



**Kenya County Government Workers Union Bungoma County Branch v
Bungoma County Public Service Board & another; Nyukuri (Applicant)
(Petition 1 of 2019) [2023] KEELRC 1822 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1822 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION 1 OF 2019
JW KELI, J
JULY 28, 2023**

BETWEEN

**KENYA COUNTY GOVERNMENT WORKERS UNION BUNGOMA COUNTY
BRANCH PETITIONER**

AND

BUNGOMA COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

THE COUNTY GOVERNMENT OF BUNGOMA 2ND RESPONDENT

AND

BARASA KUNDU NYUKURI APPLICANT

***(RULING ON CONSOLIDATED APPLICATIONS TO BE DETERMINED
TOGETHER FOR REVIEW. APPLICATION DATED 27TH JUNE 2023 BY
BARASA KUNDU NYUKURI AND APPLICATION FOR REVIEW DATED
30TH JANUARY 2023 BY THE RESPONDENTS ON JUDGMENT DATED
13TH MAY 2020 BY JUSTICE MATTHEWS N. NDUMA IN THE PETITION)***

RULING

Background and preliminary facts about the application for review

1. ..
2. The applicant/ Mr. Nyukuri states that he works for a civil society organisation called Torch Africa that has since the inception of the devolved system of government in 2013, played a leading watch dog role against maladministration and mismanagement of public funds and other resources by the successive county governments, pursuant to the provisions of Article 1,2, 3,10,22,35,47,48,50,201,227,232 and 258 of [the Constitution](#) of Kenya , 2010(Read Governor Kenneth Makelo Lusaka Regime 2013-2017,



Governor Wycliffe Wafula Wangamati Regime 2017 -2022 and currently Governor Kenneth Lusaka Makelo regime 2022-2027).

3. That the Respondents herein filed their application for review of judgement orders , decrees and claims in respect to petition no. 1 of 2019 on 30th January 2023.
4. That the Applicant filed his Application for Review of judgement, orders, decree and claims in respect to Petition No.1 of 2019 under Certificate of urgency on 7th February 2023.
5. That the Respondent on 28th February 2023 filed grounds of support for the Applicant's application for Review of Judgement , orders, Decree and Claim in respect to Petition No. 1 of 2019.
6. That the Applicant in his Notice of Motion Application dated 7th February 2023, sought for review and setting aside of the judgment , orders, decree and claims delivered by Hon Justice Nduma then of Employment and Labour relations court at Bungoma in respect to Petition Cause No 1 of 2019 on 13th May 2020 in favour of the Kenya County Government Workers Union-Bungoma Branch against the Bungoma County public Service and County Government of Bungoma(i.e., Respondents therein).
7. That the judgement that was delivered on 13th May 2020 by the Employment and Labour Relations Court at Bungoma in respect to Petition No. 1 of 2019 in which the Petitioner succeeded and the court granted the following reliefs to the petitioner:-
 - a. the continued employment of the listed 463 Grievants /members of the petitioner by the respondents on the casual basis is a violation of Section 5, 35 and 37 of the Employment Act, Cap 11 of 2007 and violates Articles 27,28,41 and 232 of the Constitution of Kenya ,2010.
 - b. The court do hereby direct the Respondents to place all the affected employees referred to above on payroll and apply to each one of them the minimum terms and conditions of service as provided under parts II, III, IV,V and VI of the Employment Act, cap 11 of 2007.
 - c. The Respondents be and are hereby ordered to compute , file and pay arrears salary due and owing. To all the Grievants , named in this petition under their employment within 60 days.
 - d. Costs of the petition do follow the event.
8. The Applicant states that he was a concerned citizen, tax payer and resident of Bungoma County aggrieved by the aforementioned Judgement, orders, claim for and decree thereto. On the 7th February 2023, the Applicant filed a notice of motion Application under certificate of Urgency for review of the said judgment orders, Decree and Claim in respect to Petition Cause no. 1 OF 2019.
9. Mr. Nyukuri grounds for review of judgment in Petition no. 1 of 2019The petition was filed out of the stipulated time frame of 3 years without the petitioner seeking leave of court.The deponent was not a member and/or official of the petitioner, since he had retired from the county public service of Bungoma in April 2016.There is discovery of new evidence that there were two (2) different lists of grievants certified by the Deputy registrar of the Employment and labour Relations Court at Bungoma on the same date of 17th August 2021.The purported Grievants were not members of the Petitioner and according to the Petitioner's constitution, it cannot represent non-members in any labour dispute in Court.There was admission before the Honourable court by the 2nd Respondent that there was no sufficient budget to hire the alleged Grievants on permanent and pensionable terms.There were fatal errors in the two lists of Grievants submitted to the Honourable Court.



The Applicant/ Mr. Nyukuri prayers:-

10. That he be granted permission to file his application for review of the judgement orders, decrees and claims in Petition No. 1 of 2019 because it raises substantial questions of law and facts that requires hearing and determination by this Honourable Court in public interest.
11. That the particulars and grounds of the Application will enable the Honourable Court to reach a just decision with regard to the genuineness and authenticity of either of the two (2)lists of Grievants/ casual workers(i.e., list of 463 and list of 660) , which were both certified by the Deputy Registrar of the employment and Labour Relations Court on the same date of 17th August 2021.
12. That this Honourable Court establishes whether or not the Deponent Moses Maelo Muyundi in Petition No. 1 of 2019 is a bona fide member of the Exparte Applicant/Petitioner(i.e.,Kenya County Government workers Union -Bungoma County Branch).
13. That this Honourable Court finds that the alleged Grievants /casual workers were not members of the Exparte Applicant /petitioner (Kenya County Government workers Union-Bungoma county Branch).
14. That the Honourable court declares that the two (2) lists of alleged Grievants /casual workers were either obtained fraudulently or alters by the petitioner and /or in conspiracy with some judicial officers and were not consistent , nor authentic and therefore declared null and void.
15. That the Honourable court Vacates its judgement , orders , decrees and claims dated 13th May 2020 because it was misinformed by the deponent/petitioner. the Applicant has come across errors in the said petition based on new information and evidence contained in the application, supporting affidavit , supplementary affidavit and annexures.
16. That the Honourable court orders and direct the Respondents therein (i.e., the county Public Service Board and the County Government of Bungoma) to carry out head count of alleged casual workers and scrutiny of the payrolls for 2016 and 2019 and other employments documents for all the Grievants on the list of 463 and or 660 persons; purporting to have been casual workers of the Defunct local authorities, this could be executed by way of demanding from all the Grievants /casual workers presentation of the Original and certified copies from their Academic Certificates & testimonial documents, original and certified copies of their appointment and deployment letters, original and certified copies of their national identification cards, letters of reference and recommendation letters from their immediate supervisors.

