



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 115 OF 2018

JOSEPH MAINGI KARIUKI.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. Before me for determination is the Claimant /Applicant's Notice of Motion dated 25th October, 2021 filed under certificate of urgency on even date pursuant to section 16 of the industrial Court Act, rule 33(1)(b) of the Employment and Labour Relations Court(Procedure) Rules 2016, Order 9 Rule 9 and Order 45 Rule 2 of the Civil Procedure Rules and all other enabling provisions, seeking the following Orders; -

1) That the Honourable Court be pleased to grant leave to the applicant to act in person.

2) That the Honourable Court to Review its Judgement delivered on 12.10.2021 by Hon Lady Justice Wasilwa to an extent of allowing the relief of an order of reinstatement with back pay.

3) That the costs of this Application be borne by the Respondents in any event.

2. The Application herein is based on the grounds on the face of the Application and the supporting Affidavit deposed upon on the 25th October, 2021 by **JOSEPH MAINGI KARIUKI**, the Claimant herein and based on the following grounds; -

a) That leave has to be sought by the claimant as the claimant was previously represented by an advocates.

b) That judgement was delivered in this matter on the 12.10.2021 however that in the said judgment the Court did not address the relief of reinstatement sought and payment of back wages.

c) The Applicant contends that the court declined the prayer on the premises that the prayer had been overtaken by time having been decided after 3 years from the date of termination, however that the Court took into consideration the Covid period when the same ought not to have been considered.

d) The applicant thus prayed for this Court to review the said Judgement and allow the prayer for reinstatement and payment of back wages.

3. In response to the application, the Respondent filed grounds of opposition dated 8th November, 2021. Which came out as follows.

a) THAT the orders as sought in the application herein cannot issue as the grounds for granting Review orders as laid out under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 as read together with Section 16 of the Employment and Labour Relations Court Act,2011 have not been met.

b) THAT the application herein falls outside the precepts of a Review application as envisioned under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

c) THAT the application herein is an Appeal disguised as a review application,

d) THAT this Honourable Court lacks the jurisdiction to grant the orders sought in the Notice of Motion application.

e) THAT the Appellants Application is frivolous, without merit and the same is an utter abuse of the powers of this Honourable

Court,

f) THAT the Application is baseless, inept and not grounded on the law.

g) THAT there is therefore no proper Review application before this Honourable Court for determination and the Respondent prays that the application herein be struck out with costs to the Respondent for being a gross abuse of the Court process.

4. The application herein was disposed of by way of written submissions.

Applicants submissions.

5. The Applicant submitted that Rule 33 of the Employment and Labour Relations court (Procedure) Rules allow this Court to review its judgement and Orders. It was argued that the grounds upon which the application is brought is that the Court did not address the relief of reinstatement and payment of back wages when it found the termination unfair and unlawful.

6. It was further argued that as much as section 12(3)(vii) of the Employment Act limits reinstatement to 3 years from the time of dismissal, the case was heard and submission filed within 3 years. The time within which the court took to write the judgement and summer vacation ought not to have been counted.

7. The Applicant therefore urged this Court to review its judgement and reconsider the prayer of reinstatement sought in the claim.

Respondents submissions.

8. The Respondent submitted that the basis of the applicant's application is on alleged error apparent on the face of the Judgement and went ahead to give a definition of error as was held in **George Nyakundi Ombaba V Attorney General [2021] eKLR** in the **National Bank of Kenya v Ndungu Njau [1997] eKLR** the court expressed itself as follows concerning an error or omission apparent on the face of record:

“A review may be granted whenever the court considers that it is necessary to correct an 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 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 the law. Misconstruing a statute or other provision of the law cannot be a ground for review.”

9. It was further argued that dissatisfaction with finding and reasoning in a judgment cannot amount to an error of law of fact apparent on the face of the record as would justify a review. In this they cited the case of **Sergii Gergel V ARFA AFRA LTD t/a IMAX Africa Ltd [2020] eKLR**.

10. The Respondent then submitted that 3 years lapsed from the dismissal to the delivery of the judgement therefore the Court was justified not to allow the said relief for reinstatement. Furthermore, that the claimant was fairly compensated by the Court in accordance with section 49 of the Employment Act.

11. The Respondent further submitted that the claimant is seeking to reopen a matter that has already been concluded and cited the case of **Sergii Gergel (supra)** where the Court held that:-

“The Court holds that the review process is not for the purpose of reopening cases that have been concluded and judgment rendered and upon the ground of the applicant solely seeking to change the character of his case to achieve a different outcome in the already determined case. In the opinion of the Court, doing so would open litigation to endless process in which litigants would wait for a judgment or ruling and thereafter, decipher the weaknesses in their cases as found in the judgment or ruling, and seek to cure the weaknesses through reopening the cases in disguised review applications. The Court will not allow litigants to invoke such unfair schemes that are inconsistent with the established tenets of due process.”

12. The Respondent therefore urged this Court to disallow the Application with costs to the Respondent.

13. I have examined the averments of the parties herein. This court rightly considered the fact that the claimant was terminated on 1/8/2018 and Judgment herein was delivered on 12/10/2021 which was after 3 years and so the prayer for reinstatement could not issue.

14. The issues raised by the applicant requiring review fall outside the ambit of review.

15. There is actually nothing for this court to review as the issues can only be determined through an appeal.

16. I find the application unmerited.

17. I disallow it and dismiss it accordingly.

18. There will be no order of costs.

RULING DELIVERED VIRTUALLY THIS 18TH DAY OF JANUARY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Gitau for Respondent – present

Applicant – absent

Court Assistant - Fred