Rotich & 3 others v Governor, County Government of Kericho & another (Cause 42, 43, 44 & 45 of 2018 (Consolidated)) [2023] KEELRC 1344 (KLR) (6 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1344 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE 42, 43, 44 & 45 OF 2018 (CONSOLIDATED)

HS WASILWA, J

JUNE 6, 2023

BETWEEN

ALEXANDER KIMUTAI ROTICH & 3 OTHERS ..... CLAIMANT

AND

GOVERNOR, COUNTY GOVERNMENT OF KERICHO ..... 1ST RESPONDENT

THE CHAIRMAN, KERICHO COUNTY PUBLIC SERVICE BOARD ..... 2ND RESPONDENT

RULING

1. Before this court for determination is the claimants Amended Notice of Motion dated 2nd February, 2023, filed pursuant to article 50(1) of *the constitution*, Sections 3, 12 and 16 of the *Employment and Labour Relations Court Act*, Rule 13(6) and 23 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of law, seeking for the following Orders.;-

    1. Thatthis Honourable court be pleased to review, vary, set aside, discharge and or vacate the orders issued on 28th May 2018 consolidating this cause with Kericho ELRC No. 43 of 2018, 44 of 2018 and 45 of 2018 because though the Four (4) had been consolidated and were supposed to be heard together only this cause (Kericho ELRC 42 of 2018) was heard, the other Three (3) causes upon deconsolidation should proceed to hearing to final disposal.

    2. Thatthe Claimants in the causes Kericho ELRC Nos. 43, 44 and 45 of 2018 be granted leave to amend their memorandum of claims to claim salaries for the unexpired term of their contract of employment from the date of illegal and unlawful termination as the prayer for reinstatement of their employment has now been overtaken with time during the pendency of the causes and therefore not available to be granted by the court.

3. Thatthis application be considered together with the Notice of Motion applications by the Claimants dated 31.1.2022 as filed in Kericho ELRC 43, 44 and 45 of 2018.

4. In the alternative this Honourable Court be pleased to review its Judgement delivered on the 1st February, 2019 which judgement determined only cause no. 42 of 2018 whereas the said cause had been consolidated with causes Nos. 43, 44 and 45 of 2018 hence an error on the face of the record.

5. That costs of this Application be in the cause in any event.

2. The application is supported by the grounds on the face of the application and the affidavit of Willy Kipkemoi Keter deposed upon on the February 2, 2023.

3. In the affidavit, the claimant stated that parties consented to have the suits herein consolidated on the 28th May, 2018 and directions were taken for compliance with Order 11 of the Civil Procedure Code.

4. The reason for consolidating the files was to have them heard together because they had been filed under certificate of urgency seeking for reinstatement of the claimants who were then Chief officers of Kericho County Public Service Board.

5. After several months and in dire need of having a determination in the suit, the parties consented once again to have the claims herein heard by pleadings, affidavits, witness statements and filed documents together with submission without need to have parties give oral testimonies.

6. Despite consenting to have the Court rely on documentation in determining the cases herein, the Court delivered its judgement on February 1, 2019 in absence of the claimants and their counsels, owing to the lack of proper service of notice of delivery of judgement.

7. On accessing the judgement of the Court, the parties learnt that the Court had only delivered judgement with regard to cause no. 42 of 2018 and left the other three filed unheard and undetermined.

8. Since then, the claimants cause of action have changed cause as their contracts have now expired and they are now seeking for leave of this Court to amend their pleadings to reflect the current turn of events and seek for compensation for the unfair termination because the relief of reinstatement is no longer available.

9. In light of the foregoing, the claimant sought for the consolidation to be discharged and each file be heard on its own merit in line with Article 50(1) of *the Constitution*.

10. It is contended, that there is an error apparent on the face of the record in that the Court by its judgement of 1st February, 2019 only determined cause 42 of the 2018 to the exclusion of the others which were left in limbo yet they were consolidated.

11. It is also stated that there is is no Appeal lodged at the Court of Appeal save for an application for leave to file notice of Appeal out of time which was heard and the Application dismissed as such there is no live appeal that was ever filed.

