



Nyangongo v Teachers Service Commission & 4 others (Employment and Labour Relations Petition E021 of 2022) [2023] KEELRC 1820 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1820 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION E021 OF 2022**

**HS WASILWA, J
JULY 25, 2023**

BETWEEN

EVANS MORARA NYANGONGO PETITIONER

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

MINISTRY OF EDUCATION 3RD RESPONDENT

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF VOCATIONAL &
TECHNICAL TRAINING 4TH RESPONDENT**

THE HON ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. Before me for determination is the Petitioner/ Applicants' Notice of motion dated 3rd March, 2023, filed under certificate of urgency on 21st March, 2023, pursuant to section 80 of the [Civil Procedure Act](#), Order 45 Rule 1 of the [Civil Procedure Rules](#) and Articles 23(3) of the [Constitution](#), seeking for the following Orders; -
 1. Spent.
 2. Conservatory orders to stay the implementation of its own court Ruling to dismiss the application and petition E021 of 2022 by Lady Justice Hellen Wasilwa dated 23rd February 2023 until the case is heard and determined.
 3. That after hearing of this application the honorable court do issue a review its own Court Ruling dated 23rd February 2023 on application and petition dated 14th December 2022.



4. That after hearing of this application the Hon court does reinstate and issue fresh hearing on merit of application and petition E021 of 2022 dated 14th December, 2022.
 5. The costs of this application abide by its outcome.*
2. The Application is supported by the following grounds; -
- a. That this honorable court Ruling has errors of facts on its face on paragraph 12 that are contradictory misstatements and misrepresentation of facts of the Consent Order dated 18th January, 2021 to allow Stay Orders issued by Abuodha J.
 - b. That the applicant has discovered that paragraph 13 of the court's ruling is inadmissible because it has error/ mistake of concealment and non-disclosure of a very important court ruling dated 18th January 2021 whose evidence is neither in court records nor served on the applicant.
 - c. That the applicant has discovered new and important evidence being a court judgment by Justice Maureen Onyango dated 10th December, 2021 that declared unconstitutional null and void and quashed the alleged Consent Order that was relied on erroneously in paragraph 12,29 and 33 of the court ruling that was relied heavily by this Court in making its determination. That the applicant has discovered that the court's ruling erroneously, on misrepresentation of facts, irrelevantly relied on the doctrine of Res judicata as captured in paragraphs 32,33 and 34 of the ruling without due diligence that the applicant was not a party in all the court litigations besides the consolidated petitions of No 85 and 97 of 2018 which matter/issues are directly and substantially different with different reliefs sought.
 - d. He stated that paragraph 14 is an error of facts on the face of the records with regard to the statement that; As per the Court Order, the petitioner and more than 3000 trainers were transferred to the 2nd, 3rd and 4th Respondents.
 - e. That paragraph 18 is an error of fact on the face of the record that should be struck out of court record for being inadmissible because the respondents filed their submissions outside court directed time on 31st January 2023 and the applicant is prejudiced because he was not served with the same and thus was unable to responded to some of the things raised in the submissions.
 - f. That the applicant has discovered that the ruling is not lawful because the respondents' did not adduce a single evidence to controvert all the applicant's valid claims or adduce evidence to show that Res judicata elements are met.
 - g. That the ruling has errors on substantive points of law that was omitted on section 166 of *Teacher Service Commission Act* 2012 and section 9 and 10 (5) and (7) in just determination of the dispute.
 - h. That paragraph 16 is an error of facts on the face of the records that fraudulently misrepresented facts, without evidence in court record, that the petitioner is a member of KUPPET in totally deviance of the provisions of sections 107 and 108 of the *Evidence Act*.
 - i. That the court should not aid the Respondent's conduct of bad faith, non-disclosure and misrepresentation of material facts relating to the dispute at hand which amounts to abuse of the court judicial process that the court must intervene to stop in the interest of justice.



