



Njuguna & 3 others (Suing on their own behalf and on behalf of 63 other former employees of the Directorate of Civil Aviation, a department within the Ministry of Transport and Communications) v Attorney General & 2 others (Judicial Review Application 3 of 2015) [2023] KEELRC 113 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 113 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION 3 OF 2015**

L NDOLO, J

JANUARY 26, 2023

[FORMERLY HIGH COURT MISCELLANEOUS CIVIL CASE NO 1278 OF 2004]

BETWEEN

**RUFUS NJUGUNA 1ST PLAINTIFF
RURIANI MICHENI 2ND PLAINTIFF
DANSON KIMANI 3RD PLAINTIFF
ALLAN MIKINDIA 4TH PLAINTIFF
SUING ON THEIR OWN BEHALF AND ON BEHALF OF 63 OTHER FORMER
EMPLOYEES OF THE DIRECTORATE OF CIVIL AVIATION, A DEPARTMENT
WITHIN THE MINISTRY OF TRANSPORT AND COMMUNICATIONS**

AND

**ATTORNEY GENERAL 1ST DEFENDANT
KENYA CIVIL AVIATION AUTHORITY 2ND DEFENDANT
CA KUTO 3RD DEFENDANT**

RULING

1. This matter has been the subject of many applications. The one now before me is the one dated March 15, 2019, by which the 2nd defendant seeks an order for review and setting aside of my judgment dated October 27, 2017.
2. The application is supported by an affidavit sworn by Polycarp Kuchio Tindi, who describes himself as the Applicant’s Chief Legal Officer and is based on the following grounds:



- a. The matter was previously heard and determined by Emukule J of the High Court, who in a ruling dated November 7, 2008, awarded the Plaintiffs salary arrears dating back to April 18, 2002. The learned Judge further directed that the exact amounts to be paid to the Plaintiffs be assessed by the Deputy Registrar;
 - b. The aforesaid ruling was the subject of Civil Appeal (Application) No. 67 of 2010, where the Court of Appeal sustained the finding of Emukule J awarding the Plaintiffs salary arrears dating back to April 18, 2002. The Court of Appeal however directed that the computation of the exact amount of salary arrears payable to the Plaintiffs be assessed by a judge;
 - c. By a judgment dated October 27, 2017, this Court, pursuant to the directions of the Court of Appeal in Civil Appeal (Application) No. 67 of 2010, assessed the salary arrears due to the Plaintiffs;
 - d. There is an error on the record in the judgment dated October 27, 2017. While Emukule J awarded salary arrears to the Plaintiffs from the year 2002-2005, this Court computed salary arrears until 2014;
 - e. The Plaintiffs are in the process of extracting a decree in this matter, with the intention of executing against the Applicant while the aforesaid error apparent on the record subsists;
 - f. The Applicant stands to suffer irreparably as any tax payer money paid to the Plaintiffs on the basis of the aforesaid error may not be recovered;
 - g. No prejudice shall be occasioned upon the Plaintiffs if the application is allowed;
 - h. It is only fair and equitable that the aforesaid judgment be reviewed and set aside.
3. The 1st Plaintiff, Rufus B. Njuguna filed a replying affidavit sworn on September 15, 2022. He terms the present application as vexatious, frivolous bad in law and an abuse of the court process.
 4. Njuguna takes issue with the delay in bringing the application being twelve (12) months after judgment.
 5. He states that the Applicant has not established any mistake or error apparent on the face of the record as envisaged under rule 33(b) of the *Employment and Labour Relations (Procedure) Rules*.
 6. The 2nd to 67th Plaintiffs filed a notice of preliminary objection dated 15th August 2022 stating:
 - a. That the application offends rule 33(6) of the *Employment and Labour Relations Court (Procedure) Rules*;
 - b. That the application is res judicata;
 - c. That the application is grossly incompetent and an abuse of the court process.
 7. The power of this Court to review its own decisions is donated by Section 16 of the *Employment and Labour Relations Court Act* and rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*.
 8. Rule 33(1) of the *Procedure Rules* provides 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; or
 - b. on account of some mistake or error apparent on the face of the record; or
 - c. if the judgment or ruling requires clarification; or
 - d. for any other sufficient reason.
9. By its application, the 2nd Respondent invites the Court to review and set aside its judgment dated October 27, 2017. The basis of the application is the cut-off date adopted by the Court in tabulating the salary arrears payable to the Plaintiffs. The 2nd Respondent takes the view that the Court ought to have reckoned the cut-off date as the date of delivery of the judgment by Emukule J being, November 7, 2005 and not the decision by the Court of Appeal in 2014. The 2nd Respondent states that this as an error on the face of the record.
 10. The purpose of review on the ground of an error on the face of the record is not to allow the Court to have a second look at its own decision but to facilitate correction of obvious errors that are obvious on the record.
 11. This position was affirmed in *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR where it was held:

“A review may be granted whenever the court considers it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
 12. The Court of Appeal, in its decision in *Nyamogo and Nyamogo Advocates v Kogo* (2001) EA 173, delivered itself on this issue as follows:

“There is a real distinction between a 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 options, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”
 13. In similar fashion, in *Francis Njoroge v Stephen Maina Kamore* [2018] eKLR it was held that a wrong view on an issue may be a ground for appeal but certainly not a ground for review.
 14. It is important to point out that the impugned judgment consists of a tabulation of an earlier award by the High Court. As per the directions of the Court of Appeal, I was not required to open up the case for substantive findings. It follows therefore that if I was wrong in the tabulation parameters, the entire



judgment was wrong. Indeed, the 2nd Respondent appears to be aware of this fact as in its application, it seeks orders to set aside the judgment. In my view, this cannot be achieved in the arena for review.

15. It was also not lost on the Court that the application was filed close to two years after judgment. As held in *Unilever Tea (K) Limited v Richard Ombati Kiboma* [2021] eKLR delay in bringing an application for review of judgment ought to be sufficiently explained and where this is not done, then the delay becomes unreasonable and inexcusable.
16. On the whole, I find the 2nd respondent's application dated March 15, 2019 to be devoid of merit and proceed to dismiss it with costs to the Plaintiffs.
17. These are the orders of the court.

DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JANUARY 2023

LINNET NDOLO

JUDGE

Appearance:

Miss Ngesa h/b Mr. Gitobu Imanyara for the 1st Plaintiff

Mr. Munyambu h/b Dr. Khaminwa, SC for the 2nd – 67th Plaintiffs

Mr. Wafula for the 2nd Respondent/Applicant

No appearance for 1st and 3rd Respondents

