Ndwiga v Principal Secretary, Ministry of Health & another (Petition 137 of 2021) [2023] KEELRC 1013 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 1013 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 137 OF 2021

K OCHARO, J

APRIL 27, 2023

BETWEEN

MARY WANJIRU NDWIGA ..... PETITIONER

AND

PRINCIPAL SECRETARY, MINISTRY OF HEALTH ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

1. The Application before this Court by the Petitioner/Applicant dated May 12022 expressed to be brought pursuant to articles 48 and 50 (1) of the *Constitution* of Kenya 2010, rule 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*; rule 9 of the *Employment and Labour Relations Court (Procedure) Rules*,2016, seeks orders:

    a. That the court record be rectified to read 938 Clinical Officer Interns including the Petitioner are as the total number of the petitioners.

    b. That the order granted on the 4th September, 2015 be rectified to read 938 Clinical Officer Interns including the Petitioner.

    c. That the costs of this Application be provided for.

The Petitioner's Application.

2. The Application is premised on the grounds obtaining on the face of it and the supporting Affidavit of Mwaniki Gachuba, counsel for the Petitioner, sworn on the 17th May 2022.

3. The Applicant stated that through an order of the court herein issued on the 3rd September, 2015, she was directed to file a schedule of all other Clinical Officer Interns, having an interest in this matter.

4. Under her affidavit sworn on the 4th September 2015, she filed the schedule of names of other 914 Clinical Officer Interns.

5. It is the Affiant's contention that the schedule of names filed on 4th September 2015 inadvertently excluded 23 Clinical Officer Interns. In lieu of this, Lady Justice Mbaru granted orders in favour of 914 Clinical Officer Inters including the Petitioner.

6. It is averred that the correct number of Clinical Officer Interns who are Petitioners is 937 and thus the Court record ought to be rectified to read the total number of Clinical Officer Interns in the petitioner to be 938 including the Petitioner. Further the order granted on the 4th September 2015 in favour of the 914 Clinical Officer Interns ought to be rectified to read 938 Clinical Officer Interns including the Petitioner.

7. The Affiant aver that the Respondent will suffer no injustice or prejudice if the Court record and the said Order is rectified to read 938 Clinical Officer Interns including the Petitioner as the correct total number of Petitioners and that the court has unfettered jurisdiction to rectify the Court record and the said order.

The Respondents' Response.

8. The Respondents opposed the Application through Grounds of Opposition dated 26th May 2022.

9. The Respondents contends that the Application is an afterthought. The proceedings herein were commenced over seven (7) years ago and all along the Applicant knew or ought to have known the persons he was representing. The Applicant has not given the reasons for not indicating all the affected persons at the commencement or earlier than this. The proceedings herein are meant to frustrate the proceedings of the Court as the matter is due for hearing and final disposal.

10. The application is an abuse of the court process, one only intended to frustrate a final determination of this matter.

11. The Respondents argue that the petition filed herein is an alleged representative petition. The Petitioner clearly states therein that she had authority from Clinical Officer Interns to so file the petition. In her supporting affidavit sworn on 31st August 2015, the Petitioner only has authority from 903 persons. Clearly, she has no authority from the other officers she wants to bring onboard.

12. The order that was granted concerning the 914 Clinical Officer Interns flowed from an affidavit that was sworn on the 4th September, 2015, therein the Applicant stated that the persons who had an interest in the matter were that number.

13. The Respondents further contend that the Applicant has not sufficiently explained why the number of the persons allegedly interested in petition has kept on changing from time to time. The Applicant intends to join more parties to the petition through the backdoor. It shall be against public policy and interest to grant the orders sought.

Reply to the Grounds of Opposition

14. The Petitioner/Applicant further filed a supplementary affidavit dated the 26th October 2022 sworn by Mwaniki Gachuba in reply to the Respondents' grounds of Opposition. In it she avers that due the geographical spread of the interns, their names reached her on varied dates hence the reason why the list changed from 903 to 914 and now to 938 interns.

15. The Petitioner/Applicant avers that the file retained the Nyeri registry case number and it was therefore not uploaded onto the Nairobi online registry on the Judiciary E-Filing and it became virtually impossible to trace it and hence the delay in filing the instant Application. Further it only became possible to file the application or to progress the matter in 2021 after the file was allocated a Nairobi Registry case number and mapped onto the Nairobi online registry on the Judiciary E-Filing

16. The Petitioner contends that the Respondents have not placed forth any evidence from the 34 Interns to buttress the position taken that they did not authorise the petitioner to represent them.