3. The Application is supported by the Applicant's Affidavit sworn on 16th March, 2023, reinstating that the Ruling of this Court is marred with errors and mistakes on the face of record that need to be corrected and urged this Court to allow the Application as prayed.
4. In the supplementary affidavit sworn on 19th May, 2023, the Applicant stated that he was not a party to either case filed in Employment Courts in Kisumu and Nairobi as such he did not hide any material facts before this Court. In fact, that he became aware that Justice Maureen Onyango had declared the consent null and void after he received the Ruling of this Court and carrying out further research. He added that the Respondent, being aware of the Ruling of that Court, should have brought the issue to light before this Court to aid this Court in making a just determination.
5. With regard to stay Orders granted at the Court of Appeal, the Applicant stated that the same were granted ex parte on 14th March, 2019 and no evidence has been brought before this Court to confirm that they were extended or that they are still in existence as such the same lapsed before interpartes hearing that was conducted on 21st March, 2019.
6. He stated further that the consent orders and they stay order were granted by Employment Court and not the Court of Appeal as suggested by the Respondent. He stated further that, since Justice Byram Ongaya granted Stay of orders granted by Justice Abuodha, a court of concurrent jurisdiction, the orders granted are fatally defective in law and judicial jurisprudence. In any case that the Orders by Justice Abuodha was a negative Order that cannot be stayed.
7. He stated that he is not seeking for determination or interpretation of the circular no. 17 of 2018, neither does he require any determination on the issues decided by Abuodha J, his only concern is on non-enforcement of the decrees, which are breaching his employment contract.
8. He reiterated that the consent entered into was declared null and void and reliance on the same should be disregarded by this Court. Also that Justice Rika being a court of concurrent jurisdiction had overstepped on its mandate in setting aside orders given by the ELRC Court.
9. It is his case that the circular no. 17 of 2018 was not subject for determination in Kisumu case number E007 of 2022, neither was it up for determination in Nakuru Petition E021 of 2022. Also that the issue for determination both in Kisumu and this Court are distinct and the reference to the circular was to give the Court some backgrounds information on issues for determination before it. Further that he was not a party to Cause No 521 of 2019.
10. The stated that there is no evidence that was adduced before this Court showing that the transfer of the 3780 teachers complied with the prescribed statutory provisions of the prescribed procedure for transfer of service as per *TSC code of regulations* 2012, sections 10(5)&(7) of the *Employment Act*, Section 3(3) of the *Contract Act*, Section 107 and 108 of the *Evidence Act* and articles 3,73 & 74 of the *Constitution*.
11. He also took issue with the fact that the replying affidavit was deposed upon by Julius Ongaya, the Respondent's Human Resource officer and contends that no evidence is before court showing that the said person was authorized by TSC. Also that the affidavit was drawn and filed by inhouse Counsel one Patrick Mulaku instead of the Honourable Attorney General as required under Article 156(4)(b) and Section 21 of the *Teacher Service Commission Act*.
12. The Application is opposed by the 1st Respondent who filed a replying affidavit sworn by Dr Julius Ongaya Olayo, the Director in charge of Human Resource Management and Development. He stated that the Application herein is a deliberate distortion and fabrication of material facts to the suit and thus is vexatious and does not have merit and a candidate for dismissal.