The Respondent's Application

17. Respondents grounds in support of their application dated 30th January 2021
18. The Respondents stated on the 10th February 2023 they filed Application dated 30th January 2023 with supporting grounds and supporting affidavit by Joseph Wakoli Wambati stating as follows:- That all persons on the list filed in Court by the petitioner herein were not members of the Petitioner. That there was no minute resolution filed in court by the Petitioner authorising the Deponent to file a suit on behalf of the people who were not their members. That the petition was filed in court out of time without seeking the leave of the court. That the Honourable Court did not have jurisdiction to entertain the petition and therefore the entire process was an abuse of the due process of the Court. The Person who signed the court papers, one Moses Maelo Muyundi did not have the capacity to sign the petition and or the Verifying affidavit on behalf of the petitioner as he was not the Secretary General of the Petitioner. That in their taskforce considering the two lists they found some of the casuals had been



employed, others left on expiry of casual engagement and others were minors. The respondents stated the delay was not inordinate as the order was issued during COVID times in 2020. That the documents were filed by a stranger.

The Respondent's Prayers

19. The respondents filed an application dated 30th January 2023 seeking nine prayers and the relevant prayer for this matter is prayer 6,7,8, and 9 which are as follows:-
 1. Spent.
 2. Spent
 3. Spent
 4. Spent
 5. Spent
 6. That the Honourable Court be pleased to set aside the judgement of this court in Bungoma Employment and Labour relations court constitutional petition no. 1 of 2019 delivered on 13th May 2020 and all Consequential orders thereto.
 7. That the Honourable court be pleased to review the judgement of this court in Bungoma Environment and Labour Relations Court constitutional petition No. 1 of 2019 delivered on 13th May 2020 for failure to comply with procedure under section 77 of the County Government Act and section 87 of the *public Service commission Act* and make finding that the said petition was incompetent and all consequential; orders thereto.
 8. That the Honourable court be pleased to set aside the said judgement and all consequential orders thereto.
 9. That costs for this application be provided for.
20. That the application by the Respondents was supported by the grounds on the face of the application and further supported by an affidavit sworn on 30th January 2023 by Joseph Wakoli Wambati, the County Secretary and head of Public service, the same was also further supported by the Supplementary affidavit sworn on 15th March 2023 by Monica Salano Fedha, the Acting County secretary and head, of public Service.

The Petitioner's Response

21. The petitioner through their advocate filed replying affidavit sworn by Moses Maelo Muyundi sworn on 28th February 2023 and a supplementary affidavit sworn on 30th March 2023 in which among others stated he was elected shop steward and still in office, that he could bring the petition under article 22 of *the constitution*, that the respondents had already commenced implementing the decision as per record of meetings held with the union. Moses further stated Mr. Nyukuri was a busy body.
22. The court thereafter directed that the application for review by the respondents and the applicant be consolidated and same be heard together as the issues were the same save for the Applicant seeking to be allowed to seek the review.
23. On the 29th May 2023, the court directed the application be canvassed by way of written submissions. The parties complied and filed their submissions in court. There was a delay in determination as the Union applied to withdraw the entire suit which was opposed by the lawyer who was on record and the



court had to determine that issue first. The court disallowed the notice to withdraw the petition as it was functus officio. The ruling was delivered on the 7th July 2023.

Applicant's submissions- (Barasa Kundu Nyukuri)

24. Mr. Nyukuri identified the following Issues for determination by the court:-
- i. Whether or not this application fulfilled the legal requirements for review of the judgement , orders, decree and claims thereto.
 - ii. Whether the petition was within the time frame stipulated in section 90 of the [Employment Act](#) 2007 and other enabling laws.
 - iii. Whether the deponent Moses Maelo Muyundi has locus standi or was a bona fide member and or official of the exparte applicant /petitioner and had consent or capacity to file the said the said petition.
 - iv. Whether the Grievants were members of the petitioner to warrant legal representation in their dispute with the respondents
 - v. Whether the alleged Grievants ever worked as casual workers for the defunct local authorities , the predecessor of the respondents in petition 1 of 2019.
 - vi. Whether or not the impugned judgement , orders, decree and claims of the petitioner were based on facts and law or misinformation and lies to the Honourable court.
 - vii. Which of the two court certified lists on 17th August 2021 were authentic for execution / implementation by the Respondents in petition no. 1 of 2019?
 - viii. Whether the Grievants /alleged casual workers had any legitimacy and employment and labour rights to compel the employer(I.e., Respondents therein) to convert their casual terms to permanent and pensionable terms.
25. On whether or not this application fulfilled the legal requirements for review of the judgement , orders, decree and claims thereto, Mr. Nyukuri submits:-
26. This application for review is fortified by section 5 of the [Judicature Act](#), section 80 of the civil procedure Rules , 2010 particularly Order No. 45 and Rule 33 of the Employment and Labour Relations Court, 2016. The reasons and grounds in this Application fulfilled all conditions set out in Order 45 of the civil procedure rules 2010.
27. The Applicant further avers that his Application for review of Petition No. 1 Of 2019 that was consolidated with a similar one on 1st March 2023 filed under Rule 3 of the Employment and Labour Relations Court Rules, 2016 , which gives four(4) scenarios where this Honourable court can review its orders 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 judgement 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 sub paragraphs (b) , (c) or 9d) , 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.....”
28. The Applicant submits that the Honourable court has jurisdiction under section 80 of the Civil Procedure Act, CAP 21, to admit the application for Review in petition no. 1 of 2019. This particular provision gives the court the power to make orders for review of the judgement in any petition of a similar nature .in this context, Section 80 of the Civil Procedure Act, Cap 21 provides as follows:-
- “ any person who considers himself aggrieved –
- a). by a decree or order from which an appeal is allowed by this act , but from which no appeal has been preferred; or
 - b). by a decree or order from which no appeal I allowed by this Act, may apply for review of judgement to the court which passed the decree or made the order , and the court may make such order thereon as it thinks fit.”
29. The applicant submits that the reasons he has given herein in the application seeking for review of the judgement, orders, decree and claims in petition no 1 of 2019 dated 3 May 2020 falls under the above-mentioned legal framework and are sufficient enough to warrant this Honourable court to review the impugned judgment , orders , decree and claims thereto. This application for review is anchored in the relevant laws and has merits and should therefore be allowed, heard and determined by this Honourable court.
30. On Whether the petition was within the time frame stipulated in the section 90 of the Employment Act, 2007 and other enabling laws.
31. The applicant /Mr. Nyukuri submits that In petition 696 of 2019, petition 3 of 2017 and petition no. 250 of 2019 of the Employment and Labour Relations Court pronounced that section 90 of the Employment Act, 2007 is framed in mandatory terms. A claim based on a contract of employment must be filed within 3 years . In this context, petition no. 1 of 2019 was time barred under the provisions of section 90 of the said Act. The petitioner never sought any leave of court before filing the said petition out of time. The dispute was an employment and labour issue which should have been handled internally by the respondents before the petitioner moved to court.
32. On Whether the deponent Moses Maelo Muyundi had locus standi or was a bona fide member and / or official of the petitioner, the Applicant submits:-
33. That the deponent in the petition No. 1 of 2019 , one Moses Maelo Muyundi who filed the petition on behalf of the petitioner had no locus standi to prosecute the matter as he was not the national general secretary or Bungoma Branch secretary or authorized officer of the petitioner therein(read the Kenya county government workers union).The Deponent did not submit any authentic documents that gave him the express authority to prosecute the said Petition on behalf of the Petitioner(i.e., a membership Organisation and its mandate of representation was limited to fully paid members only.)