12. Owing to the magnitude of the error at hand, Review orders would suffice and this Court is clothed with jurisdiction under Rule 33 (5) to set aside its own decision and hear the case a fresh with regard to the other files number 43, 44 and 45 of 2018 and subsequently allow the Application to amend the pleadings.

13. The Application is opposed by the Respondents who filed Grounds of Opposition dated 4th April, 2023. They are as follows;

1. The application is fatally defective and an abuse of the court process and the limited judicial time.

2. Judgment was delivered on 1st February 2019 and the Applicants opted to pursue an appeal at the time albeit out of time. When filing an appeal out of time was no longer viable following the dismissal of the application seeking leave to file an appeal of out of time. the Applicants decided to approach this court for review. as a second option. A party cannot pursue both an appeal and review at the same time. The Applicants simply want a second bite of the cherry with this application. The review was an afterthought after the Court of Appeal declined to grant them leave to file the appeal out of time on 21st July 2021.

3. The order of consolidation which the Applicants seek to set aside was issued on 23rd May 2018 before judgement was delivered. It was granted as part of procedure to expedite the hearing of the claims. Therefore, this Honourable Court is functus officio and does not have the jurisdiction to discharge interlocutory orders as sought in prayers 1,2 and 3 of the Amended Application dated 2nd February 2023.

4. In terms of prayer 4 of the amended application, the applicants have not established any mistake or error apparent on the face of the record as envisaged in Order 45 of the Civil Procedure Rules.

5. The Application for review has been filed after an unexplained, inordinate delay, without reasonable justification and the same is inexcusable.

6. The Applicants are just forum shopping with the intent to reopen the suit that was determined 4 years ago. The application is therefore bad in law, brought in bad faith. unmerited, and prejudicial to the Respondents.

14. The Application herein was canvassed by written submissions.

Applicants' submissions.

15. The Applicants submitted that each of the claimants in these causes were former Chief officer of Kericho County whose employment was terminated by the then Governor with effect from December 31, 2017 and not the County Public Service Board that is chaired by the 2nd Respondent. The claims herein were then lodged in court on February 7, 2018 to address the dismissal which the claimants felt was unfair.

16. It is submitted that all the claimants herein have a right to have their cases heard and determined as provided for under Article 50 (1) of *the Constitution*, therefore that they had legitimate expectation that the Court would determine all the causes having been consolidated but instead that the Court focused on only the lead file to the exclusion of the other three matter.

17. It was argued that Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules* gives this Court power to review its judgement. To support this argument, the Applicant cited the case of in *National Bank of Kenya v Ndungu Njau [1997]* eKLR concerning an error or omission apparent on the face of record:

> " A review may be granted whenever the court considers that it is necessary to correct an 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 the law''.

18. They also cited the case of in *Republic versus Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad [2019]* eKLR the court held 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."

19. On that basis, the applicants submitted that the error on record is the fact that the court failed to make a determination on the other three files which was consolidated with this lead file.

20. Contrary to the opposition of the Respondents, The Applicant submitted that they did not file an Appeal save for an application seeking for extension of time to file a notice of Appeal out of time, which the Court of Appeal declined, as such there was no Appeal that can bar them from filling this Review Application.

21. On the grounds that the delay is inordinate, the Applicants submitted that Under Rule 33 (l)of the *Employment and Labour Relations Court (Procedure) Rules*, the operative word used is "may within reasonable time" which the Respondents have confirmed through their response that the Applicant's first sought for leave to file a Notice of Appeal out of time. The Court of Appeal in its wisdom in declining to grant leave to file Notice of Appeal out of time felt that the grievances of the Claimants could be better dealt by way of review informing the filling of this Review application.

22. It was argued further that Rule 33 (5) of the *Employment and Labour Relations Court (Procedure) Rules* gives this court wide powers in considering applications for review and the orders it can grant if it finds merit on such application. It provides where an application for review is granted, the court may review its decision to confirm to the findings of the review or quash its decisions and order that the suit be heard again".