13. He stated that the Court have analyzed the facts of the case, the evidence and submissions of the parties and decided to dismiss the Application together with the Petition for being Res Judicata.
14. It is the Respondent's case that review orders are granted only if they meet the parameters provided for under section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#) as read with Rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules](#).
15. Based on the law cited, the Respondent stated that there is no new evidence that the Applicant has discovered that was not at his disposal at the time of filling the previous application, because the Judgement alluded to, was delivered by Justice Maureen Onyango in Nairobi ELRC case number 521 of 2019 on 10th December, 2021 a year before the the petition and the contemporaneous application was filed on 15th December, 2022. As such that the Applicant did not exercise any due diligence before filling this Suit.
16. With regard to the decision rendered by Abuodha J in Consolidated Petition numbers 85 and 97 of 2018, the affiant stated that as soon as they received the Judgement, the Attorney General filed a formal application for stay of judgement which was granted on 14th March, 2019. Subsequently the parties recorded a consent on the terms of stay. The Petitioner, thereafter sought to set aside the consent order entered but the Court (Rika J) decline to set aside the consent, holding that he was functus officio.
17. The deponent herein stated that even though Lady Justice Maureen Onyango declared the consent null and void, there is a valid stay of execution order which order is still valid and has not been set aside.
18. The Respondent accused the Applicant for forum shopping in that he has filed several suit in various courts seeking for a favorable decision, because he had initially filed a similar case in Kisumu ELRC under case number ELRC Petition No. E007 OF 2022 whose decision was rendered on 1st December, 2022 against him, informing the subsequent filling of this case in this Court on 15th December, 2022.
19. Honourable Lady Justice Christine Baari was ceased of the matter in Kisumu where she held that the issues of the circular No. 17 of 2018 have already been decided by a court of concurrent jurisdiction and were subject of Appeal. The Affiant added that the Applicant hid material facts with regard to being a party in Kisumu Court suit and Nairobi Suit, before approaching this Court, an act that this Court should frown upon.
20. The Respondent maintained that the move taken by the Applicant was to embarrass this Court in making a decision on a matter that has already been decided by a court of concurrent jurisdiction as such barred by the provision of section 7 of the [Civil Procedure Act](#).
21. He stated that the allegations by the Applicant that there are errors on the face of the record is far from the truth because the paragraphs quoted as containing errors are a true reflections of the statement by the Respondent and pleadings in the Application and no errors can be seen on the record. With regard to alleged error of the Court omitting provisions of section 166 of the [TSC Act](#), section 9 and 10 (5&7) of the [TSC Act](#), the affiant stated that the [TSC Act](#) does not have Section 166, while Section 9 and 10 talks of oath of office of the chairperson of the Commissions, members and the secretary which provisions are not relevant to the issue at hand.
22. He contends that the Applicant has misunderstood the elements of mistake and error for the purposes of review, therefore that the application is misconceived and should be dismissed for being vexatious.
23. The affiant stated that the ruling herein was very clear and does not need any clarification.
24. In response to the Applicant's supplementary affidavit, the Respondent filed a further affidavit sworn on 5th June, 2023 stating that Section 20 of the [TSC Act](#) provides for the delegation of the Commissions



duties to members of the commissions, officers, staff and agents of the Commission, while section 16(6) (d)(ii) of the *Act* empowers the Commissions' secretary to assign duties to staff and supervise such duties, therefore that his mandate was drawn from the Commissions.

25. On representation by Patrick Mulaku Advocates, the affiant stated that the Attorney General gave the go ahead, by the letter of 4th July, 2017, to external and in-house advocates to represent the commissions, therefore that Mr., Patrick Mulaku being inhouse advocate is duly authorized by the Attorney General to draw the pleadings herein and represent the Commission.
26. The Application was dispensed with by written submissions with the Applicant filing on 28th May, 2023 and the Respondent filed on 5th June, 2023.

Applicant's Submissions.

27. The Applicant on two issues; whether the petitioner's application meets the threshold for review and whether the applicant is entitled to the reliefs sought.
28. On the first issue, it was submitted that the applicant approached court on 15th December 2022 through an application and petition on alleged breach of his TSC employment contract through unlawful transfer of payroll services to the PSC, MOE. The respondents were to file a reply in readiness for interpartes hearing on 20th December 2022. However on 20th December, 2022, they had not complied and sought for leave which was granted and the matter was mentioned for compliance on 17th January, 2023, which they had complied but sought leave to file a substantive application to object on grounds of res judicata. They were granted leave for 7 days to file the application together with written submission and the file mentioned on 31st January, 2023 for compliance. However, on the said date, the Respondent had not filed the Application or submissions and the court directed their compliance with a ruling date slated for 23rd February, 2023. Since no reply or submissions had been served at the time the applicant was filling his submissions, he was deprived of the opportunity to file a corresponding defence.
29. The Applicant submitted that he was aware but not a party in the case determine by Justice Abuodha on 1st March, 2019. With regard to that case, he submitted that on 4th March, 2019 the Attorney general and the other respondents filed an appeal notice at the Employment and Labor Relations Court instead of the court of appeal. On 14th March 2019, Justice Byram Ongaya issued Stay of execution of the Abuodha decrees pending inter parte hearing on 21st March 2019. That it's at submissions stage that the Applicant was made aware of the consent entered into on 15th March 2019. Therefore, that the initial ex parte stay orders by justice Byram were deemed withdrawn or lapsed upon the adoption of the parties Consent Order and non-filing of substantive appeal. Thus the allegations by the Respondents that Appeal had been filed is misleading and a deliberate distortion of facts misguiding this Honorable court.
30. On the basis for review, it was submitted that the Applicant discovered, after the ruling on this application, that the Consent Order relied upon by the 1st respondent was quashed and declared unconstitutional, null and void by Justice Maureen Onyango on 10th December 2021, which suit the Respondent was a party to and ought to have been aware of but still concealed that information from this court.
31. He submitted that the stay of execution orders was granted by Justice Byram Ongaya and not the Court of Appeal. Also that its these non-disclosure of facts that has driven the Applicant out of the seat of justice having been blocked from being heard via the ruling of this Court of 23rd February, 2023



contrary to the provisions of Article 50(1) &(2) of the Constitution and the decision in National Bank of Kenya v Ndung'u Njau, 1996.