34. That the representation of the alleged Grievants by the deponent and Petitioner in petition Cause no. 1 of 2019 had no legal basis and rational was not in compliance with the Petitioner's Constitution, 2016, particularly with provisions of Article 4(2) b of *the Constitution* of the KCGWU, 0216, which stipulates fees and other levies for all persons seeking to be members of the said Union must pay Kenya Shillings one hundred (Kshs. 100-) as entrance fee and two percent(2%) of the gross earnings per month as subscription fees up to A Maximum of Kenya shillings five hundred (Kshs. 6500/-). The cited section of the Petitioner' Constitution is annexed and marked BKN '4" on the supporting affidavit of the applicant herein dated 7th February 2023.
35. That the Deponent did not file before this Honourable court in Petition No. 1 of 2019 any Written consent from the secretary of the Petitioner and /or Kenya County Government Workers Union -Bungoma County Branch. He did not file in the Honourable court any minute resolution of a special meeting held by the Bungoma Branch executive Committee in respect to the said petition. The Applicant asserts that it was necessary requirement as per the KCGWU Constitution For The deponent Moses Maelo Muyundi to obtain a written consent to express authority before filing the petition Cause No. 1 of 2019 from an authorised officer Or structure of the petitioner , before filing the Petition cause No. 1 of 2019. The Lack of such express authority is not merely procedural or technical issue as it goes to the roots of the operations of the Petitioner therein.
36. That according to Article 4 and particularly Sub Article 2(b) iv of the Petitioner's constitution , which states that any member who is in arrears of his/her subscription for a period of 13 weeks shall not stand for election as an official of any structures of the union(i.e., including the position of a shop steward and coordinator). Therefore, the deponent (Moses Maelo Muyundi) in Petition no 1 of 2019 was not a legitimate official to file any petition on behalf of the Petitioner. The Applicant submits that the deponent therein (Moses Maelo Muyundi) was by the time of filing the said petition in 2019 not a bona fide member and /or official of the Kenya County Government Workers union(KCGWU) -Bungoma branch. He was an impostor, impersonator and busy body , masquerading as a Union steward and Coordinator of the Petitioner.
37. The applicant further submits that according to Article 4 and particularly Sub Article 2(b) iv and Article 8(4) of Petitioner's Constitution , an official who is in arrears of his /her subscription for a Period of thirteen weeks ceased to be an official . in this context, Moses Maelo muyundi ceased to be a member and purported shop steward and coordinator OF KCGWU - Bungoma County branch way back in 2016 upon his retirement and upon the expiry of 13 weeks from 9th April 2016. Article 4(4) of the petitioner's Constitution , 2016, states that membership in the said union terminated when The member has his /her employment lawfully terminated, is expelled, dies , resigns by giving fourteen (14) days' notice to the general Secretary , in any way becomes so incapacitated that he or she would cannot reasonably sustain membership.
38. The applicant submits that the deponent was not the coordinator and shop steward of the ex parte Applicant/ petitioner(.e reads the Kenya county government Workers Union (KCGWIU)-Bungoma Branch. This is based on the following reasons:-
- a. The purported letter from the county Labour officer did not name /appoint Mr. Moses Maelo Muyundi (;Petitioner therein in petition no 1 of 2019) as the "Coordinator" of KCGWU - Bungoma Branch). It simply listed the names and sub-counties of the nine (9) shop stewards, with Mr. Moses Maelo Muyundi as the Shop Steward for Kanduo sub-County. The cited memo was a communication note/memo to the Registrar of trade Unions in Nairobi about the trade unions elections that were held by the union of Kenya County Government Workers



(UKCGW)-Bungoma Branch on the 4th May 2016. The Same memo was copied to the labour commissioner , branch Secretary , KCGWU Bungoma or Registrar of trade Unions.

