Walingo v Maasai Mara University Council & 4 others (Petition E007 of 2022) [2023] KEELRC 2219 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2219 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION E007 OF 2022

HS WASILWA, J

SEPTEMBER 28, 2023

IN THE MATTER OF ARTICLES 2, 19, 20(1-4), 21(1) & 3, 22(1) & (2)(B) &(C), 23(1) & (3), 25(A)&(C), 27, 28, 29(A), (C) & (D), 41 (1) & (2)(B), 47, 48, 50 (1), 73, 75, 159, 162(2)(A), 165(3)(B), 232, 258(1) &(2)(B) &(C) AND 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF THE CONTRAVENTION OF THE PETITIONER'S FUNDAMENTAL RIGHTS AND FREEDOMS PROTECTED BY ARTICLES 27, 28, 31, 41, AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION OF NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE UNDER ARTICLE 10, THE PRINCIPLES OF LEADERSHIP AND INTEGRITY UNDER ARTICLE 73 AND THE VALUES AND PRINCIPLES OF PUBLIC SERVICE UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULES 2, 4, 10, 11, 13, AND 14 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF SECTIONS 4, 7, 8, 9, 10 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT AND IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT

BETWEEN

PROF. MARY KHAKONI WALINGO ..... PETITIONER

AND

MAASAI MARA UNIVERSITY COUNCIL ..... 1ST RESPONDENT

MAASAI MARA UNIVERSITY ..... 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF EDUCATION ..... 3RD RESPONDENT

THE PUBLIC SERVICE COMMISSION ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

RULING

1. Before me for determination is the Petitioner/Applicant's Notice of Motion dated 29th May, 2023, filed pursuant to Article 162(2) of the *Constitution* of Kenya, *Section* 89 *Public Service Commission Act*, Rule 19 and 23 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, Section 3(1), 12 and 20 of the *Employment and Labour Relations Court Act*, Rule 17(2) of the *Employment and Labour Relations Court (Procedure) Rules 2016*, Sections 1A, 1B & 3A of the *Civil procedure Act,* Order 51 Rule 1 & 3 of the *Civil Procedure Rules* and all other enabling provisions of law, seeking the following Orders;-

    1) That this Honourable Court be pleased to issue an order directing the 1st and 2nd Respondents by way of mandamus to pay the Petitioner all her outstanding salaries and attendant allowances amounting to Kenya Shillings Eighty-One Million, Nineteen Thousand, Three Hundred and Forty-Eight (Kshs. 81,019,348).

    2) That this Honourable Court be pleased to enter judgement of Kenya Shillings Eighty-One Million, Nineteen Thousand, Three Hundred and Forty-Eight (Kshs. 81,019,348) against the 1st and 2nd Respondents in execution of the Honourable Court Orders dated 17th January, 2023.

    3) That the court do grant any other order that this Honourable Court deems fit and just to grant in the circumstances.

    4) That the cost of this application be borne by the Respondents.

2. The application is supported by the grounds on the face of the application and the supporting affidavit of the applicant sworn on the 29th May, 2023 and based on the following grounds; -

    a) That the Applicant appealed the decision of the 1st Respondent to the 4th Respondent on 20th May 2022. The decision by the 1st Respondent was to the effect that her services had been terminated, which termination was null and void for failing to follow the substantive and procedural disciplinary proceedings.

    b) The 4th Respondent which is mandated to exercise disciplinary control over public service and remove persons holding or acting in offices in the public service, such as the Applicant and the 1st and 2nd Respondents, proceeded to hear and determine the Appeal on 6th September 2022 rendering itself as follows; -

        i. The Appellant be reinstated back to her employment on suspension pending the hearing and determination of the Anti-Corruption Case No. 2 of 2020 and/or until her contract is lawfully terminated.

ii. The Appellant be paid half (1/2) salary and the attendant allowances pursuant to Section 62 of the *Anti-Corruption and Economic Crimes Act* if the same has not been paid from the date of the charge and/or suspension.