32. He argued that the Respondent failed to disclose such material evidence before this Court, which material could have helped this court to adjudicate on the issue justly. He added, that failure by the Respondent to disclose material facts before this Court, was in breach of section 20 (7) of ELRC Act, 2011 and Rule 3 (8) of the Constitution of Kenya Practice and Procedure rules 2013 that stipulates the penalty of giving court misleading or/and false information. To support this argument they relied on the case of Abdullahi Muhammed Sheikh v Gulf African Bank and 2 others in Civil Case E416 Of 2018 where it was urged that:-

“courts should invoke their inherent jurisdiction in exceptional circumstances on discovery of fraud to protect itself from abuse by litigants who seek to mislead court and taint judicial process and the courts should not be tricked to make an award.”

33. It was submitted further that this Court failed to determine issues in paragraph 2 (a) and (b) of the ruling on re-designations and promotions which were the core/ basis of the application. Also that paragraph 19 of the ruling captured the applicant's concern and request pertaining the fate of his employment contract, which was equally omitted in the ruling.
34. The Applicant also submitted with regard to the form of the pleadings and argued they are incurably defective in that, the Respondent's replying affidavit dated 5th May 2023 was sworn by the Director Human resource that is a stranger and not a party to the petition and also that he is not a member of Teachers Services Commission as stated under section 5 of TSC Act 2012. Further that the 1st Respondent's replying affidavit is drawn and filed by Advocate, Patrick Mulaku is inconsistent with Article 156(4)(a)&(b) a function that is exclusively reserved for the office of the Attorney General in accordance with section 16 (d),17 (1), 20 of the Attorney General Act, 2012.
35. Accordingly, the Applicant invites this court to find the replying affidavit fatally incompetent, abuse of court process and inadmissible and relies on the case of Godfrey Julius Nduma Mbogori v Nairobi City Count, [2018] eKLR where it was concluded that exemplary damages are different from ordinary damages which is to punish and deter arbitrary, oppressive and offensive misconduct by government officers whose actions are lawless and set up against statutes and the Constitution.
36. He also relied on the case of Alton Homes ltd and another v Davis Nathan Chelogoi and 2 others [2019] eKLR, where the court awarded 5 million as general damages for fraud and illegality against those that violate the law and turn around to expect court to be an instrument to validate their action.

Respondent's Submissions.

37. The Respondent submitted on whether the stay of execution can be granted in the circumstances, it was argued that the orders sought by the Applicant are not allowable on the basis that the Applicant has misconstrued the provisions of the Civil Procedure Rules on grant of stay of execution Orders. It was argued that the Applicant has not demonstrated any of the grounds of stay under Order 22 of the Civil Procedure Rules. In any event that the orders being stayed are negative orders that cannot be stayed. In this they relied on the case of Milcab Jeruto Tallam t/a Milcab Faith enterprises v Fina Bank Ltd and another [2013] eKLR where the court held that:-

“The order by Ogola J was a negative order and that there is nothing to be stayed and the fact that the Plaintiff is not entitled to any conservatory orders, I do not find any merit in



the Plaintiff's application. For that reason, I hereby dismiss the Plaintiff's Notice of Motion application dated 29th November 2012 with costs to the Defendants."

38. This position was also reiterated by the court in the case of *George Ole Sangui & 12 others v Kedong Ranch Limited*[2015] eKLR where the Court stated that;-

"The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted."

