



Njuguna & 3 others (Suing on their own behalf and on behalf of 63 other former employees of the Directorate of Civil Aviation, a department within the Ministry of Transport and Communications) v Attorney General & 2 others (Judicial Review Application 3 of 2015) [2022] KEELRC 12825 (KLR) (31 May 2022) (Ruling)

Neutral citation: [2022] KEELRC 12825 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION 3 OF 2015**

L NDOLO, J

MAY 31, 2022

[FORMERLY MISCELLANEOUS CIVIL CASE NO 1278 OF 2004]

BETWEEN

RUFUS NJUGUNA 1ST PLAINTIFF

RURIAN MICHENI 2ND PLAINTIFF

DANSON KIMANI 3RD PLAINTIFF

ALLAN MUKINDIA 4TH PLAINTIFF

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF 63 OTHER FORMER
EMPLOYEES OF THE DIRECTORATE OF CIVIL AVIATION, A DEPARTMENT
WITHIN THE MINISTRY OF TRANSPORT AND COMMUNICATIONS**

AND

ATTORNEY GENERAL 1ST DEFENDANT

KENYA CIVIL AVIATION AUTHORITY 2ND DEFENDANT

C A KUTO 3RD DEFENDANT

RULING

1. This ruling responds to the 2nd defendant's preliminary objection to the 65th plaintiff's notice of motion application dated July 22, 2021. The objection was raised by notice dated September 15, 2021 and is based on the following grounds:
 - a. The application offends rule 33(6) of the [Employment and Labour Relations Court \(Procedure\) Rules](#);



- b. The application is *res judicata*;
 - c. This court is devoid of jurisdiction to hear and determine the application;
 - d. The application is grossly incompetent and a blatant abuse of the court process;
 - e. The application ought to be dismissed with costs.
2. The subject notice of motion dated July 22, 2021 seeks the following orders:
- a. That the court be pleased to review the ruling by O N Makau J delivered on September 28, 2018;
 - b. That in reviewing the ruling, consideration be given to the possible annual salary increments that would have accrued to the applicant as per ‘the Kenya Civil Aviation Authority: Realigned Salary Structure and Grades of July 2006’ as well as the increments effected on November 2, 2011 as per the internal memo dated November 3, 2011 titled KCAA Salary Scales and Progression and therefore include the salary increments while tabulating the salary arrears of the applicant;
 - c. That in reviewing the ruling, the court do give due consideration to the allowances and benefits that would have been accorded to the applicant as the document titled ‘the Kenya Civil Aviation Authority: Realigned Salary Structure and Grades of July 2006’;
 - d. That while placing reliance on the salary increments as well as the allowances and benefits sought, the court be guided by the accountant’s report from Woodvale Associates, which has factored in the tabulations in (b) and (c) above and the pension due to the applicant.
3. The applicant based his application on the following grounds:
- a. That the matter was heard and determined in the High Court before Emukule J who delivered a ruling on November 7, 2005;
 - b. That the matter went on appeal and the Court of Appeal, while upholding the substance of the ruling by the trial judge, reversed the direction that the salary arrears be assessed by the Registrar or the Deputy Registrar;
 - c. That the Court of Appeal directed the applicant, together with the other plaintiffs in the matter to file a schedule of arrears due to them to form the basis for assessment before any other High Court judge;
 - d. That the matter went before Mumbi Ngugi J (as she then was) and was later transferred to the Employment and Labour Relations Court;
 - e. That in an interim ruling delivered on August 19, 2016, Linnet Ndolo J directed the plaintiffs to file documentary evidence in support of their respective tabulations;
 - f. That only 40 plaintiffs were able to file their documentary evidence in support of their respective tabulations, which fact was noted in the judgment delivered on October 27, 2017;
 - g. That the applicant was part of the remaining 24 who at the time of the tabulations were not able to produce their payslips as evidence because they were not in possession of them and had to write to the Ministry of Transport in order to obtain the payslips and this resulted in the 24 not being included in the tabulations of the salary arrears and the award thereon by the court;