c) Pursuant to that decision, the Applicant wrote a letter dated 15th September, 2022 addressed to the 1st and 2nd Respondents, informing them of the said decision and seeking enforcement and compliance of the same, which letter was not responded to. The Applicant wrote a follow up letter dated 4th October, 2022 which was not responded to either.

d) It is stated that the 1st and 2nd Respondents have adamantly refused to comply with the Public Service Commission decision by paying her all the outstanding salaries and attendant allowances.

e) Having received no communication and compliance the Applicant approached this Honourable Court vide the application dated 28th October 2022, seeking that the court adopts the 4th Respondent's decision as an order of the Court for execution, which court allowed on 17th January, 2023 and ordered that 1st Respondents to pay the Petitioner immediately.

f) The Petitioner served the said orders upon the 1st and 2nd Respondents on 20th January 2023 and sought compliance, However the 1st and 2nd Respondents did not comply with the said Orders.

g) Aggrieved by the 1st and 2nd Respondents actions and inaction, the Applicant, through an application dated 27th January, 2023 sought the council members of the 1st Respondent be committed to civil jail for disobeying court orders.

h) In response to this Application, the 1st and 2nd Respondents stated that they are in the process of computing the outstanding sums and reinstate the Petitioner to the University payroll.

i) Soon thereafter, the 1st Respondent's council's members' term lapsed rendering the council inquorate. However on 22nd May, 2023, the council was reconstituted, which is now able to process the payment expeditiously in compliance with Court orders and pay the Petitioner's outstanding dues of Kenya Shillings Eighty-One Million, Nineteen Thousand, Three Hundred and Forty-Eight (Kshs.81,019,348).

j) She stated that the 1st and 2nd Respondent refused to Comply with the decision of PSC and the subsequent Orders of this Court adopting the decision of PSC but continue to use its powers, as the Council, to level dogmatic excuses not to pay the outstanding salaries, when the Applicant continues to suffer intimidation, harassment, discrimination and victimization by the actions of the 1st ad 2nd Respondent of withholding her dues.

k) It is her case that unless the Honourable court intervenes, the applicant will continue being subjected to untold mistreatment and is equally at risk of not being paid her entitled dues.

l) She states that it is just, for the purposes of equity and justice and the overarching purpose of constitutional integrity to make the orders sought herein.

3. The Application is opposed by the 1st and 2nd Respondents who raised a Notice of Preliminary Objection filed on 12th June, 2023 based on the following grounds; -

1) That this Honourable Court is already functus officio Having already entered a judgement in this matter vide its decision of 17th January, 2023.

2) That this Honourable Court cannot for a second time enter judgement in the same matter as being sought by the Petitioner/Applicant in her application dated 29th May, 2023.

3) That it is trite law that parties are bound by their pleadings and no order of assessment of unpaid salary and/or allowances has been sought in the Petition and as such the instant application is pegged on a vacuum since no such order is sought in the Petition and as such the application is incompetent and cannot be sustained under the law.

4) That without an order sought for assessment of unpaid salary and/or allowances then no order of payment of the alleged Kshs. 81, 019,348 can be issued by this Honourable Court as the same goes beyond what was pleaded in the Petition and which is the primary pleading. The whole application is thus pegged on sinking sand, it is incurably defective, incapable of being awarded and ought to be dismissed with costs forthwith.

5) That the Petitioner/Applicant is in effect introducing a new cause of action through an application since the nature of claim before court is clear from the Petition and what is now in this instant application was never pleaded and is now being introduced through the back door and against the set down procedures and rules and in the process shall aid the Petitioner/Applicant to steal a match as against the Respondents herein.

6) That the instant application is essentially a judicial review application being introduced after judgment and completely contrary to the provisions of Order 53 of the *Civil Procedure Rules, 2010* and which provides a mandatory procedure to be followed by a litigant and the same ought to be in a different cause.

7) That the applicant herein has approached this court through the wrong forum since there is judgment in this matter which was already entered and this Honourable Court thus lacks jurisdiction to hear a judicial review application in the same cause and after judgment has already been entered.