23. From the foregoing, it was submitted that this court will therefore be quite in order to direct that the Four (4) causes be heard again and thereafter make a determination on all the causes and in the alternative the court to exercise its judicial discretion by reviewing the Judgement delivered on the 1st February 2019.

24. The Applicants further urged this Court to make an order for the amendment of the claimants' pleadings in line with Rule 4(1) (d) of the *Employment and Labour Relations Court (Procedure) Rules* and supported this argument by citing the decision of *Ong'udi J in Kipkirui Mutai Vs Richard Kibet & Another Civil Appeal No. 17 Of 2014* at paragraph 15 held that:

> "The purpose of the provision for amendments in the law is to enable parties correct any errors, omissions etc so as to bring before the Court all the relevant material to enable the Court arrive at a just decision. "

25. The Applicant also cited the case of Court of Appeal in *Central Kenya Limited v Trust Bank Limited* [2000] 2EA 365 as follows:

> " A party is allowed to make such amendments as may be necessary for determining the real question in controversy so as to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action I introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side"

26. In conclusion, the Applicants submitted that, they have satisfied all the grounds for review as per the Employment and Labour Relation Procedure rules and supported their application with sufficient jurisprudence and vehemently opposed the respondent's grounds of opposition. They urged the Honorable court to exercises its discretion as per Rule 33 of the *Employment and Labour Relation(procedure) Rules* and Article 50 (1) of *the Constitution* of Kenya 2010 by allowing the application dated May 31, 2022 as prayed.

Respondents' Submissions.

27. The Respondent submitted from the onset that Judgement on the consolidated cases herein was delivered on 1st February, 2019 by Justice D.K.N Marete in presence of counsel for all parties. Upon delivery of judgment, the Applicants' counsel lodged an application for extension of time to file a Notice of Appeal and/or record of appeal to the said decision on 29th April 2019. All parties herein filed their affidavits in the court of Appeal application in Nyeri Civil Application No. 65 of 2019: *Alexander Kimutai Rotich V Governor, County Government of Kericho & Another* where they sought redress. However, on June 21, 2021 the court declined to grant the prayers sought. They then filed a reference under Rule 55 of the Court of Appeal Rules 2010, before the Court of Appeal against the decision delivered on 21st June 2021. That it's until the appeal process failed that the Applicants filed this Application.

28. It was submitted that a party cannot subject itself to both an appeal and review. It has to choose one. And if one fails, it cannot turn and try whether the other one will work out. It was argued that the Applicants have only approached this Court after the Appeal process failed almost 5 years down the line. He added that the Applicants simply sat on their rights when equity does not aid the indolent. Litigation must come to an end and the decree-holder should be left to enjoy the fruits of the judgement. A party cannot seek to re-open a case after such a long time as it will not serve justice if it is allowed to happen.

29. On whether the court should review the order dated 28th May 2022 deconsolidating Kericho ELRC Cause 42 of 2018, it was submitted that the order sought is based on a misleading fact the parties were absent when the judgement was read when all parties were present in Court on delivery of the said judgement. It was argued that this Honourable court is functus officio and does not have the jurisdiction to discharge the interlocutory orders as sought in the amended application. To support this argument, the Respondent relied on the case of *Telkom Kenya Limited vs John Ochanda [2014]* eKLR which dealt with the functus officio principle thus: -

> " Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon... The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or

pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.

30. They reinforced their arguments further by citing the Supreme Court decision in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013]* eKLR which cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832* in which the learned author stated;

> ..."The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

31. On whether the Court can grant leave to amend the pleadings, the Respondents submitted that the relevant law on amendment of pleadings is rule 14 of the *Employment and Labour Relations Court (Procedure) Rules 2016*. Rule 14(6) provides generally that courts will allow amendment of pleadings at any stage of the proceedings if the same will not occasion injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. It was submitted that the court has discretionary power to allow amendments before judgment for purposes of determining the real question or issue which have been raised by parties. In this they relied on the case of *Josiah Magena v Wakenya Pamoja Sacco Society Ltd[2017]*eKLR, the Court stated as a follows:

> " As in the cited cases above, the amendment of pleading even under the Court Rules requires that this be done before hearing commences and where the Court finds it necessary to call for further submissions, further documents may be submitted or filed by parties fourteen days before the case is set down for hearing. Upon the close of hearing, supplementary documents can be filed but not an amendment to pleadings".

