



Abdi v Governor, Kakamega County Government & 2 others (Employment and Labour Relations Petition E004 of 2022) [2023] KEELRC 1105 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1105 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS PETITION E004 OF 2022**

JW KELI, J

MAY 4, 2023

IN THE MATTER OF IN THE MATTER OF ARTICLES

1,10,19,20,21,22,23(3)(A-

C),27(2),28,41,47(1),50,165,236(A &B))258(1) OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: UNLAWFUL, UNFAIR,

UNPROCEDURAL AND UNREASONABLE

SUSPENSION FROM THE OFFICE OF CHIEF

EXECUTIVE OFFICER FOR THE KAKAMEGA COUNTY

WATER AND SANITATION COMPANY LIMITED.

AND

IN THE MATTER OF THE EMPLOYMENT ACT

BETWEEN

ABDIKADIR MOHAMED ABDI PETITIONER

AND

**THE GOVERNOR, KAKAMEGA COUNTY GOVERNMENT 1ST
RESPONDENT**

**THE BOARD OF DIRECTORS OF KAKAMEGA COUNTY WATER AND
SANITATION COMPANY LIMITED 2ND RESPONDENT**

KAKAMEGA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

(Before Hon. Lady Justice Jemimah Keli)



RULING

1. The Applicant/ Respondents following delivery of judgment of the court on the 16th February 2023 in the Petition filed the instant application Notice of Motion application dated 10th March 2023 under certificate of urgency seeking the following substantive relief:-
 - a. That this honourable court be pleased to review and set aside its order no. 5 issued in the judgement delivered on 16th February 2023 by substituting the award payable to the petitioner from Kshs. 4,965,714.20 to Kshs. 1,848,000/-.
2. The application was premised on the ground that the court having awarded unpaid salary from February 2022 to date of judgment it since came to the attention of the respondents' Counsel that the petitioner was receiving half pay from the date of suspension in February 2022 to January 2023. That the petitioner was paid full salary in February 2023. That the petitioner was paid net salary of Kshs. 1,544,064/- after statutory deductions for the period running February 2022 to February 2023 and total outstanding amount payable to the petitioner arising from the judgment was net Kshs. 1,848,000/-. That the petitioner would be unjustly enriched if execution proceeds under the judgment without the review. The application was supported by the affidavit of Boaz Odemu Bulimu dated 10th March 2023 which annexed the copies of schedule of salary paid to the petitioner, bank print outs and payslips(BOB-2).
3. The respondent/petitioner swore affidavit on the 20th March 2023 in response. The respondent further filed grounds of opposition of even date. Both pleadings were to effect the application was misconceived and afterthought and that all the information was under custody of the respondents hence no discovery of new and important matter.
4. The application was canvassed by way of written submissions. The applicant's written submissions drawn by the County Attorney Vivian M'mbaka Komwonyo were dated 18th April 2023 and received in court on even date. The respondent/ petitioner written submissions were drawn by Hassan Lakicha & Company Advocates and dated 14th April 2023. The same were received in court on the 17th April 2023.

Decision

5. The issue for determination in the instant application was whether the application was merited.
6. The application was brought under section 16 of the *Employment and Labour Relations Court Act, 2011* and Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules 2016* and all other enabling provisions of the law.
7. Section 16 of the *Employment and Labour Relations Court Act, 2011*, states:- '16. Review of orders of the Court The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.'
8. Rule 33 of the *Employment and Labour Relations Court(Procedure)Rules, 2016* provides:-'Rule33.
 - (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.
- (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), 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.
 - (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.
 - (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
 - (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
 - (6) An order made for a review of a decree or order shall not be subject to further review.”
9. The court finds that the foregoing is the law and procedure that applies to review of decisions of this court.
 10. The Applicants challenge order 5 of the judgment delivered on the 16th February 2023 which read:- ‘That the payment of special damages from 7th February 2022 to-date is considered sufficient compensation for the violations committed by the respondent against the petitioner. The unpaid salary is calculated applying the gross salary of January 2022 being KES 395000 X 12 Months (KES 4,740,000/-) plus 16/28 Days x 395000 (225,714.20) total award of KES 4,965,714.20 (award amount payable subject to statutory deductions)’
 11. The applicant pleaded and produced evidence that the petitioner was paid Kshs. 170,000/- per month from February 2022 to January 2023 and paid full salary in February 2023. The applicants’ Advocate being the County Attorney acting for the respondents stated they got the information after the delivery of judgment. That the issue of unpaid salary was not an issue in contest at the hearing hence there was no basis to produce the evidence of payment of salary as aforestated.
 12. The respondent/ petitioner in his affidavit dated 20th March 2023 did not deny receipt of partial salary in the period as stated by the applicants. All what the petitioner did was rely on advise of his advocates yet matters of payment of salary was within his personal knowledge and not the advocate. The court holds (BOB-2) was uncontested evidence of prove of partial salary payment in the suspension period to the petitioner.
 13. The issue which the court must then consider is whether the application was proper and met the threshold of review as stated in Rule 33 of the [Employment and Labour Relations Court \(Procedure\)Rules 2016](#) being ‘ Rule 33(1):-
 - 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.”