- b. The County Labour officer did not appoint Moses Maelo Muyundi as the Shop Steward and coordinator for the UKCGW as purported letter that is annexed and marked MMM”1” in his replying affidavit dated 28TH February 2023. The cited letter/Communication Memo to the registrar of trade Unions in Nairobi did not state anywhere in its contents that Moses Maelo Muyundi had been appointed as the shop steward and coordinator out of the nine(9) Shop stewards elected on 4th May 2016. (i.e./ a single paragraph Memo) or give any express authority /consent to the Deponent to represent the Kenya County government Workers Union-Bungoma county branch in Petition Cause NO. 1 of 2019.
39. The Deponent and/or the petitioner did not submit in the Honourable Court any letter of appointment from the national general secretary or Branch Secretary with regard to the consent or express authority to swear a supporting Affidavit on behalf of the KCGWU Exparte Applicant in Petition Cause no. 1 of 2019 and subsequent Applications before this Honourable Court as stipulated in the Petitioner’s constitution. The consent to represent the KCGWU must be based on a Minute resolution of a special meeting convened for such a matter like filing a petition in the Employment and Labour Relations Court at Bungoma. The KCGWU like other trade unions have decision making and communication protocols that are government by the union constitution , as confirmed by the Applicant in his Annexures marked BKN”3” on the supplementary affidavit, the deponent in the said petition , he had long retired from the county public service OF Bungoma, and was not a contributor or a fully paid-up member as illustrated by the human resource payment schedules and deductions from the Petitioner’s members.
 40. That from the foregoing analysis of the union Constitution , the non -membership and non-official status of one Moses Maelo Muyundi by the time of filing the Petition No. 1 of 2019 has been proved beyond any reasonable doubt by the applicant herein. that since the deponent was not a bona fide member or an authorised officer of the petitioner , he had no capacity to file and prosecute Petition No. 1 of 2019 and as well as Bungoma ELRC Judicial review No. E001 of 2022. That At the time of the said trade union Elections, the deponent had retired from County Public service on 9th April 2016 as illustrated by his last pay slip and was not therefore an active member and eligible to vie for the position of a shop steward.
 41. On whether the grievants were members of the petitioner to warrant legal representation in their dispute with the respondents the Applicant submits:-
 42. That the listed persons(Grievants) alleged to have been employed by the defunct local authorities of Bungoma were not at any given time members of the Petitioner (Kenya county government Workers Union- Bungoma Branch). This has been confirmed by the Applicant’s list of Union Members for the Period 2016 to 2023 annexed on his supplementary affidavit. The applicant categorically states that none of the 463 and /or the 660 Grievants are fully paid-up members of the Petitioner (KCGWU- Bungoma Branch) and could not have been represented by the Deponent on behalf of the said petitioners as per provisions of Article 3 on the objects of the Petitioner’s Constitution that was annexed to the Application for Review dated 7th February 2023. This has been illustrated by the herein from the Certified lists of Payment Schedule And Deductions By The 2nd respondent IN petition no. 1 of 2019(i.e., the county government of Bungoma) from the petitioner ‘s bona fide (registered) members, obtained from the Director of Human resource in Bungoma County dated 3rd March 2023 as illustrated in Annexure marked BKN “4” A,B,C,D,E & F on the Applicant’s supplementary affidavit.



43. The deponent deliberately or knowingly failed to file or submit alongside his petition No. 1 of 2019 an annexure of the Union Registers containing names of 463 or 660 Grievants (purported members) from the CGWU-Bungoma County Branch. That register of members should contain details of all the members who are based in that County (Bungoma County), in the custody of the branch secretary. The mandatory details are: Sex, date of birth and personal contacts (postal, email and telephone), and station of employment, (section/department/unit) in the County. This requirement for details in the registers for the shop steward floor level, branch and headquarters of the Petitioners is a mandatory requirement under Article 4(2) (d) of the petitioner's Constitution. Article 4(2)e of the petitioner's Constitution, 2016, which does not allow non-members of the said Union to participate in all its activities, including; decision making processes, vote for a candidate of his/her choice during elections, vie for any position in the governance structures of the union and/or benefit from legal representation in Employment disputes such as the one canvassed in petition No. 1 of 2019.
44. The Applicant states he had copies of national identification cards for two (2) under-age individuals on the list of 463 and /or 660 Grievants who were young and in primary school by the year 2011, 2012 or 2013 during the period of transition to County Government it was alleged by Moses Maelo Muyundi that they were part of the alleged Casual workers of the Defunct Local Authorities, which the Honourable court in its judgement, orders, decree and claims declared that the 1st and 2nd Respondents) in Petition Cause no. 1 of 2019 to issue them with letters of appointment on permanent and pensionable terms, to place the affected employees on payroll and to compensate them in respect of their salary arrears.
- Submissions by the officials of the Petitioner Dated 29th June 2023 Filed By Ms.Mary Murongoro(Chair of KCGWU Bungoma County Branch); Mr. Florian S. Nganga(Secretary of KCGWU Bungoma County Branch); Mr. Winslaus Puria(Treasurer of KCGWU Bungoma County Branch
45. That they are the legal and legitimate officials of the Kenya County Government Workers Union(KCGWU) Bungoma county Branch and were gazetted by the Registrar of Trade Unions in Nairobi. It is instructive to note that all the legitimate union officials appeared in person and made their presentation before this Honorable court on 29th May 2023. That they are aware Of the petition no 1 OF 2019 THAT was ruled in favour of the alleged Grievants that was delivered on 13th may 2020 by the Employment and labour Relations Court.
46. That they were aware of the Judicial Review Application FOR contempt OF court No. 001 of 2022 by the Deponent, Mr. Moses Maelo Muyundi against the County Public Service Board and the county government of Bungoma, without our authority and consent as the Bungoma county Branch officials of the Kenya county Government workers union.
47. That the Deponent on Moses Maelo Muyundi in the Petition and Judicial Review Application is not a bona fide member and/or official of KCGWU Bungoma County branch in accordance with Article 4 of the Union Constitution, 2016 and therefore not authorised to transact any business on its behalf. That the deponent retired from the County public service in April 2016 and has no legitimacy to file a suit in any court of law on behalf of the KCGWU Bungoma County branch as stipulated in article 4(4) of our Union constitution, 2016.
48. That as a Branch of KCGWU they were opposed to the contempt Application because the legitimate officials were not involved or consulted by the deponent before filing the said petition and judicial Review Application. That there was no KCGWU Bungoma Branch County Branch Minute resolution that granted consent or power of attorney to Moses Maelo Muyundi to file any suit in the Employment and labour Relations County at Bungoma.



