



REPUBLIC OF KENYA



KENYA LAW
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**Adul v County Assembly of Kisumu & 5 others (Petition
297 of 2014) [2023] KEELRC 251 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 251 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 297 OF 2014
CN BAARI, J
FEBRUARY 2, 2023**

BETWEEN

ANNE ATIENO ADUL PETITIONER

AND

COUNTY ASSEMBLY OF KISUMU & 5 OTHERS RESPONDENT

RULING

1. The Applicant's motion is dated November 25, 2022, and is brought pursuant to sections 1A, 1B and 100 of the [Civil Procedure Act](#), and order 45 rules 1, 2,3, and 4 of the [Civil Procedure Rules](#), 2010. The Applicant seeks orders that: -
 - i. Spent
 - ii. The court be pleased to find and hereby hold that based on the establishment that both the judgment by Hon. Hellen Wasilwa delivered on January 12, 2015, and the resultant decree are in the court file, the court reviews its ruling dated and delivered on 21st day of March, 2018, by assessing and determining the quantum of damages.
 - iii. The honourable court proceeds to, and make an award of damages to the petitioner/applicant based on the submissions on record.
 - iv. Costs of this application be provided for.
2. The application is supported by grounds on the face of the motion, and the affidavit of Anne Atieno Adul, the Applicant herein, sworn on November 25, 2022. The application is premised on a declaration made in a judgment rendered by Hon. Justice Hellen Wasilwa on January 12, 2015, wherein, she made an order for compensation of the Applicant for violation of her rights, but did not proceed to assess the quantum of damages payable to the Applicant.



3. The Applicant further avers that she filed an application for assessment of the quantum of damages awardable to her on account of the findings of the court in the judgment herein referred, but in a ruling delivered on March 21, 2018, Hon. Justice Maureen Onyango dismissed her application on the basis that the judgment subject of the order/decreed was not in the court record.
4. The applicant further avers that the ruling rendered on 2March 1, 2018, was made in error and hence an error is apparent on the face of the record and which calls for review of that ruling.
5. The Respondents opposed the motion vide a replying affidavit sworn by Bill Omondi on December 2, 2022.
6. The Respondents aver that the application does not meet the minimum grounds for grant of review orders for reason that the Applicant had already preferred an appeal on the same issue, and secondly that Rule 33 of the Employment and Labour Relations Court Procedure rules requires that an application for review be made within reasonable time, yet it took the applicant ten (10) years to file the instant application.
7. The application was urged orally on January 16, 2023. Counsel for the Applicant argued that the court should look at the file and proceed to make a determination on the quantum of damages payable to the Applicant, the trial court having found that she was entitled to compensation.
8. It is Counsel for the Applicant's assertion that the Judge who heard the first application seeking assessment of quantum, did not have the file under which the judgment was made as the Applicant had difficulties retrieving the file owing to a fall-out with her previous Advocates.
9. It is submitted that the delay in making this application is not inordinate on account of the difficulties the Applicant experienced in tracing the court file. It is his prayer that the court reviews the orders of Hon. Justice Hellen Wasilwa on the basis that the full record is now available.
10. Counsel for the respondents opposed the application on the ground that it should have been brought within reasonable time, and further arguing that a delay of ten (10) years cannot be reasonable.
11. It is further submitted for the Respondents that the alleged fall-out between the Applicant and her Counsel has not been pleaded, and is thus not truthful but a ploy to hoodwink the court into granting the orders sought.
12. The Respondents argue that the Applicant being dissatisfied with the ruling issued in the matter, lodged an appeal and that the court wrote to her informing that the typed proceedings they requested were ready. Counsel further submits that the allegations that the court file was lost, and hence the delay in filing the application, is not true as the proceedings could not have been typed if indeed the file was lost.

Determination

13. The Applicant's prayer is for this court to review orders made in a judgment rendered on January 12, 2015.
14. Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, states as follows in respect of review:

“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.... (emphasis mine)”
15. In *Bethwel Omondi Okal v Managing Director KPLC and Co.* [2017] eKLR, Mativo J, while upholding the finding in *National Bank of Kenya Ltd v Ndungu Njau* [1996]KLR 469 (CAK) at Page 381 held thus:-
- “A review may be granted whenever the court considers that 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 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.”
16. A perusal of the judgment and the orders sought to be reviewed, is apparent that indeed there is an omission on the part of the court, having made an order for compensation for violation of the Applicant’s rights, and failing to assess the amount payable.
17. In *Chandrakant Joshibhai Patel v R* [2004] TLR, 218, cited with approval in *Kenya Union of Hair and Beauty Salon Workers Union v Metal Crowns Limited* [2020] eKLR, an error was explained thus:
- “...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may conceivably be two opinions.”
18. The Respondents opposition to the application is premised on its timing, arguing that it was not filed within reasonable time. The orders sought to be reviewed were made in a judgment rendered on January 12, 2015. An earlier application for similar orders was dismissed on March 21, 2018.
19. Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules*, requires that review orders be sought within reasonable time. It is seven years today since the orders sought to be reviewed were made. The question that beg answer is whether seven years, or even four years if I consider the ruling rendered in 2018, is reasonable time.
20. The delay in filing this application is attributed to the loss/misplacement of the court file and a fall-out between the Applicant and her previous Counsel. These reasons as correctly submitted by Counsel for the Respondents, have not been pleaded and no evidence has been produced to show that the court file was misplaced/lost at any one time between the judgment and the filing of the instant application.
21. The Applicant in my opinion has not given plausible reasons for the very inordinate delay in filing this application. This in my view is simply the Applicant’s failure to act, and failure to act does not constitute a good or sufficient cause. (*Alibhai Musajee v Shariff Mohammed Al-Bet* Civil Appeal No. 283 of 1998)



22. In *Daphne Parry v Murray Alexander Carson* [1963] EA 546 the Court had this to say on delay: -

“.....if the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy; and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”

23. The Applicant in my opinion slept on her right to pursue the compensation awarded to her by the court. Her seven years of slumber can neither be justified nor sufficiently explained, and on this basis, I find her application devoid of merit and is hereby dismissed.

24. I make no orders on costs.

25. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2ND DAY OF FEBRUARY, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance

Ms. Onsongo present for the 2nd Petitioner/Applicant.

Mr. Otieno Obiero present for the Respondents

Christine Omollo – C/A