8) That in line with the holding in the celebrated case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* (1989) eKLR this Honourable Court ought to forthwith down its tools and dismiss this suit for lack of jurisdiction.

9) That the application is incurably defective, bad in law, incompetent, null and void ab initio for having been filed in a wrong forum, in a court which is already *functus officio*, the orders sought in the application were not pleaded in the Petition and the same thus introduces a new cause of action through an application, it is bad in law and as such a candidate for dismissal.

4. In addition to the Preliminary objection, the 1st and 2nd Respondents filed a replying affidavit deposed upon on the 12th June, 2023 by Prof. James Nampushi, a senior officer of 2nd Respondent. The affiant reiterated the contents of the preliminary objection on the fact that the Court is *functus officio* having adopted the decision of the 4th Respondent as its judgement and should not make a decision on this Application because it will be tantamount to making another judgement in the same matter.

5. He stated that the orders sought by the Applicant in their previous application at prayer 3 is to have the entire petition disposed of which prayer was granted by the Court as such this Application has no legs to stand on having already disposed of the Main suit.

6. He stated that parties are bound by their pleadings and since no order was sought in the Petition for assessment of dues, the same cannot now be sought in an application because this Court does not

have powers to make orders for assessment at this stage. He added that the prayers being sought in this application can only be sought in a fresh suit.

7. The affiant stated also that the figure of Kshs 81,019,348 are special damages that must be strictly pleaded and proved. He thus stated that the figure herein has been plucked from the air as it is not supported by any documents.

8. It is also stated that most of the allowances that the Petitioner is seeking is unknown to the Petitioner and moreover that it has gone beyond the orders granted by Public Service Commission.

9. The deponent stated that unless the said figures are raised in another suit and subjected to proper evidence and gross examination, the Respondents herein will be prejudiced and public funds will be embezzled.

10. The Affiant therefore urged this Court, in the interest of Justice, to decline the Application herein with costs.

11. Directions were taken for the application to be disposed of by way of written submission.

Applicant's Submissions.

12. The Applicant submitted on two issues; whether the Orders Sought in the Application should be granted and whether this Court is *Functus Officio*.

13. On the first issue it was submitted that the Applicant has sought for an order of Mandamus to compel the 1st and 2nd Respondents to pay all her outstanding salaries and allowances as per the Court's Judgment of 17th January 2023. Subsequently that it has computed the said amount to Kshs; 81,019,348/-, and has asked this Court to adopt the same as judgment in execution of the Order. He argued that the Applicant has presented evidence to show that she has made several requests and demands for payment of the said amount, which demands have not been heeded to by the Respondents. Therefore, that there is implied refusal on the part of the Respondents to pay the demanded sums. In support of this she relied on the case of *Republic v Town Clerk of Webuye County Council & Another* HCCC 448 of 2006 wherein Majanja J. addressed the importance of the Court in ensuring that the right of a successful litigant to enjoy the fruits of his judgment as follows:

> "...a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favour enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the *Constitution* particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of the *Constitution*.

14. Similarly, that since the Respondents refused to pay his dues, she was forced to approach this Court and seek enforcement of the judgement and order of the Court issued on 17th January 2023.

15. On whether this Court should grant the Order of Mandamus, the Applicant submitted that under Section 1A (3) of the *Civil Procedure Act*, the Respondents and their advocates have a duty to assist the court to further the overriding objectives of civil litigation to ensure expeditious disposal of civil cases which include complying with the directions of the court and by failing to comply with the court Orders, they are in breach of that duty. In this they relied on the Court of Appeal decision in *Republic v*

Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] eKLR held with regard to the nature of the remedy of mandamus that:-

> " The next issue we must deal with is this: What is the scope and efficacy of an Order Of Mandamus? Once again we turn to *Halsbury's Law Of England*, 4th Edition Volume 1 at page 111 FROM Paragraph 89. That learned treatise says:-"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing there in specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice maybe done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

16. It was submitted that the requirements for an order of mandamus to issue were further explained by Mativo J. in *Republic v Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another* [2018] eKLR as follows:

> " Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. v Canada* (Attorney General), [23] and, was also discussed in *Dragan v Canada* (Minister of Citizenship and Immigration).[24] The eight factors that must be present for the writ to issue are:- (i) There must be a public legal duty to act; (ii) The duty must be owed to the Applicants; (iii) There must be a clear right to the performance of that duty, meaning that: a. The Applicants have satisfied all conditions precedent; and b. There must have been:
>
> i. A prior demand for performance;
>
> ii. A reasonable time to comply with the demand, unless there was outright refusal; and
>
> iii. An express refusal, or an implied refusal through unreasonable delay;
>
> iv. No other adequate remedy is available to the Applicants;
>
> v. The Order sought must be of some practical value or effect;
>
> vi. There is no equitable bar to the relief sought;
>
> vii. On a balance of convenience, mandamus should lie."

17. Accordingly, that it is not disputed in the present application that judgment was entered in favour of the Applicant. The Respondents therefore, being public bodies are under a duty and obligation to satisfy the orders issued in favour of the Applicant. Failure to which it would amount to an injustice. In any event that when the application for contempt was filed in this Court, the Respondent indicated that they are in the process of computing the outstanding sums and since no counter proposal has been given, this Court should adopt the computed sums, to allow for enforcement of the judgment.

18. The Applicant submitted on the issue of payment of a decretal amount by a public entity by citing the case of *Jaribu Credit Traders Limited v Nairobi County Government* [2018] eKLR where Aburili J stated;

> "It should also be noted that the law does not condition settlement of decree on budgetary allocations. In any case, the decree subject of these proceedings is over one year from 29th February 2016 and each year that passes, the respondent County Government is allocated funds and generates revenue from its own sources to cater for such eventualities/ meeting their legal obligations especially for a civil suit that proceeded to hearing interpartes hence there can be no genuine claim that the respondent has been ambushed with these mandamus proceedings. Furthermore, provision for settlement of decrees emanating from courts is something each Government agency must make in its annual budgetary projections. This position is supported by the holding in Republic vs Permanent Secretary of State for Provincial Administration (*supra*) where the court stated, and I agree. Albeit not a County Government, the 2nd Respondent is a Public Institution which is allocated funds and generates revenue from its own sources to cater for such eventualities."

19. It was argued that in seeking the Court to adopt the computed amount, the Applicant is not asking the Court to enter another judgment in her favour. Instead she is providing the Computation to enable enforcement of the Court's initial Judgment. Therefore, that the Application herein is merited.

20. On whether this Court is *Functus Officio*, the Applicant relied on the Supreme Court of Kenya decision on the doctrine of *functus officio* in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR that cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832:

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

21. The Applicant also relied on the case of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550 to the effect that:

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

22. Accordingly, that even though this court entered judgment in this matter, the court is not functus as the said judgment is yet to be perfected, and the Court has not performed all its duties in the Applicant's Petition, because the exact figure payable was not stated by the 4th Respondent and thus it was prudent for the 1st and 2nd Respondent to give the figure owed failure to which the Applicant took initiative and

calculated the dues owed and approached this Court to assist it in adopting the same for enforcement purposes.

23. To emphasize on their argument, the Applicant relied on the Court of Appeal in the case of *Telkom Kenya Limited v John Ochanda* (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR stated thus;

> " *Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. Similar position was held in the case of *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR where the court stated that; "It is clear that the doctrine of functus officio does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit- based re-engagement once final judgment has been entered and a decree issued, as is the case herein."

24. On that basis, it was submitted that the Court is not *functus officio* as the Applicant is neither reopening the case, nor asking the Court to revisit the matter on a merit-based re-engagement.

1st and 2nd Respondent's Submissions.

25. The Respondents herein submitted on three issues; whether the Notice of Preliminary Objection is meritorious, whether the application dated 29th May, 2023 has merit and whether costs should issue.