49. That the advocate on record for the Deponent Mr. Robert Wamalwa was not given instructions or hired by the KCGWU Bungoma County Branch. That is why the Union officials appeared in person. That why they resolved to withdraw from the Contempt application by the deponent through his advocate on record Robert Wamalwa because there were two conflicting list of grievant (430 and 660), which could not be verified and authenticated without the intervention and direction of this Honourable Court.
50. That they were opposed to the contempt of court application because of the political goodwill, positive gesture and willingness of the Respondents herein(i.e., County public Service board and the County Executive of Bungoma) through various Tripartite Consultative meetings with the Branch officials of the Union.
51. That the alleged Grievants in Petition No. 1 of 2019 were not registered members of Bungoma County Branch of the Kenya County Government Workers' Union. They are only eligible to join the union after being employed and /or confirmed on permanent and pensionable terms of the county government of Bungoma and upon payment of requisite registration fee and subscription fees stipulated in Article 4(2)b of our union Constitution, 2016.

The Respondent's Written Submissions

52. The respondents submit that by a petition dated 1st April 2019 and filed in court on 1st April 2019, the petitioner Kenya County Government workers Union -Bungoma County Branch brought this Petition seeking inter alia the following prayers:-
 - a. A declaratory order compelling the respondents pursuant to Section 37(a) and (b) of the Employment Act, cap 226 (207) to issue to the petitioner's affected members working for the respondents on casual terms the letters of appointment on Permanent and pensionable terms.
 - b. a declaratory order compelling the Respondents to place the affected employees on payroll.
 - c. The respondents be ordered to compensate the petitioner's affected members in respect of their salary arrears due to them.
 - d. Costs of the suit.
 - e. Any other relief the court may deem fit and just to grant.
53. That the petition was supported by the supporting Affidavit sworn by Moses Maelo Muyundi sworn on 1st April 2019 and filed in court on the same date. The deponent stated in his affidavit that he was the coordinator and shop steward of the petitioner and had the authority from his fellow union officials to swear the affidavit in support of the Petition and on behalf of the petitioner. The Petitioner argued that the county government in its discretion only confirmed some of the said casual employees to permanent and pensionable leaving the rest due to nepotism and favoritism. That the said Grievants who are members of the petitioner had remained on casual terms for more than seven years at the time of filing the Petition contrary to the provisions of the Employment Act.
54. That the respondents filed their responses via replying affidavit sworn on 12th June 2019 in which they denied that the County Government of Bungoma issued Letters of Appointment to the Grievants who alleged to be members of the petitioner. The Respondents also denied that the Grievants are eligible members of the Petitioner and further denied knowledge of the Grievants being employed by the defunct Local Government. The Respondents further denied having violated any constitutional right or freedom of the alleged Grievants and no such prove occurred in this matter and requested forth dismissal of the Petition.



55. That the petition was thereafter heard by way of written submissions and judgement was delivered on 13th May 2020 as follows:-
- a. the Court declares that the continued employment of the listed 463 Grievants /members of the petitioner by the respondents on casual basis is in violation of section 5, 35 and 37 of the Employment Act, No. 11 of 2007 and violates Article 27,28,41 and 232 of the constitution of Kenya ,2020.
 - b. The Court directs the respondents to Place all the affected employees referred to above on payroll and apply to each one of them the minimum terms and conditions of service provided under parts II,III,IV, V AND VI of the employment Act, 2007.
 - c. The Respondents to compute , file and pay arrears salary due and owing to all the Grievants , named in this petition under their Employment within 60 days.
 - d. Costs follow the events.

The respondents submissions on applicable law on review

56. The respondents submit that the substantive law on review is found under section 80 of the Civil Procedure Act which states as follows:-

“

“80. Any person who considers himself aggrieved-
A, By a Decree or order from which an Appeal is allowed by this Act but from which no Appeal has been preferred; or

By a Decree or order from which no Appeal is allowed by this Act may apply for review of Judgement to the court which passed the Decree or made the order , and the court may make such order thereon as it thinks fit.” Further Order 45 which states as follows:-

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 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 judgement to the court which passed the decree or made the order without unreasonable delay.”

57. To buttress their submissions the respondents relied on the decision in In Republic v Public procurement Administrative review Board & 2 Others (2018) eKLR where it was held :-

“Section 80 gives the power of review and order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds ; a)discovery of new and important matter or evidence which after



the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him 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) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

58. Further in *Pancras T.Swai V Kenya Breweries Limited* (2014) eKLR where the Court of Appeal Held:-

‘Order 44 rule 1(now order 45 rule 1 in the 2010 Civil procedure Rules) gave the trial court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.”....As repeatedly pointed out in various decisions of this court, the words , “for any sufficient reason” must be viewed in the context firstly of section 80 of the *Civil Procedure Act*, cap 21 Which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words needs not be analogous with the other grounds specified in the order.’

59. The Respondents submit that the court of Appeal in the aforementioned *Pancras T. Swai* ‘s case also cited with approval the case of *Sarder Mohamed V Charan Singh Nand Sing and Another* (1959) EA 793 where the High Court held that section 80 of the *Civil procedure Act* conferred an unfettered discretion in the court to make such order as it thinks for on review and that the omission of any qualifying words in the section was deliberate. That in *Shanzu investments limited v Commissioner for Lands* (Civil Appeal No. 100 of 1993) the Court of APPEAL Upheld its earlier decision in *Wangechi Kimate & Another Vs, Charan Singh* (C.A. No. 80 of 1985)(unreported) where it was held :-

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the *Civil PROCEDURE act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general held could be said to be analogous. “

Issues for determination by the respondents

60.

- a. Whether the Respondents and the Applicant have fulfilled the conditions necessary for the review of the judgement of the court dated 13th May 2023
- b. who should bear the costs?

Determination

61. The procedure for review of this specialist court is under rule 33 of the Employment and Labour Relations Court Procedure Rules 2016. It is provided:-

‘33.

(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.” The court finds that the rules mimic order 45 of the Civil Procedure Rules with slight modifications and the court finds that reliance on order 45 of the Civil Procedure Rules was a procedural technicality that did not affect the validity of the applications.