14. It was the petitioner’s case that the applicants were in custody of the records hence the threshold of new evidence after exercise of due diligence not within their knowledge was not met. The petitioner relied on several decisions to support its submissions being in *Re Estate of Mutio Mutwii Kamwilu (Deceased)* 2018 eKLR, *Suleiman Murunga V Nilestar Holdings Limited & another* (2015)eKLR, and *Hosea Nyandika Mosagwe & others v County Government of Nyamira* (2022)eKLR.

Applicants’/Respondents’ submissions

15. The Applicants submit that the issue of payment of salary was never brought up as an issue in the course of proceedings thus the respondents could not address an issue that was not in contest. That they had paid the petitioner a total net salary of Kshs. 1,544,064/- and they understood the outstanding amount payable arising from the judgement was Kshs 1,848,000/-. That the petitioner was not agreeable to the position necessitating the application. That they do not seek to appeal the judgment but the contest was the outstanding money payable to the petitioner under the judgment which they seek review against.
16. That Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules* 2016 states:- “33(3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed;” That BOB-1 was the judgment in compliance with the rule.
17. The applicants submit that to distinguish the authorities cited by the petitioner/ respondent they were all under the *Civil Procedure Rules* and their application was under the *Employment and Labour Relations Court (Procedure) Rules* 2016.
18. The applicants submit that any of the 4 grounds under Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules* 2016 suffices for the grant of order of review being:- ‘Rule 33(1):-
- 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.”
19. That the issue of the paid half salary or any salary was not brought up during the proceedings hence the evidence could not be produced as at the time the decree was passed satisfying the 2nd limb of the Rule33(1)(a) namely:- ‘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;”



20. The applicants further relied on Rule 33(1)(d) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, and submits that they have sufficient reason to warrant grant of review of judgment of this court for reasons that, Order 4 and 5 of the judgment are intertwined and should not be considered in isolation. That Order 4 made reference to payment of salaries and benefits withheld from the petitioner from February 2022. Order 5 then proceeded to quantify the award under order 4 by dint of use of words;- ‘That payment of special damages from February 2022 to date is considered sufficient compensation..’ That order 5 of the judgment refers to unpaid salary which the applicants opine would mean the same thing as salaries and benefits withheld from the claimant from February 2022 that is referred under order 4. That there is no legal justification for an award of more than the petitioner’s salary of 12 months for he would be unjustly enriching himself from limited public coffers.
21. The court finds that as a specialist court it has its own procedural rules being the *Employment and Labour Relations Court (Procedure) Rules*, 2016. The procedure for review is as under Rule 33 to wit:- ‘Rule33.
- (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.
 - (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), 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.
 - (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed
 - (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
 - (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
 - (6) An order made for a review of a decree or order shall not be subject to further review.”
22. The court holds that Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 mirrors Rule 45 of the *Civil Procedure Rules* which states:
- ‘Application for review of decree or order [Order 45, rule 1.]
- (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or



evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

23. The court then finds the authorities cited by the respondent /petitioner were relevant to the instant application.
24. It is true there are 4 distinct limbs for review under Rule 33(1) *Employment and Labour Relations Court (Procedure) Rules*, 2016 namely :-
 - 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.” The Court holds that it may grant the order of review of decision based on any of the 4 limbs.
25. The application seeks review of decision under order 5 of the Judgment which provided: -
 5. That the payment of special damages from 7th February 2022 to-date is considered sufficient compensation for the violations committed by the respondent against the petitioner. The unpaid salary is calculated applying the gross salary of January 2022 being KES 395000 X 12 Months (KES 4,740,000/-) plus 16/28 Days x 395000 (225,714.20) total award of KES 4,965,714.20 (award amount payable subject to statutory deductions)”
26. The court agreed with the applicants that order 5 of the court judgment was intertwined with order 4 which stated:-“4. An order that all the salaries and benefits payable under the petitioners terms of service withheld from the claimant from February 2022 on account of the said unlawful suspension to date of judgment be released to him forthwith.”
27. Order 5 of the court judgment referred to unpaid salary and the court proceeded to tabulate the amount payable as if no payment had been done. The applicants submit that since the payable salary was not in contest at the hearing, there was no basis to produce evidence of paid salary. That the only reason they brought the application was because order 5 did not factor in the paid monies and the petitioner was not cooperative insisting to be paid entire money.
28. The court finds that the Order 5 of its judgment having been for compensation to be based on the unpaid monies under Order 4 , then there is sufficient reason to review the Judgment of the court with respect to Order 5. The Petitioner in response to the application did not deny the payment as per BOB-2. The issue of unpaid salary was not in contest at the hearing. There is an obvious error on tabulation of the payable monies which does not require elaborative argument and the error was not contested. In holding so the court is guided by authority of the Court of Appeal (Kwach, Akiwumi and Pall, JJA) in *National Bank Of Kenya Limited v Ndungu Njau* [1997] eKLR cited in decision relied



on by the petitioner/ respondent by Muriithi J in *In re Estate of Mutio Mutwi Kamwilu (Deceased)* [2018] eKLR as follows:-

“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 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.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”(emphasis give)

29. The court finds that the issue of paid salary was not contested by the petitioner in his replying affidavit to the application, the error in the tabulation in Order 5 is self evident and does not require elaborative argument to be established as stated by the court of appeal in Court of Appeal (Kwach, Akiwumi and Pall, JJA) in *National Bank Of Kenya Limited v Ndungu Njau* [1997] eKLR (*supra*). The court holds it would be injustice and unreasonable to allow Order 5 of the judgment to stand as it is while there is uncontested evidence before court that the petitioner had been paid gross salary of Kshs 2,495,000.00 from February 2022 to February 2023. February 2023 being paid full salary and the rest of the period partial salary as he was on suspension. The judgment was delivered on 16th February 2023. The court finds failure to review order 5 of the judgment would lead to double payment of the petitioner as the order related to unpaid salary under order 4 hence unjust enrichment. The court holds the applicant established sufficient reason to review of Order 5 of the judgment delivered by myself on the 16th February 2023.
30. Order 5 of the judgment was based on gross salary(salary and benefits) subject to statutory deductions. The paid salary monies were not factored. The court held there is sufficient reason established for review of Order 5 which it proceeds to. Order 5 of the judgment was for payment of special damages of unpaid salary from February 2023 to 16th February 2023. The petitioner was paid full salary in February 2023 as per the period pay slips, banking details and and salary schedule (BOB-2). The salary schedule indicated expected gross salary was Kshs.395,000. The Petitioner was paid Kshs. 175,000/- monthly in the period February 2022 to January 2023. The outstanding unpaid salary and benefits was thus Kshs. 220,000/- per month for the period. Consequently the unpaid salary and benefits for the period February 2022 to January 2023 was 12 months at Kshs. 220,000/- total sum of Kshs. 2,640,000/- subject to statutory deductions. The court finds after PAYE the amount came to Kshs. 1,848,000/- as prayed in the application.
31. In conclusion the application is allowed and order 5 of the judgment delivered on the 16th February 2023 is reviewed to read:
 5. That the payment of special damages from February 2022 to-date is considered sufficient compensation for the violations committed by the respondents against the petitioner. The unpaid net salary is calculated applying the gross salary of Kshs. 395,000/- minus paid sum of



Kshs. 175000 for 12 months total sum of Kshs 2,640,000/- (award amount payable subject statutory deductions) total payable Kshs. 1,848,000/-.”

32. Each party to bear own costs in the application.

33. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF MAY 2023.

**JEMIMAH KELL,
JUDGE.**

In The Presence Of :-

Court Assistant: Lucy Macheso

Petitioner :- Lakicha Advocate

Respondent: Wabuko Advocate