26. On the first issue, it was submitted that the 9 grounds of the preliminary objection raise issues of pure points of law, which demonstrate that this Court lacks jurisdiction to entertain the Application herein and should therefore down its tools. It was argued that the main grounds of the Application is on the fact that the Court is functus officio having adopted the decision of the 4th Respondent as its judgment cannot embark on determining application on new issues such as the calculations of dues, which issue in their opinion is new and should have been raised in a fresh suit and not under an application after Judgement.

27. The Respondent submitted that a P.O can only be raised; firstly, on pure points of law, secondly its argued on assumption that all fact and law are correct, thirdly that it cannot be raised when any of the fact is to be ascertained. Which they feel that they have raised herein in tandem with the decision in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 where the Court held that;-

> " ....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

> A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

28. Similarly, that the Preliminary Objection raised is qualified on all aspects and is in accordance with Section 25 of the *Civil Procedure Act* and Rule 28 of the *Employment and Labour Relations Court Procedure Rules*.

29. The Respondents submitted that the court adopted the decision of PSC as its judgement, limiting its jurisdiction not to handle any fresh matter regarding the case herein, because the court has become functus officio. He added that the Application herein, in so far its seeking for further judgement from this Court, is res judicata as provided for under Section 7 of the *Civil Procedure Act*. Therefore, that the Applicant is barred from re-litigating any issue that is similar to issues already raised and the Court is deprived of jurisdiction to handle the issue a second time. To support their argument on res judicata they relied on the case of *John Florence Maritime Service Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR where the Court held as follows;-

> "The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature."

30. To put more emphasize on their argument they relied on the case of *Okiya Omtatah Okoiti v Communication Authority of Kenya & 14 others* [2015] eKLR where the Court held that;-

> "The rationale behind the provisions of Section 7 above entrenching the doctrine of res judicata is that if the controversy in issue is finally settled, determined or decided by a competent Court, it cannot be re-opened. The doctrine is therefore based on two principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause... I agree with the learned judge and as I have stated above, it matters not that the Petitioner has framed different questions for determination or has sought slightly different orders from those in Petition No.14 of 2014. To my mind, the core and crux forming the subject matterof the Petitioner's case is largely the issue of digital migration save the additional issue as regards the Board of the CAK. I am clear that the Petitioner is therefore trying to bring to this Court, in another way and in the form of a new cause of action, a suit that has already been placed before a competent court in earlier proceedings and which was adjudicated upon and judgment delivered."

31. Accordingly, that the application herein is res judicata and this Court should dismiss forthwith. They added that the doctrine of estoppel should be applied in the current application as was held in *Nancy Mwangi t/a Worthlin Marketers v Airtel Network (K) Ltd & 2 others* [2014] eKLR and the case of *E. T v Attorney General and another* [2012] eKLR.

32. The Respondent submitted also that the Applicant has tried litigating on the issues already litigated through the back door in effect introducing a new cause of action after judgement, which move is

abhorred by the law. In support of this they relied on the case of *Paul Mujera & 6 others v African Israel Church Nineve & 3 others* [2011] eKLR where the Court held that;-

> " Thirdly, a party must be held to its pleadings and the interlocutory Application cannot introduce a cause of action not founded on the Plaint. I have elsewhere above reproduced the prayers in the Plaint. Prayer (ii) is superfluous and should not be in the Plaint and it is obvious why! Prayers (i) and (iii) relate to amendments of the *Constitution*, period! They do not relate to the effects of the amendments and any injury known to law that the Plaintiffs may suffer as a result thereof. Further, the purported injury cannot be presumed, nor surmised, neither can this court imagine what the injury may be. The Application has introduced, a whole new cause of action regarding the "Plaintiffs possession control, and administration of their congregations at Koibarak, Kibaita, Ng'erek, Kechire, Chanda, Efeso, Ileho, Kabras and Nairobi (Kawangware/Kibera) branches!" Where is that issue pleaded in the Plaint? I submit nowhere."