62. The respondents filed an application dated 30th January 2023 seeking nine prayers and the relevant prayer for this matter is prayer 6,7,8,and 9 which are as follows:-

- a. That the Honourable Court be pleased to set aside the judgement of this court in Bungoma Employment and Labour relations court constitutional petition no. 1 of 2019 delivered on 13th may 2020 and all Consequential orders thereto.
- b. That the Honourable court be pleased to review the judgement of this court in Bungoma Environment and Labour Relations Court constitutional petition No. 1 of 2019 delivered on 13th May 2020 for failure to comply with procedure under section 77 of the County Government Act and section 87 of the *public Service commission Act* and make finding that the said petition was incompetent and all consequential; orders thereto.
- c. That the Honourable court be pleased to set aside the said judgement and all consequential orders thereto.
- d. That costs for this application be provided for.

63. The Applicant / Barasa Kundu Nyukuri, brought the application as a concerned citizen. He said he was aggrieved with the judgment in the petition delivered on the 13th may 2020 for reasons which the court has outlined above. He then sought for review of the decision on the grounds outlined above. Mr. Nyukuri seeks for the following orders:-



- i. That he be granted permission to file his application for review of the judgement orders, decrees and claims in Petition No. E001 of 2019 because it raises substantial questions of law and facts that requires hearing and determination by this Honourable Court in public interest.
 - ii. That the particulars and grounds of the Application will enable the Honourable Court to reach a just decision with regard to the genuineness and authenticity of either of the two(2)lists of Grievants/casual workers(i.e., list of 463 and list of 660) , which were both certified by the Deputy Registrar of the employment and Labour Relations Court on the same date of 17th August 2021.
 - iii. That this Honourable Court establishes whether or not the Deponent Moses Maelo Muyundi in Petition No. 1 of 2019 is a bona fide member of the Exparte Applicant/Petitioner(i.e., Kenya County Government workers Union -Bungoma County Branch).
 - iv. That this Honourable Court finds that the alleged Grievants /casual workers were not members of the Exparte Applicant /petitioner (Kenya County Government workers Union-Bungoma county Branch).
 - v. That the Honourable court declares that the two (2) lists of alleged Grievants /casual workers were either obtained fraudulently or alters by the petitioner and /or in conspiracy with some judicial officers and were not consistent , nor authentic and therefore declared null and void.
 - vi. That the Honourable court Vacates its judgement , orders , decrees and claims dated 13th May 2020 because it was misinformed by the deponent/petitioner. the Applicant has come across errors in the said petition based on new information and evidence contained in the application , supporting affidavit , supplementary affidavit and annexures.
 - vii. That the Honourable court orders and direct the Respondents therein (i.e., the county Public Service Board and the County Government of Bungoma) to carry out head count of alleged casual workers and scrutiny of the payrolls for 2016 and 2019 and other employments documents for all the Grievants on the list of 463 and or 660 persons ; purporting to have been casual workers of the Defunct local authorities, this could be executed by way of demanding from all the Grievants /casual workers presentation of the Original and certified copies from their Academic Certificates & testimonial documents , Original and certified copies of their appointment and deployment letters , original and certified copies of their national identification cards , letters of reference and recommendation letters from their immediate supervisors.
64. It is the holding of the court that Mr. Nyukuri was never a party to the petition, he is not an employee or related to the employer in terms of government. How then can he seek to review a judgment in which he is not affected by the decision. I find that he did not demonstrate the reason why the court should allow him to seek review of the decision as per his prayer 1 when the respondents had already filed for review of which he was aware of. He has not demonstrated what prejudice he would suffer beyond that of any other taxpayer if his application is not allowed. The court disallows his request for permission with respect to the review of the decision as stated in his prayer 1.

Decision On The Respondents Application

65. I then proceed to consider the Respondent's application for review on the 4 grounds under rule 33 Employment and Labour Relations Court Procedure Rules, 2016. The rules require the application for review to be brought within reasonable time and that is an issue I will also address.



66. On whether there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the Respondents or could not be produced by that them at the time when the decree was passed or the order made; The applicant Nyukuri was not a party to the suit. The respondent did not address or produce any relevant new evidence.
67. On account of some mistake or error apparent on the face of the record; The respondents submits as follows:-‘We note that the petition was purportedly filed by the Kenya County Government Workers union Bungoma County BRANCH . when the officials of the Chapter/branch appeared before this Court, they vehemently denied ever or at all making a resolution to have a case filed against the County Government of Bungoma. They denied having instructed the deponent of the affidavit one Moses Maelo Muyundi to sign the affidavit and /or petition and or any other documents on their behalf or at all.The officials and also Moses Maelo Muyundi admitted that the 463 Grievants were never members of the Petitioner. That will mean the Court an error apparent on the face of the record when it held that the Grievants were the members of the Petitioner herein.It also transpired that under *the Constitution* of the Petitioner there are two types of Membership, ordinary and honorary member. It transpired that the deponent of the affidavits Moses Maelo Muyundi was none of the members having retired from the county public Service in April 2016. He therefore lacked capacity to file suit on behalf of the Petitioner nor was he authorised to sign any document on behalf of the Petitioner.We also note that proceeding with the case on written submission on contested issue such as the list of Grievants was an error as the Court was not able to interrogate the list and ascertain that indeed the people on the list were working as casuals under the defunct local Authorities.’
68. The Petitioner on this issue submits :-‘We are aware of the Bungoma Petition No. 1 of 2019 that was ruled in favour of the alleged Grievants that was delivered on 13th may 2020 by the Employment and Labour Relations Court.We are also aware of the Judicial Review Application for contempt of court No. 001 of 2022 by the Deponent, Mr. Moses Maelo Muyundi against the County Public Service Board and the county government of Bungoma, without our authority and consent as the Bungoma county Branch officials of the Kenya county Government workers union.That the Deponent on Moses Maelo Muyundi in the Petition and Judicial Review Application is not a bona fide member and/or official of KCGWU Bungoma County branch in accordance with Article 4 of the Union Constitution, 2016 and therefore not authorized to transact any business on its behalf.That the deponent retired from the County public service in April 2016 and has no legitimacy to file a suit in any court of law on behalf of the KCGWU Bungoma County branch as stipulated in article 4(4) of our Union constitution, 2016.That as a Branch of KCGWU we are opposed to the contempt Application because the legitimate officials were not involved or consulted by the deponent before filing the said petition and judicial Review Application.That there was no KCGWU Bungoma Branch County Branch Minute resolution THAT GRANTED CONSENT or power of attorney to Moses Maelo Muyundi to file any suit in the Employment and labour Relations County at Bungoma.That the advocate on record for the Deponent Mr. Robert Wamalwa was not given instructions or hired by the KCGWU Bungoma County Branch. That is why the Union officials appeared in person. The reason why we resolved to withdraw from the Contempt application by the deponent through his advocate on record Robert Wamalwa because there were two conflicting list of grievant (430 and 660), which could not be verified and authenticated without the intervention and direction of this Honourable Court.That they were opposed to the contempt of court application because of the political goodwill, positive gesture and willingness of the Respondents herein (County public Service board and the County Executive of Bungoma) through various Tripartite Consultative meetings with the Branch officials of the Union.That the alleged Grievants in Petition No. 1 of 2019 are not registered members of Bungoma County Branch of the Kenya County Government Workers’ Union. They are only eligible to join the union after being employed and /or confirmed on permanent and pensionable terms of the



