



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**ELRC CAUSE NUMBER 493 OF 2016**

**(FORMERLY HCCC NO. 1579 OF 2001)**

**LUKE CHERUIYOT & 37 OTHERS.....CLAIMANTS/APPLICANTS**

**VERSUS**

**NATIONAL OIL CORPORATION OF KENYA.....RESPONDENT**

**RULING**

1. The application before court is the one dated 22/10/2019. The application is for review. The application was filed through a notice of motion application filed under Rule 33 (1) (2) and (3) of the ELRC (Procedure) Rules 2016.

2. The applicant seeks orders that;

This matter be certified urgent, fit to be heard ex-parte and service thereof be dispensed in the first instance.

The judgment of this Honourable Court delivered in open court on 20/12/2018 be and is hereby reviewed as follows;

a. That paragraph 11 be and is hereby deleted and substituted therefor with;

11. Luke Cheruiyot, the 1<sup>st</sup> claimant, testified on behalf of claimant’s No. 2, 3, 4, 6, 7, 8, 9, 10, 12, 14, 15, 16, 18, 23, 25, 26, 28, 29, 30, 31, 32, 33, 35, 36 and 37. The rest were yet to give their authority as at the time of trial.

b. That paragraph 24 be and is hereby deleted and substituted therefore with:

24. It is submitted that 26 claimants are the only ones to have their claims considered before this court. It is further submitted that of the 25 claimants who gave authority, only the 6 claimants with witness statements on record should have their claims against the respondent considered.

c. That paragraph 30 be and is hereby deleted and substituted therefore with;

30. I have examined the evidence and submissions of all the parties. As stated by CW1, he had authority to prosecute this claim on behalf of claimants Nos. 2, 3, 4, 6, 7, 8, 9, 10, 12, 14, 15, 16, 18, 23, 25, 26, 28, 29, 30, 31, 32, 33, 35, 36 and 37.

d. That paragraph 31 be and is hereby deleted and substituted therefore with;

31. I therefore start from the premise that the claim by claimants Nos.5, 11, 13, 17, 19, 20, 21, 22, 24, 27, 34 and 38 has not been prosecuted and I therefore strike it out.

e. That paragraph 45 be and is hereby deleted and substituted therefore with;

45. The figures translate as follows:-

<b>1<sup>st</sup> Claimant</b>	<b>Luke Cheruiyot</b>	<b>26,878.00</b>	<b>X</b>	<b>12</b>	<b>=</b>	<b>322,536.00</b>
<b>2<sup>nd</sup> Claimant</b>	<b>Christine Cheboror</b>	<b>15,598.00</b>	<b>X</b>	<b>12</b>	<b>=</b>	<b>187,176.00</b>

3 <sup>rd</sup> Claimant	Ann J. Kisang	19,178.00	X	12	=	230,136.00
4 <sup>th</sup> Claimant	Sophia Seghu	19,838.00	X	12	=	238,056.00
6 <sup>th</sup> Claimant	Rose W. Gatete	30,158.00	X	12	=	361,896.00
7 <sup>th</sup> Claimant	Teresia Githaiga	19,178.00	X	12	=	230,136.00
8 <sup>th</sup> Claimant	Judith Andiemba	18,658.00	X	12	=	223,896.00
9 <sup>th</sup> Claimant	Mary M. Ndegwa	29,558.00	X	12	=	354,696.00
10 <sup>th</sup> Claimant	Jackson S. Koiyet	22,318.00	X	12	=	267,816.00
12 <sup>th</sup> Claimant	Samuel K. Sabulei	21,138.00	X	12	=	253,656.00
14 <sup>th</sup> Claimant	Appofia N. Mutungi	22,178.00	X	12	=	266,136.00
15 <sup>th</sup> Claimant	Marion G. Maraga	22,958.00	X	12	=	275,496.00
16 <sup>th</sup> Claimant	James M. Macharia	21,138.00	X	12	=	253,656.00
18 <sup>th</sup> Claimant	Jerotich Kiprof	19,398.00	X	12	=	232,776.00
23 <sup>rd</sup> Claimant	Jones Kasaya	29,558.00	X	12	=	354,696.00
25 <sup>th</sup> Claimant	Philip S. Kiptoo	16,423.00	X	12	=	197,076.00
26 <sup>th</sup> Claimant	Barnaba K. Koech	18,958.00	X	12	=	227,496.00
28 <sup>th</sup> Claimant	Paul M. Chege	20,878.00	X	12	=	250,536.00
29 <sup>th</sup> Claimant	Francis R. Metto	16,243.00	X	12	=	194,916.00
30 <sup>th</sup> Claimant	Richard Muchoki	43,508.00	X	12	=	522,096.00
31 <sup>st</sup> Claimant	Cecilia W. Maina	24,293.00	X	12	=	291,516.00
32 <sup>nd</sup> Claimant	Bryan C. Kipkoech	40,013.00	X	12	=	480,156.00
33 <sup>rd</sup> Claimant	Kimutai S. Cherono	47,983.00	X	12	=	575,796.00
35 <sup>th</sup> Claimant	Kiprotich V. Chelimo	34,573.00	X	12	=	414,876.00
36 <sup>th</sup> Claimant	Capt. Franklin Njeru	29,473.00	X	12	=	353,676.00
37 <sup>th</sup> Claimant	Christopher M. Shanyuma	51,283.00	X	12	=	615,396.00

f. That a new paragraph 46 be and is hereby inserted to the effect that:

This Honourable Court hereby provides a clarification on the unpaid allowances for claimants who had served the respondent for eleven (11) years and more and hereby holds that unpaid allowances are due to claimants Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 12, 30 and 31 for the following figures:

1 <sup>st</sup> Claimant	Luke Cheruiyot	49,434.00	X	16	=	790,944.00
2 <sup>nd</sup> Claimant	Christine Cheboror	18,534.00	X	15	=	278,010.00
3 <sup>rd</sup> Claimant	Ann J. Kisang	29,934.00	X	15	=	449,010.00

<b>4<sup>th</sup> Claimant</b>	<b>Sophia Seghu</b>	<b>29,934.00</b>	<b>X</b>	<b>15</b>	<b>=</b>	<b>449,010.00</b>
<b>6<sup>th</sup> Claimant</b>	<b>Rose W. Gatete</b>	<b>48,534.00</b>	<b>X</b>	<b>15</b>	<b>=</b>	<b>728,010.00</b>
<b>7<sup>th</sup> Claimant</b>	<b>Teresia Githaiga</b>	<b>29,934.00</b>	<b>X</b>	<b>15</b>	<b>=</b>	<b>449,010.00</b>
<b>8<sup>th</sup> Claimant</b>	<b>Judith Andiemu</b>	<b>18,534.00</b>	<b>X</b>	<b>14</b>	<b>=</b>	<b>259,476.00</b>
<b>9<sup>th</sup> Claimant</b>	<b>Mary M. Ndegwa</b>	<b>49,434.00</b>	<b>X</b>	<b>14</b>	<b>=</b>	<b>692,076.00</b>
<b>10<sup>th</sup> Claimant</b>	<b>Jackson S. Koiyet</b>	<b>36,534.00</b>	<b>X</b>	<b>14</b>	<b>=</b>	<b>511,476.00</b>
<b>12<sup>th</sup> Claimant</b>	<b>Samuel K. Sabulei</b>	<b>31,434.00</b>	<b>X</b>	<b>13</b>	<b>=</b>	<b>408,642.00</b>
<b>30<sup>th</sup> Claimant</b>	<b>Richard Muchoki</b>	<b>60,534.00</b>	<b>X</b>	<b>16</b>	<b>=</b>	<b>786,942.00</b>
<b>31<sup>st</sup> Claimant</b>	<b>Cecilia W. Maina</b>	<b>29,514.00</b>	<b>X</b>	<b>16</b>	<b>=</b>	<b>383,682.00</b>

g. That the holding that “The respondent will in addition pay to the claimants costs of this suit plus interest at court rates with effect from the date of this Judgment” be and is hereby deleted and substituted therefore with:

The respondent will in addition pay to the claimants costs of this cause plus interest at court rates with effect from 17/09/2001.

3. The application is premised on the following grounds;

- a) The error on the face of the record that warrant review of this Honourable Court’s Judgment delivered on 20/12/2018.
- b) The error on the record is two-pronged, being an inadvertence omission of certain claimants in the Award of this Honourable Court and mix up of names.
- c) Twenty-five (25) out of the thirty-seven (37 others) claimants duly authorized Luke Cheruiyot to prosecute their claims before this Honourable Court a fact noted under paragraph 24 of the Judgment and duly acknowledged by the respondent under paragraph 14 of its submissions dated 3/12/2018.
- d) The authorities of the Twenty-five (25) claimants were filed on two occasions, namely 23/10/2018 and 30/10/2018.
- e) The claimants’ case was heard on 23/10/2018 and on 30/10/2018.
- f) That on 23/10/2018 the testimonies for and on behalf of claimants Nos.1, 2, 3, 4, 6, 7, 9, 10, 14, 15, 16, 18, 23, 28, 30, 31 and 36 were heard and rightly noted under paragraphs 11 and 30 of the Judgment.
- g) That on 30/10/2018 the testimonies for and on behalf of claimants Nos. 8, 12, 25, 26, 29, 32, 33, 35 and 37 were heard which fact was omitted in the Judgment leading to the erroneous striking out of the claims of these nine (9) claimants under paragraph 31 of the Judgment.
- h) That the striking out of the claims of the claimants Nos. 5, 11, 13, 17, 19, 20, 21, 22, 24, 27, 34 and 38 under paragraph 31 of the Judgment was correct and factual.
- i) The claimants were listed in the plaint (memorandum of claim) in two broad categories – union members and management staff and further based on their employee numbers.
- j) The schedules of damages and unpaid allowances filed together with the claimants had the claimants listed according to their years of service with the respondent, starting from the highest to the least and did not discriminate the claimants as either unionsable or management staff, as per the list of the claimants in the plaint (memorandum of claim).
- k) The non-categorisation of claimants in the schedule of damages, created an unfortunate and unintended mix up of the claimants’ names which inadvertently confused this Honourable Court thus causing an interchanging of the claimants’ names in the list of awardees of the compensation.
- l) The mix up further resulted in the inadvertent omission of names of certain claimants (e.g. No. 30 – Richard Muchoki and replaced with No. 25 – Philip S. Kiptoo) in the award of this Honourable court and an inadvertent inclusion of a claimant (No. 19 – Matilda Muturi in place of No. 23 – Jones Kasaya) who was allegedly reported by the respondent during the hearing, to be deceased and had not given authority for the prosecution of her claim nor presented evidence was erroneously included in the award.
- m) The inadvertent omission of nine (9) claimants, the inadvertent inclusion of one (1) claimant and the inevitable mix up and