39. On whether the application meets the threshold for review, it was submitted that Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, enumerates the conditions that must be met before a review Order is granted. with regard to the first issue on discovery of important matter of evidence, it was submitted that none has been discovered and that the application has been disguised as a review when the applicant is seeking to reopen the application and the suit herein for litigation in total violation of the provisions of section 7 of the *Civil Procedure Act*. In this they relied on the case of *Abdulkadir A Khalif v Principal secretary Ministry of lands and physical planning and 4 others; National Land Commission and another (Interested parties)* [2020] eKLR where the court upheld the decision of the trial court and held that;-

"Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of res judicata can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case... A review cannot be claimed or asked for (sic) 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 or for any other sufficient reason. It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule. Any attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out would amount to an abuse of the liberty given to the court under the Act to review its judgment."

40. On mistake apparent on the face of record, it was submitted that the alleged errors are not errors for the purposes of review but an analysis of the parties' pleadings as presented before this Court. Therefore, that the Applicant has grossly misunderstood the meaning of error/ mistake on face of record. He added that an error on face of record is an error that is so clear and does not need any interpretation by the Court. In this he relied on the case of *Abdulkadir A Khalif v Principal Secretary Ministry of Lands and Physical planning and 4 others, National land Commission and another (Interested parties)*[2020] eKLR where the Court held that;-

"Review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied



or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible. It is my view, that the question of jurisdiction is a point of law, which, even if I were to find that I was wrong, it can only be corrected by way of an appeal. In other words, counsel is inviting this court to sit as an appellate court on its own decision, which I can't do. Therefore, the plea for review fails.'

41. They also relied on the case of *National Bank of Kenya Limited V Ndungu Njau* [1997] eKLR where the Court stated 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. 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.”

42. In conclusion, the Respondent submitted that this Court's Ruling was clear that the suit is res-judicata and therefore does not need any clarification. He added that the Applicant conceded that the issues surrounding the circular number 17 of 2018 was duly determined and if he is dissatisfied, he ought to Appeal against the said decision and not seek review. He submitted therefore, that the application before court is not merited and the same should be dismissed with costs to the Respondent for being misconceived, frivolous and an abuse of Court process.

43. I have examined the averments and submissions of the parties herein. The applicant has sought a review of this court's orders dismissing the application and petition by this court's ruling of 23rd February, 2023 on the ground of error and discovery of new and important evidence being the judgment of the court Onyango J of 10th December, 2021 that declared unconstitutional null and void a court order relied upon by this court in paragraph 12, 29 and 33 of the ruling of this court.

44. I have looked at the attachments attached to this application. The judgment of Onyango J in Nairobi ELRC Cause 521 of 2019 relates to union membership of the claimant therein one Kheper Langi to 1st respondent – KUPPET. Apparently by a consent of the parties of 15th July, 2019 it was agreed that all trainers in the employment of the Principal Secretary, Ministry of Education, Department of Vocational and Technical Training be taken over and become members of the 1st Respondent.

45. By a judgment of the court of 10th December, 2021, the court (Onyango J) found the consent order of 15/7/2019 in Petition 85 of 2018 as consolidated with Petition 97 of 2018 unlawful, null and void. The consent was consequently set aside.

46. In another ruling in Petition 97 of 2018 Ruka J in delivering a ruling in relation to a circular No. 17/2018 dated 27th July, 2018, issued by the 1st respondent which Abuodha J. found unconstitutional hence null and void and quashed the same, J. Rika heard the application before him and declined the application indicating that he was fuctus officio.

47. What I perceive from the 2 judgments and ruling determined by my learned colleagues, the issue of the circular being unconstitutional has already been determined by courts of concurrent and competent jurisdictions.



48. The petitioner herein with another also filed Petition No. 7/2022 before Kisumu ELRC and vide a Ruling of Christine Baari J of 1/12/2022 and at paragraph 19 of the ruling the court indicated that :-
- “the issue of the circular subject to this matter was already determined by a court of concurrent jurisdiction and whose decision has been challenged in the Court of Appeal”.
49. The learned judge found the application devoid of merit and dismissed it in its entirety.
50. My learned colleagues Onyango, Abuodha, Baari JJJ having determined related matters and in my ruling of 23rd February, 2023 found the application and Petition before me res judicata.
51. There is nothing new before me which my colleagues have not determined.
52. Infact the orders, rulings and judgments already determined have been determined in relationship to the impugned circular which the applicant is still pursuing in this petition and application.
53. In my view there is nothing new to determine or review. The application for review is found unmerited and is dismissed accordingly.

RULING DELIVERED VIRTUALLY THIS 25TH DAY OF JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mulaku for 1st Respondent – present

Morara in person