county government of Bungoma and upon payment of requisite registration fee and subscription fees stipulated in Article 4(2)b of our union Constitution, 2016.

Decision On Mistake Or Error Apparent On Face Of The Record.

69. I am guided by a Ugandan case in *Al-Shafi Investment Group LLC v Ahmed Darwish & Anor* (Miscellaneous Application NO. 901 OF 2017)10 [2017] UGHCCD 205 (13 July 2017) where the Bashaija, J, cited with approval *Attorney General & Others vs. Boniface Byanyima HCMA No. 1789 of 2000*, and *Levi Outa vs. Uganda Transport Company [1995] HCB 340*, where it was held that; ‘the expression “mistake or error apparent on the face of record” refers to an evident error which does not require extraneous matter to show its incorrectness.’¹
70. The court deduces the issues raised on account of some mistake or error apparent on the face of the record to be on the jurisdiction of court to handle the petition under section 77 of the *County Governments Act* as read together with section 87 of the *Public Service Commission Act*, limitation of time under section 90 of the *Employment Act*, whether the workers were members of the union and whether the deponent Moses Maelo Muyundi had authority to file the petition. The said provisions of section 77 and section of the *County Governments Act* are to the effect that an employee under the county public service aggrieved by a decision of their employment ought to appeal to the Public Service Commission. It is the opinion of the court that the said points of law were an issue of jurisdiction of which go to the root of the case and is thus not available for review since the trial judge satisfied himself on his jurisdiction. This also applies to the issue of section 90 of the *Employment Act* as the court has no jurisdiction to act outside the timeline and to have proceeded it must have satisfied itself on the issue. The court finds that the petition had informed that the workers had been in place within 2 years of the petition. In paragraph 26 of the judgment the trial court held:- ‘The respondent has not succeeded to demonstrate that this long list of 463 employees are not in their employ as casuals for prolonged periods exceeding 7 years’ . If this was an erroneous holding then the same is subject of appeal as no new material was placed before the court to the contrary. The same position also applies to the status of the worker and of the petitioner for in paragraph 33 the trial court held:-‘ The court finds that the petitioner has established that the treatment of the grievant members of the petitioner listed in the suit,,,’ The union in denying the workers and the deponent has not produced its register of members. The document produced by Mr. Nyukuri was not the register by the union but a payroll document of the respondents. The membership of the union is an extraneous matter as stated in the said Ugandan decision(supra). I cannot question the decision of a judge of concurrent jurisdiction on merit basis without new evidence being placed before me which was not available at time of hearing despite diligence. I looked into the submissions of the Respondent filed on 3rd December 2019 at the trial court and the issue of membership of the workers was not addressed as an issue for determination. The petition proceeded by way of submissions. The parties were represented and counsel are always free to inform the court how they wish to canvass their case. The respondent acquiesced to proceed by way of submissions so that cannot be an issue at review. The court can also not review decision of another judge on jurisdiction.
71. There is adequate precedent on my foregoing opinion. Justice Manani in *Ferrotech Industries Ltd v Mwadziwe Ali Hare [2021] eKLR* upheld with approval the following cases :- In *Pancras T. Swai v Kenya Breweries Limited [2014] eKLR* the Court of Appeal once again expressed itself in the following terms on the issue under consideration:-

‘It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good

¹ Available at <https://ulii.org>



ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *functus officio* and have no appellate jurisdiction.” This decision applies to the issue of section 77 of the *County Governments Act* and 87 of the *public service commission Act* and section 90 being points of law. I do uphold the decision and hold the provisions are point of law which cannot be dealt with at the review.

72. The applicant and the respondent have called upon the court to find the petition incompetent and consequential orders. Further to find the court was misinformed as to status of the workers and the deponent Moses Maelo Muyundi. In *Manjula Dhirajlal Soni v Dukes Investments International Limited & 2 others* [2018] eKLR the court held:- ,

“I am of the view that when a court proceeds to exercise jurisdiction it does not have, that is not a mistake or error apparent on the face of the record but an error of judgment that goes to the merit of the decision. Such error in my view can only be corrected through an appeal process. If a judge is to be called upon to review his decision on the ground of lack of jurisdiction, that would be tantamount to calling upon the judge to sit in an appeal against his own decision. In the case before me, the Bank has contended that the decision of Nyamweya J. was null and void and of no legal effect. A court cannot be called upon to declare its own decision null and void. It is only an appellate court that can do that.” Like wise in the instant applications cannot declare the orders of the court incompetent on grounds raises of jurisdiction and locus standi of the deponent. Lastly in *Patrick Miano v Mathira Coffee Farmers Housing Cooperative Society Ltd* [2017] eKLR Ngaah J dealing with a similar issue as in the current case had the following to say on the matter:-

“Even if the appellant’s argument that the trial court lacked jurisdiction was to be accepted as plausible and therefore it either misapprehended the law or misdirected itself in that regard when it proceeded to hear and determine the dispute before it, that cannot be a ground for review. As always, a difference of opinion on the interpretation of the law or a legal principle cannot be a ground for review. I have previously stated elsewhere (HCCC No. 12 of 2014(Nyeri) *Ecobank Ltd versus David Njoroge Njogu and Ann Wanjiru Njogu*) that where a party aggrieved by an order or a decree is of the conviction that the order or the decree was based on a misapprehension of the law, the correct course would be to appeal against that decree or order rather than file a review application which, in my humble view, puts the judge or the magistrate who made it in a somewhat awkward position of explaining or defending the order or the decree.” I uphold the decision and state that the application raise plausible issue of jurisdiction and it is possible the court may have misdirected itself in hearing the petition but that is not my place to determine. It is an issue of appeal.”

