



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 148 OF 2014**

**PETER KINGOINA.....CLAIMANT**

**VERSUS**

**COUNTY ASSEMBLY OF NYAMIRA.....RESPONDENT**

**RULING**

1. The Court of Appeal in a judgment delivered on 10 February 2017 in Civil Appeal No. 84 of 2015, *Peter Kingoina v the County Assembly of Nyamira* set aside a judgment of this Court (differently constituted) and also ordered:

Considering that the suit before the lower Court was determined on the basis of the pleadings and affidavits without viva voce evidence, we are unable to determine prayer 24(d) of the Memorandum of Claim as there is no material before us on the basis of which to consider this prayer.. In the circumstances, we order that prayer 24(d) of the Memorandum of Claim be and is hereby remitted back to the Employment and Labour Relations Court ... to determine whether the appellant is entitled to any of the heads of relief sought thereunder and to assess the quantum of compensation payable to the appellant under any of those heads, if any.

2. When the Cause was placed before the Court on 7 December 2017 after the Court of Appeal judgment, it directed that:

Oral evidence to be led in respect of prayer 24(d) of the Memorandum of Claim. Hearing on 26/7/2018. Parties at liberty to file witness statements in respect of the hearing as directed by the Court of Appeal.

3. The Court did not sit on the scheduled hearing date and the hearing was rescheduled to 17 October 2018, when the Court upon brief oral submissions from the Respondent ordered that since the Cause had been finalised, it could not take any further steps without a substantive application.

4. As a result, the Claimant filed a Motion dated 4 February 2019, seeking an order readmitting the Cause for a rehearing pursuant to the directive by the Court of Appeal.

5. The Motion was allowed by consent of the parties and on 9 December 2019, the parties sought for a hearing date.

6. The hearing was fixed for 5 March 2020, but was rescheduled to 16 March 2020, because the Respondent had changed advocates.

7. However, due to COVID19, the hearing did not proceed on 16 March 2020, and when the parties appeared before the Deputy Registrar on 29 September 2020, she was informed that the parties had complied and therefore they were seeking a judgment date (not a hearing date).

8. The Cause was then placed before the Judge and in a judgment delivered on 11 March 2021, the Court held:

The Court finds therefore that the Claimant has failed to prove the Claim set out under paragraph 24(d) of the Memorandum of Claim on a balance of probabilities and the suit is dismissed in respect of that prayer 24(d)(i) to (d) for failure of proof by the Claimant.

9. Aggrieved, the Claimant moved the Court on 26 April 2021 seeking orders:

(1) spent

(2) spent

(3) THAT this Honourable Court do review and/or set aside it's Ruling and consequential orders issued on 11 March 2021 pending

the hearing and determination of this suit.

10. The main/primary ground advanced in support of the Motion was that the parties had consented to have the question under reference determined through the record and written submissions.
11. The Claimant also contended that the reliefs sought under paragraph 24(d) of the Memorandum of Claim were statutory and could be granted without the oral evidence of the Claimant.
12. According to the Claimant, there was a mistake/error apparent on the face of the record which could be rectified under the review jurisdiction.
13. The Clerk of the County Assembly filed a replying affidavit in opposition to the Motion on 5 October 2021, in which it was deposed that prayer 24(d) of the Memorandum of Claim sought special damages but the Claimant had failed to produce the evidence to support the special damages.
14. The County Assembly took the view that there was no mistake or error apparent on the face of the record which could be reviewed.
15. In the County Assembly's view, the recourse available to the Claimant was to appeal.
16. Pursuant to directions by the Court, the Claimant filed his submissions on 17 November 2021, (should have been filed and served on or before 6 November 2021) while the County Assembly had filed its submissions on 5 October 2021.
17. The Court has given due consideration to the Motion, affidavits and submissions and the following emerge.
18. The Court of Appeal appreciated and noted that the prayers sought by the Claimant in paragraph 24(d) of the Memorandum of Claim could not be adjudicated without proof through viva voce evidence.
19. Consequently, the Court of Appeal gave the Claimant an opportunity to present the evidence before this Court.
20. When the parties appeared before this Court on 7 December 2017, the Court explicitly directed the parties to file and exchange witness statements ahead of hearing on 26 July 2018.
21. The Claimant did not comply with that peremptory Court directive whose significance was that the witness statement should have been on record by the hearing date.
22. From the record, the Claimant did not seek leave to file any witness statement after the aborted hearing on 26 July 2018.
23. Instead, the Claimant agreed with the Respondent that the hearing proceeds on the basis of what was on record and submissions to be filed.
24. In the Court's view, the consent to proceed by way of submissions was a reckless option on the part of the Claimant which cannot be blamed on the Court under the guise of error apparent on the face of the record.
25. Further, the prayers pleaded by the Claimant at paragraph 24(d) of the Memorandum of Claim were in the nature of special damages which required strict proof.
26. When the Court gave its judgment, it clearly stated that the Claimant had failed to meet threshold of proof expected of him.
27. The finding by the Court was therefore not an error apparent on the face of the record. The Claimant had failed to prove his case and entitlement to special damages sought.
28. If the Claimant was of the view that there was sufficient evidence on record through the submissions (pleadings are not and do not constitute evidence), and that the Court failed to consider the evidence or misapprehended the evidence, his option should have been an appeal to the Court of Appeal.
29. The Court finds that the Claimant has failed to satisfy the test for review.
30. For whatever it is worth, this Court notes that the heads of claim pleaded at paragraph 24(d) of the Memorandum of Claim were seeking anticipated or lost income which the Claimant would have earned had he served a full term as the Speaker.
31. In the view of this Court, it is doubtful whether the said reliefs would have been available to the Claimant.
32. In making the observation, the Court draws comfort and endorses the decision from the Supreme Court of Uganda decision in *Bank of Uganda v Tinkamanyire* (2008) UGSC 21 that:

The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch

allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law.

33. The Motion is dismissed with costs to the County Assembly.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 19TH DAY OF JANUARY 2022**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**APPEARANCES**

**FOR CLAIMANT PROF TOM OJIENDA & ASSOCIATES**

**FOR RESPONDENT OCHIENG WALUKWE & ASSOCIATES ADVOCATES**

**COURT ASSISTANT CHRISPO AURA**