33. They also relied on the case of *Witmore Investment Limited v County Government of Kirinyaga & 3 others* [2015] eKLR where the Court held that;-

> " An interlocutory application being an offshoot of the main suit or petition must have a correlation. Besides that, a party is bound by the pleadings and where a new issue emerges or was inadvertently left out, the right way is to amend or seek leave to amend if pleadings have been closed as provided by law. But it is irregular and an abuse of court process for a litigant to introduce a new issue to a pending suit without amending the pleadings and putting the other party or parties in the litigation on notice. In that regard this Court is in agreement with the decision cited by the Respondent in the case of The *Independent Electoral & Boundaries Commission & Anor v Stephen Mutinda Mule & Others* [2014] eKLR though the context upon which the decision was made is somewhat different from the present case. The principle is nonetheless the same and is all about informing the other party what your case is all about to accord him or her a chance to respond or defend himself or herself."

34. On that basis, that since assessment of of dues was not sought in the Petition, the prayer for payment of Kshs 81, 019, 348 cannot be granted in this application because it lacks legs to stand on. Therefore, that the Application herein is not merited and the orders sought should be disallowed.

35. On costs of the Application, it was submitted that costs follow event as aptly stated in section 27 of the *Civil Procedure Act* and being that the application is without any basis, the same should be dismissed with costs.

36. In conclusion, the Respondent submitted by quoting the words of Justice M. Mbaru that " Even with the best application of Article 23(3)(d) of the *Constitution*, the procedural requirements of Rule 7 and Order 53 have not abated. These remain alive."

37. I have examined all the averments and submissions of the parties herein vide this court's ruling of 17/1/2023 this court entered Judgment for the applicant on the following terms;-

    1) That the decision of the 4th Respondent dated 6th September 2022 on an appeal by the Applicant is recognized, adopted as a Judgment of this Court and a decree issued for appropriate enforcement.

2) That this Honourable Court grants an order directing 2nd, 3rd and 4th Respondents by way of mandamus to commence implementation of the Ruling of the Public Service Commission dated 6th September 2022.

3) That the Petition herein is deemed as disposed upon the Honourable Court granting prayers No 1 & 2 above.

4) That the cost of this application be borne by the Respondents.

38. The order (2) above granted the applicant power to respondents by way of mandamus to commence implementation of the ruling of the PSC dated 6/9/2022.

39. The respondents have filed a preliminary objection averring that this court is fuctus officio and therefore lacks the requisite jurisdiction to handle this matter having already entered Judgment in this matter.

40. Indeed this court entered judgment on 17/1/2023 adopting the orders of the PSC as above. My understanding of this order is that the order to commence implementation of the order of the PSC was granted and a fresh suit to order the same thing need not be filed.

41. In line with that implementation, the parties embarked on a process to compute what was owed to the petitioner.

42. This court directed the parties to file their figures for consideration.

43. Infact in a contempt application filed by the applicant petitioner dated 27/3/23, the respondents reported that they had partially complied with the orders by placing the petitioner back on payroll and what now awaited was computation of the arrears payable.

44. The averment that this court is *fuctus officio* is not in my view true based on the fact that the parties are basically following up on execution on the implementation of the orders already granted and the court is not rewriting any new Judgment.

45. On 11/7/23, this court directed the parties to file submissions on the figures payable to the petitioner.

46. The applicants in support of this application relied on the petitioner's affidavit and indicated that the respondents have been slow in implementing the orders of this court and have never filed for review, appeal or stay of the said orders.

47. The applicants had made their computation of the figures payable to the petitioner but the respondents were reluctant to file any rejoinder despite several orders of the court to do so.

48. The respondents omitted to reply to the computation insisting they didn't have a council in place.

49. The council was finally appointed in May 2023 but still no action was taken by the respondents.

50. It is my finding that the respondents are duly bound to implement the decision of PSC as adopted by this court and as computed by the applicants to the tune of kshs.81,019,348/= in the absence of any rejoinder.

51. Those would be the orders of this court.

52. The amount is payable less statutory deductions.

RULING DELIVERED VIRTUALLY THIS 28TH DAY OF SEPTEMBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mwangi holding brief for Kahiga for the 1st & 2nd Respondents – present

Miss Mbuchi holding brief for Manwa for Applicant – present

Nyambura for AG – Present

Court Assistant – Fred