Whether the judgment or ruling requires clarification and for sufficient reason

73. The applicants case was that elections were held on 9th August 2022 where Bungoma County elected Honourable Kenneth Makelo Lusaka as the 3rd Governor. Upon his inauguration , he appointed a task force to look into the issues of the casuals and one of its findings was that there were two lists on containing 463 persons and the other 660 persons. Both the lists were purportedly certified as true copies of the original by the Deputy registrar of the Court on 17th August 2021. That this alone is



sufficient reason to review the judgement so that the case can be re-heard to ascertain the correct list of the persons who were working as casuals under the defunct local authorities.

Decision of the court whether the judgment or ruling requires clarification and for sufficient reason

74. The respondents submits that in discussing the scope of review, the Supreme court of India in the case of *Ajit Kumar Rath vs State of Orisa & others*, 9 supreme Court Cases, 596 at page 608 had this to say:-

“the power can be exercised on the application of a person on 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 order was made. The power can also. Be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason”means a reason sufficiently analogous to those specified in the rule”

75. The Respondents allege there are two list of workers emanating from the court of 463 and list of 660 and which were both certified by the Deputy Registrar of the employment and Labour Relations Court on the same date of 17th August 2021. The court takes the position that the judgment of the court is by Judge. In this case the decision of Justice Nduma dated 13th May 2020 stated :-‘a. The court declares that the continued employment if the listed 463 grievant/members of the petitioner by the respondents on casual basis is in violation of section 5,35 and 37 of the *Employment Act* No. 11 of 2007 and violates articles 27,28,41 and 232 of *the constitution*.

the court directs the respondents to place all the affected employees referred to above on payroll..”

76. The court finds no ambiguity as to the number of workers in the decision being 463 and that is the same number in the petition. A decree of the court flows from the judgement. The court finds it is mischievous for the applicant to allege two lists when there was already an Order of Mandamus of the court in JR E001 OF 2022 issued on the 7th July 2022 and an earlier certificate of order against government dated 17th February 2022 declaring list 463 workers as per the judgment. I do not hesitate to say that the Deputy Register role in execution of Orders of the court is administrative and any contradiction with the judgment would be a nullity. The court further finds that from the material placed by the respondents it was obvious the said list of 663 emanated from the respondents and if such any order was extracted it was their doing and the court was not part of it as the number 663 is not in any of the decisions by the court.

77. The applicants further stated that it had emerged some of the persons were minors. The court holds that the challenge the respondents allegedly faced, was based on the alleged two lists and not on the judgment list of 463. It is thus not possible for the court to review the decision based on that allegation considering the list before court had national identity numbers for each worker disclosed.

78. Lastly, I address myself on whether the application for the review is brought within reasonable time. The impugned judgment was delivered on the 13th May 2020. In execution of the judgment a certificate of order against government dated 17th February 2022 was issued. Further on the 7th July 2022 Mandamus order was issued against the respondents in Bungoma JR NO. E001 OF 2022 and there being no compliance execution proceedings were instituted by was of contempt of court. while the hearing of the execution proceedings was ongoing on the 30th January 2023 the respondents vide



the County Attorney filed application for review of the judgment and alleged there were two lists of workers emanating from the court.

79. The court finds a delay of 2 years and 5 months inordinate. I have read all the affidavits and the delay was not explained save for the COVID issue. The respondents are guilty of laches tainted with impunity. There is a mandamus order of the court which has not been set aside. The contempt of court had not been purged.
80. In the upshot, though I may have held a different opinion or take different approach on the petition sitting as trial judge, I am now wearing cap of review of judgment of concurrent judge. I have no authority to overrule the judge. The parties have remedy of appeal for another opinion. I decline the prayer for review of the judgment of Justice Nduma, a concurrent judge dated 13th May 2020 for reasons of the application being on points of law, and on extraneous issues which require exercise of appellate jurisdiction and for lack of new evidence as required under the law.

Any further sufficient reason in public interest

81. I have considered the acrimony of the deponent Moses Maelo Muyundi and the petitioner. In order to protect interest of the workers under the judgment and further to clarify on the implementation of placement on payroll and payment of the said wages. I do exercise my judicial discretion and order the respondents jointly and severally to comply with the decision of the court as per judgment of Justice Nduma of 13th may 2020 and file a report within 60 days on the compliance and for avoidance of doubt the list of 463 persons as per the following directions:-
- a. The 1st respondent has the mandate to employ and create offices within the county public service hence has the statutory mandate to comply with the judgment. I order the 1st respondent, to within 14 days of today to issue notice of date and venue where the said 463 workers will present themselves to the 1st respondent with original ID cards as per list filed in the petition and their last letter of employment as a casual worker.
 - b. The employee will disclose to the 1st respondent in writing the last station of work with the county and the immediate supervisor for verification purpose. The 1st respondent will issue the notice in writing to the Petitioner and Moses Maelo Muyundi and as well as post the said notice stating these requirements at prominent places within its premises within 14 days of today.
 - c. Any worker of the 463 who fail to avail themselves as per the notice without sufficient reason will be considered as not having been a worker. The 1st respondent to file in court the register of attendance of the said persons.
 - d. The 1st respondent to file in court a report on compliance with these directions and of the judgment.
82. The Applicant was denied permission to seek the review. The respondents' application though unsuccessful on their grounds, the court in public interest exercised its judicial discretion in the review to allow the above procedural order. The petitioner union appeared to support the applications and is thus not entitled to costs.
83. The court pending the 60 days holds in abeyance the contempt application.
84. Mention on 28th September 2023 to confirm compliance with the court directions and of the judgment dated 13th May 2020.
85. Right of appeal in 30 days.



86. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 28TH JULY 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda

For Applicant : Nyukuri

For Respondents:- Mr. Makokha

For Petitioner:- Masengeli

Further Court Order

The parties to be supplied with typed and certified proceedings and this ruling on priority basis on application.

It is so ordered

JEMIMAH KELI

JUDGE

28/7/2023