17. If the orders aren't granted, the 23 interns stand to suffer immense prejudice as they shall have been denied access to justice for a mistake not of their own making. The Respondents stand to suffer no prejudice with the inclusion of the said interns in the Petition.

18. The Petitioner argues that the Respondents' position on the affidavit sworn in support of the instant application, stands on loose sand. They cannot be allowed to approbate and reprobate. They did not oppose his swearing of the supporting affidavit dated the 2nd September 2015 and further affidavit dated 4th September 2015 sworn in similar circumstances and capacity.

The Petitioner's Submissions.

19. The Petitioner filed her submissions on the 15th July 2022 distilling one issue for determination thus;

Whether the Court record and the order granted on 4th September, 2015 should be rectified to read 938 Clinical Officer Interns.

20. The Petitioner submitted that the court under section 99 and 100 of the *Civil Procedure Act* and the inherent jurisdiction has the power to rectify or amend at any time the court record or the proceedings. The said provisions provide:

> " Section 99 Amendment of judgments, decrees or orders Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.
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> Section 100. General power to amend, the court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."

21. The Petitioner relied on the case of *Vallabhdas Karsandas Raninga v Mansukhlal Jivraj & others* (1965) E.A 780 in fortification of her submissions.

22. The Petitioner further relied on the case of *Leonard Mambo Kuria v Ann Wanjiru Mambo* (2017) eKLR, where the Court of Appeal held:

> " We stated earlier that an oral application for rectification was made before the trial judge on 24th November 2016 under Section 100 of the *CPC*. Later on (1st December, 2016) the respondent's counsel wrote to the Deputy Registrar invoking Sections 99 and 100 to the same effect. The application of these two sections has been considered before in several decisions. They vest a general power to the courts to correct or amend their records. As such they are an exception to the doctrine of 'functus officio'-- the principle that once a decision has been given, it is (subject to any right of appeal) final and conclusive. It cannot be revoked

or varied by the decision-maker. As the court stated in the case of *Jersey Evening Post Limited v Ai Thani* [2002] JLR 542 at 550: -

> " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available".

23. The petitioner argued that her counsel's mistake should not be visited on her. To support this point, she placed reliance on the case of *Michael Njoroge "B" & Others v Cinvent Kimani Chege* 1997 where the held;

> " Professional standard must be maintained at their highest. But when a lawyer errs, and the error is remediable, his client ought to be given a chance to be heard."

24. Further reliance was placed on the holding in the the case of *Gideon Moses Onchwati v Kenya Oil Co Ltd & another* (2017)eKLR, thus;

> " Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions."

The Respondents' submissions.

25. The Respondents submitted that the Petitioner is guilty of laches and that the application is an afterthought. The matter herein was commenced over 7 years ago. At the inception of it or in the course of the years, the petitioner/Applicant knew or ought to have known the persons who had an interest in this matter to be enjoined as petitioners. It is too late in the day to start enjoining new people in the petition.

26. It was further argued that the Petitioner has not given any sufficient reason for the inaction for all these years the matter has been in court.

27. Equity aids not the indolent but the vigilant. The petitioner cannot be availed a favourable order as the principle militates against her. To fortify this submission the holding in the case of *Abigael Barma v Mwangi Theuri* 2013 eKLR was cited; was held:

> " equity aids the vigilant and not those who slumber on their rights". The court referred to "Snell's Equity, 30th Edition at p 33 para 3-16 (quoting Lord Camden L.C in *Smith v Clay* (1767) 3 Bro. C.C. 639n. at 640n) where it was asserted that a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience,

good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing."

28. The Petitioner herein has not been candid to the Court. In the affidavit sworn on the 31st August, 2015, she clearly stated that she had authority from 903 Clinical Officer Interns. In a further affidavit that she swore on the 4th September 2015, she indicated that the officers interested in the matter as 914. The petitioner now wants the number to be changed to 938, without placing forth any reason why the numbers keep shifting. The Petitioner has not even demonstrated that she has authority from the persons she wants to bring on board, to so do.

The Petitioner's Supplementary Submissions.