- h. That as a result, an application for review was filed on behalf of the plaintiffs left out, which was heard and determined by O N Makau J in the following terms:
- “Under the judgment by Emukule J dated November 7, 2005, the plaintiffs were awarded salary arrears and other benefits backdated to April 18, 2002. In my view the award by Emukule J was for salary arrears for the period between April 18, 2002 and November 7, 2005 and not up to 2014 as assessed by Ndolo J in the impugned judgment. Consequently, the impugned judgment is reviewed and varied by adding thereto assessment of salary arrears for the successful 27 applicants...based on the aforesaid payslips produced.”
- i. That in his ruling, O N Makau J was of the view that the award by Emukule J was for salary arrears for the period between April 18, 2002 and November 7, 2005 and not up to 2014 as assessed by Ndolo J in the impugned judgment;
- j. That as a result, O N Makau J awarded the 27 applicants salary arrears between April 18, 2002 and November 7, 2005, which is from the date of dismissal to the date of the judgment by Emukule J on November 7, 2005, making a sum of 42 months;
- k. That the applicant seeks review on account of a mistake or error apparent on the face of the record being a sufficient reason for review under order 45 of the *Civil Procedure Rules*. The applicant contends that the salary arrears and other benefits should be computed from the date of dismissal to the date of mandatory retirement age of each employee as this is in accordance with the order by Emukule J in declining the prayer for reinstatement in which he stated that “the plaintiffs are at liberty to urge for damages for wrongful dismissal in addition to lost salaries.” According to the applicant, restitution of salaries and benefits to the period of retirement constitutes an objective and reasonable basis for damages for wrongful dismissal;
- l. That the applicant has annexed an accountant’s report by Woodvale Associates, an independent CPA Firm, giving effect to the orders of Emukule J and the preliminary decree by the Court of Appeal with the correct computation of the salary arrears, benefits and pension due to the applicant as from the time of dismissal up to the mandatory retirement age of 60 years to aid the court in the just and fair determination of the application;
- m. That in determining this matter, the court should consider the prospect of inconsistent determinations in relation to the law of employment and the appealed orders given in the matter as would affect the process of application of the law, and would have a bearing on the interests of members of the public.
4. The first ground upon which the 2nd defendant bases its preliminary objection is that the application dated July 22, 2021 offends rule 33(6) of the *Employment and Labour Relations Court (Procedure) Rules*. The said rule provides that:
- (6) An order for a review of a decree or order shall not be subject to further review.
5. In its written submissions dated April 26, 2022, the 2nd defendant referred to the decision in *Jeremiah M’Njogu v District Land Registrar, Meru Central & 3 others; H Young & Co (E A) Ltd & 2 others (interested parties)* [2021] eKLR where Cheron J in considering the import of order 45 rule 6 of the



Civil Procedure Rules, which is similar to rule 33(6) of the Employment and Labour Relations Court (Procedure) Rules, stated the following:

“It is clear from this provision that the law bars any application to review an order made on review. My understanding why the law bars a party from seeking review from a decree and/or order passed and/or made in [a] judicial review proceedings is a good public policy that will ensure that once a court has been called upon to look at its own decision by way of review, it will be wrong to call on the same court to once again reconsider [on] a decision it has reviewed.”

6. I am fully persuaded by the foregoing reasoning and the only thing to add is that a party who keeps going back to the same court for orders of review treads on the path of abuse of the court process.
7. It is not in contest that the order which the applicant seeks to review was the subject of a ruling pursuant to an earlier application for review. In addition, the grounds upon which the applicant bases his application are similar to those in the previous application.
8. What is more, by his application, the applicant effectively invites this court to rewrite the ruling by Emukule J when all the court was required to do was to tabulate the award under that ruling. This is clearly an abuse of the court process and the preliminary objection taken by the 2nd defendant is upheld.
9. In the result, the application dated July 22, 2021 is struck out with no order for costs.
10. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MAY 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Munyambu h/b for Dr. Khaminwa for the 2nd -6th Plaintiffs

Mr. Kioko for the 1st Defendant

Mr. Wafula for the 2nd Defendant

No appearance for the 1st Plaintiff