32. On that basis, it was submitted that the end of justice will not be met if the amendment orders are granted herein after judgement.

33. On whether the court should review its judgement delivered on 1st February 2019, it was submitted that Order 33 of the *Employment and Labour Relation Court (Procedure) Rules* ,2016 gives this Court powers to review its orders and provides as follows

> " 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 judgement or ruling-

a. If there is discovery of new and important evidence which, after the exercise of due diligence, was not within the knowledge of 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."

34. In determining an error on the face of record as a ground which the Applicants have relied on in seeking for review, the Respondents relied on the case of *National Bank of Kenya Limited v Ndungu Njau [1997]* eKLR that held that:

> " 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.

35. Additionally, in *Nyamogo and Nyamogo v Kogo* [2001] EA 174, the Court of Appeal held that:

> " An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. 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 opinions, 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.(Emphasis ours) 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.

36. Based on these case law, the Respondent submitted that the Applicants have not met the threshold to warrant review of the judgment delivered by Hon. Justice D.K Njagi Marete on 1st February 2019 on the basis that there was no error apparent on the face of the record. Furthermore, that the Application herein has been filed after an unexplained inordinate delay given that judgment was delivered on 1st February 2019 yet the application for review was filed on 31st May, 2022 and amended on 2nd February, 2023 about four years later. They argued that the Applicants are guilty of inordinate delay as was defined in *Mwangi S. Kimenyi Vs. Attorney General & Another (2014)* eKLR the court considered what amounts to inordinate delay thus;

> " There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth" nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable..."

37. The Respondent argued that equity does not aid the indolent but the vigilant. Therefore, the Applicants having slept on their right for far too long cannot purport to move this Honourable court seeking review of the judgment. Moreover, they have not given any reason explaining why they delayed in applying for review. Based on the above, they argued that the prayer seeking review of the judgment is untenable in law and an abuse of the court process and urged urged this Court to dismiss the entire Application with costs.

38. I have considered the averments of the parties herein. This claim was filed in 2018 and a judgment rendered on 1/2/2019.

39. From the pleadings herein, after the judgment, the applicants herein filed an application before the Court of Appeal seeking to file an appeal out of time but their application was dismissed accordingly.

40. This application for review was then filed after leave to appeal was denied.

41. Rule 33 of the *ELRC (Procedure) Rules 2016* state as follows;

“33.	Review (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 —

(ii) 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) the judgment or ruling requires clarification; or
		(d) for any other sufficient reason.
	(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".
(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.	
(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".

42. Indeed under this rule, this court has powers to review its judgment, ruling or orders. The applicants have pointed out that the error on record is failure by the court to consider the causes of the other claimants after consolidating this claim with 3 others.

43. The respondents have argued that the orders sought by the applicants are untenable because the applicants sought to appeal the orders of the court which was denied by the Court of Appeal before turning to this court for review.

44. The respondents submit that the applicants cannot seek to appeal and review the same orders as sought by the applicants.

45. Whereas there is no express provision in the rules of this court denying the applicants an opportunity to file both an appeal and review, I note that judgment in this cause was rendered on 1/2/2019 over 4 years ago.

46. The law envisages that if indeed the applicants were aggrieved by the orders of this court, they were to file orders of review within a reasonable time. In this case however, the applicants are seeking review orders 4 years down the line which I consider inordinately long.

47. The applicants also seek leave to amend their pleadings and introduce a new cause of action, a claim for damages.

48. Section 90 of the *Employment Act* 2007 states as follows;

"90.	Limitations Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof".

49. In view of this provision, any amendment envisaged at this point will be time barred and therefore a waste of precious judicial time.

50. I therefore find the application sought without merit and I dismiss it accordingly.

Ruling delivered virtually this 6th day of JUNE, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mercy Munyao for Respondent – present

Claimants – absent

Court Assistant – Fred