2452 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E103 OF 2022**

AN MWAURE, J

OCTOBER 4, 2024

BETWEEN

GRIFFINE SONGOLE PETITIONER

AND

NARIONAL CITY WATER AND SEWERAGE COMPANY RESPONDENT

RULING

1. The Petitioner/Applicant filed a Notice of Motion dated 8th May 2023 seeking orders That: -
 1. spent
 2. spent
 3. the Court to review its judgment on 3rd November 2023 and allow the petition based on the discovery of new and important evidence which after the exercise of due diligence was not available during the pendency of the Petition and more particularly, reinstate the Petition to his employment and for his to be appraised.
 4. any other just order the court may deem fit to grant.

Petitioner/ Applicant's Case

2. The Petitioner/Applicant avers that this court delivered judgment dismissing the Petition on 3/11/2023.
3. The Petitioner/Applicant avers that the Respondent's Human Resource and Procedure Manual reviewed by the Board on 18/12/2012 introduced term limits for functional directors for a period of 5 years renewable based on performance and for a period not exceeding two terms was unconstitutional and illegal as it sought to introduce fresh terms contrary to his initial contracts and the Respondent's



HR Policies and Procedure Manual 4th Revision of March 2009 which are renewable subject to performance only.’

4. The Petitioner avers that the 2012 HR Manual contravened his legitimate expectation as it had not been approved by the Public Service Commission as is required.
5. It is the Petitioner’s case that after delivery of the judgment, he came across a directive from PSC dated 15/2/2024 titled ‘Approval of Human Resource Management Instruments for State Corporations and Public Universities’ which stated:

“Once Human Resource Management Instruments have been developed by the concerned public institution in a participatory manner, the same must be submitted to the Commission for consideration and approval.”
6. The Petitioner avers that this new and material evidence which was not available during the pendency of the petition, the court’s judgment is ripe for review as the non- renewal of his employment contract was based on the 2012 HR Manual which was not submitted to PSC for consideration and approval based on Article 234(2) of *the Constitution* read together with the PSC Act, 2017 and PSC Regulations, 2020.

Respondent’s Case

7. In opposition to the Application, the Respondent filed a replying affidavit dated 21st August 2024.
8. The Respondent avers that the Petitioner’s application for review is based on the grounds that he has discovered new material evidence which is a directive by PSC dated 15/2/2024.
9. The Respondent avers that the application is an abuse of the court process as the Petitioner had ample opportunity to conduct its case and had 2 years to collect evidence in support of his case.
10. It is the Respondent’s case that the Petitioner is trying to enforce a directive that was issued after his contract of employment ended due to effluxion of time, and therefore, cannot amount to new and material evidence.

Petitioner/Applicant’s Submissions

11. The Petitioner submitted that the PSC directive dated 15/2/2024 makes it mandatory for the public universities and state corporations to submit to their Human Resource Manual to the Public Service Commission for approval. The lack of such submission to the Commission has the effect of annulling the Human Resource Policy and Manual thus invalidating the subsequent changes to the Petitioner’s term of the contract.
12. The Petitioner/ Applicant submitted that the directive was not available as at the time of instituting the suit and subsequent delivery of the judgment, it could not have been within his knowledge, even with utmost due diligence, as the same had not been publicized by the PSC, therefore, it meets the threshold for review.
13. It is the Petitioner’s submission that the Manual revised by the Respondent on 18/12/2012 lacked the PSC approval and thus was invalid ab initio. The same ought not to have taken effect in the first place thus the subsequent adjustment of the contractual terms was unfounded, illegal and unsubstantiated.
14. The Petitioner submitted that the Human Resource Policy and Manual did not take off, from the very beginning, for want of approval by the Public Service Commission as is mandatorily required under Article 234 of *the Constitution* of Kenya 2010. Consequently, the respondent had no authority to vary



the employment terms of the applicant on the basis of an invalid document. The same was illegal and unjustified and ought to be quashed and he should be reinstated.

Respondents' Submissions

15. The Respondents submitted that the Petitioner/Applicant has no ground to claim discovery of new evidence which after due diligence was not within his knowledge as the directive was released on 15/2/2024, two months from the date when judgment was delivered on 3/11/2023. Therefore, the directive cannot be applied retrospectively as it has been overtaken by events and the application must fail.
16. It is the Respondents submission that the directive cannot be applied retrospectively as it does not give express or implied conditions for it to apply. The directive was of 15/2/2024 whereas the HR Manual which advised this judgment was reviewed by the Board on 18/12/2012 thus it cannot be applied retrospectively.

Analysis and Determination

17. Having considered the application, affidavits and submissions on record, the issue for determination is whether the Petitioner/Applicant is entitled to review of the judgment delivered by this court on 3rd November 2023.
18. Section 16 of the *Employment and Labour Relations Court Act* which provides the following in respect to review: -

“The court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.”
19. Rule 33 (1) of the Employment and Labour Relations Court (procedure) Rules further prescribes the requisite ingredients that warrant a review 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.”
20. The Petitioner/Applicant argues that he is entitled to the review of judgment based on discovery of new evidence. However, it is key to note that the new evidence being relied upon is a PSC directive released on 15/2/2024, two months from the date when judgment was delivered on 3/11/2023.
21. This cannot be regarded as new evidence as the same was not in existence during the hearing and determination of the instant suit and is trite law that laws do not act retrospectively. The Petitioner is trying to depend on a directive that was issued after his contract of employment had already expired by effluxion of time.



22. The court therefore finds no grounds for review of its judgment delivered on 3rd November 2023. Indeed the court is of the view that application herein is not merited for review and if the Petitioner is dissatisfied by the court's judgment he should have appealed the same.

23. The application for review of court's judgment is not merited and is dismissed.

24. The court orders each party to meet their respective costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY OF OCTOBER, 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