interchanging of the claimants' names and positions is an error on the face of the record and can and should be rectified by this Honourable Court.

n) The claimants desire clarification on the issues of: unpaid allowances due to the claimants who served the respondent for eleven (11) years and more; and interest.

o) That it is just and fair to allow for the review this the Judgment of this Honourable Court to allow for a conclusive determination of this suit and to prevent a multiplicity of suits that may ensue at the appeal stage.

4. The application is also supported by the supporting affidavit of Luke Cheruiyot one of the claimants herein who reiterates the averments made in the grounds in support of the application.

5. The application was opposed by the respondents herein who filed their replying affidavit dated 14/2/2020 indicating that the application is unmerited and intended to circumvent their intended appeal.

6. They aver that upon reading and interpreting the Judgment of this court delivered on 18/12/2018 they decided to file an appeal and so filed a Notice of Appeal in January 2019 and also sought to be supplied with a copy of typed proceedings.

7. They also served the claimant applicants herein with an application for stay at the Court of Appeal which application was allowed in October 2019 after the claimant's advocates conceded to the application.

8. They aver that whereas the claimants' counsels informed the Court of Appeal that they had filed an application for review they failed to inform the court that they had filed the application the previous day.

9. That they also failed to inform the Court of Appeal that they also applied to strike out the appeal.

10. The respondents further averred that the applicants filed this application late over 10 months after the Judgment was delivered and that they came to court with unclean hands.

11. The respondents aver that the reason the claimants have filed this application is to circumvent the appeal.

12. They contend that the application lacks merit and should therefore be dismissed accordingly.

13. I have considered the averments of the parties herein plus submissions filed accordingly.

14. The gist of the application by the applicants is that there are errors on the face of the record which consists of the inadvertent exclusion of nine claimants, inadvertent inclusion of one claimant and interchanging of the claimants names and positions.

15. The applicants fault the non-categorization of the claimants in the schedule of damages for the mix up of the claimants names which caused an interchanging of the claimants names on the list of awardees of the compensation.

16. The applicants aver that the mix up further resulted in the inclusion of a claimant who was allegedly deceased in the award.

17. The application is brought under Rule 33(1), (2) & (3) of the ELRC (Procedure) Rules 2016 which states as follows;

**“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.”***

18. The issue for this court's determination is;

**1. Whether the application is properly before court.**

**2. Whether there is an error on the face of the record which this court can correct.**

**ISSUE NO. 1**

19. On issue No. 1 above, the respondents have averred that the applicants are improperly before court because the applicants approached court late and the issues they seek review of this court are based on the merit of the court's Judgment which falls within the province of the Court of Appeal.

20. The applicants averred that they filed this application timeously and that the application has merit.

21. Under Rule 33 (1) a review application can be sought within reasonable time for the reasons of discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge of the person or could not be produced by that person at the time when the decree was passed by the order made, on account of some mistake or error apparent on the face of the record, if the Judgment requires clarification or for any other sufficient reason.

22. The applicants herein approached court due to what they term as error on record which they discovered upon reading of the Judgment.

23. In the circumstances of the case, the error was apparent if it is upon the reading of Judgment passed in December 2018.

24. This application was filed in October 2019 10 months after the Judgment which pauses inordinate delay. The applicants have not explained the delay in filing the review application.

25. There is already a Notice of Appeal also filed by the respondents based on the Judgment which was already delivered in December 2018 and which the applicants have acknowledged knowledge of.

26. If indeed there is that knowledge, that an appeal has been filed, the move to review the court's Judgment would in my view conflict with any decision that the Court of Appeal may wish to take.

27. I find that the application for review was filed way too late and any correction they may wish can also be addressed by the Court of Appeal.

28. In the circumstances I decline to review the Judgment as applied. Costs to abide outcome of the appeal.

**RULING DELIVERED VIRTUALLY THIS 20TH DAY OF JANUARY, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Teddy Ochieng for claimant/applicant – present

Respondents – absent

Court assistant – Fred