29. The Petitioner filed Supplementary submissions on the 26th October 2022 as a rejoinder to the Respondents' submissions and submitted that the 23 interns are necessary parties in the petition. That rule 5[c][d][ii] of the *Constitution of Kenya [protection of Rights and Fundamental Freedoms] Practice and Procedure Rules ,2013* gives the court authority to at any stage of the proceedings ,if satisfied that the proceedings have been instituted through a mistake made in good faith , and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as a petitioner upon such terms as it thinks fit and that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added. this honourable court has discretion to allow addition of more parties into a matter at any time.

30. As to who is a necessary party, the petitioner relied on the holding in the case of *Amon v Raphael Tuck & Sons* 1956 I ALL ER 273.

31. The Petitioner submitted that the Supporting affidavit and the supplementary affidavit explained in detail how the numbers of interns rose from 903 to 914 and later to 938. The rectification of the number from 903 to 914 w be heard to raise any question thereon therefore at this juncture.

32. Lastly it was submitted that the Petitioner is the Applicant herein and her Advocate on record swore the supporting affidavit as he was seized of the facts thereof. Further the Respondent did not allege and provide any evidence to demonstrate that the petitioner did not consent to the filing of the Application or cite any law barring the petitioner's Advocate from swearing the affidavits in support of the Application. The Petitioner relies on order 19 rule 3 (1) of the *Civil Procedure Rules 2010* which states:

> " Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

33. The Petitioner further relied the case of *Hakika Transporters Services Ltd v Albert Chulah Wamimitaire* 2016 eKLR where the court held:

> " As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the *Advocates (Practice) Rules* however permits an advocate to swear an affidavit on formal or non-contentious matters."

Analysis and determination.

34. To dispose of the instant application, this Court shall, first consider the applicability of sections 99 and 100 of the *Civil Procedure Act*, then the length of time that passed since the order sought to be rectified was issued and the date of filling the instant application and its import.

35. The Petitioner heavily placed reliance on the provisions of sections 99 and 100 of the *Civil Procedure Act*, in a bid to persuade this Court that it has the authority to entertain her application and grant the orders sought. Straight away, I state that the said provisions are not relevant to, and are inapplicable in the circumstances of, the application. After the promulgation of *the Constitution* of Kenya,2010, procedure and practice Rules, to guide litigations under the constitutional provisions were crafted, in my view the drafters of the *Constitution* of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules,2013, did not envisage application of two parallel Practice and Procedure guidelines in Constitutional litigations and applications emanating thereunder. I hold that any procedure provided for in the *Civil procedure Act*, and or procedure Rules are inapplicable to constitutional litigations and applications arising thereunder.

36. My understanding of the wording of the two sections is that they speak to errors made by the court itself in a judgment, decrees, or orders. The two sections, 99 and 100 of the *Civil Procedure Act*, cannot be invoked to correct any other error other than one by the court, as a result of any accidental slip or omission in the nature clerical or arithmetical mistakes. The Petitioner /Applicant does not assert, and indeed there is not any material from which it can be discerned, that the court made an error in its order dated 4th September, 2015. The provisions are inapplicable in the instant application therefore.

37. The decisions cited by the Petitioner/Applicant on the stated sections all point the position as taken hereinabove. For instance, in the case of *Republic v Attorney General& 15 others ex-parte Kenya Seed Company Limited & 5 others* [2010] eKLR, the court expressed itself thus,

> 27. It is a codification of the common law doctrine dubbed "the Slip Rule", the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdictions of the court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.
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> 28. Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip rule is to give effect to the actual intention of the judges and or ensure that the judgment /order does have a consequence which the Judge intended....."

38. This Court is not convinced that the petitioner's application herein is not an application for review camouflaged. I will treat it as an application for review of the court's order of 4th September, 2015. One of the vital considerations when interrogating an application for review, is to whether the applicant has brought the application timeously. There is no contestation that the application was filed more than 7 years after the order was issued. The period is inordinately long, depicting the petitioner as an indolent litigant. Equity cannot come to her aid.

39. In the premises, the Petitioner's application herein is hereby dismissed.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF APRIL 2023.

OCHARO KEBIRA

JUDGE

In the presence of

Mr. Gachuba for the Petitioner/Applicant.

Mr. Oure for the Respondents.

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.

OCHARO KEBIRA

JUDGE