



**Khaoya v Chairman, County Public Service Board of Bungoma & 3 others; County Assembly of Bungoma (Interested Party) (Petition E001 of 2020) [2022] KEELRC 1474 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1474 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
PETITION E001 OF 2020**

**JW KELL, J  
MAY 26, 2022**

**BETWEEN**

**JOHN WEKESA KHAOYA ..... PETITIONER**

**AND**

**GOVERNOR, COUNTY GOVERNMENT OF BUNGOMA .... 1<sup>ST</sup> RESPONDENT  
CHAIRMAN, COUNTY PUBLIC SERVICE BOARD OF  
BUNGOMA ..... 2<sup>ND</sup> RESPONDENT  
COUNTY PUBLIC SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT  
COUNTY GOVERNMENT OF BUNGOMA ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**COUNTY ASSEMBLY OF BUNGOMA ..... INTERESTED PARTY**

**RULING**

1. The Ruling is on the Notice of Motion Application by Petitioner/Applicant dated 24<sup>th</sup> February 2022 and brought Under Section 3,- 3A, 63 (e) and 80 of the [Civil Procedure Act](#) and Order 43 of the [Civil Procedure Rules](#) for review of Judgment dated 31<sup>st</sup> March 2021. The Application seeks the following orders:-
  - a. That service of this application be dispensed with.
  - b. That this Honourable court be pleased to review and set aside the orders of this Honourable court issued on the 31<sup>st</sup> March 2021.
  - c. Upon allowing prayer No. 2 above this Honourable court be pleased to set down for hearing interpartes and stay of orders as I have filed Notice of Appeal.



- d. That costs of this application be in the cause.
2. The Application is based on sworn affidavit of the Applicant and on the following grounds:-
- a. That the Applicant could not attend court hearing of his application on dates of 16<sup>th</sup> November 2020, 30<sup>th</sup> November 2022 and 14<sup>th</sup> December 2020 because he was not notified of the hearing dates above only on the 16<sup>th</sup> November 2022 when the court was not sitting after receiving handwritten directions from Kisumu court on condition of his complaints.
- b. That as his Constitutional Rights were denied pursuant to Articles 50 (1) 47 (1) (2) 48, 3 (1) 22 of *the Constitution* of Kenya 2010.
3. The supporting of the Affidavit facts are that the Applicant was not aware of the court attendance dates and was not served with hearing notices or submissions by other parties. That pursuant to Articles 50 (1) of *the Constitution* this court be pleased to grant orders to be heard as his Constitutional Rights (sic) as he has filed Notice of Appeal.
4. That pursuant to Articles 22 of *the Constitution* this court be pleased to review and set aside the orders of this court issued on the 31<sup>st</sup> March, 2021 as he has never been served by any party with submissions on the Petition and or Application that was pending direction from the court Registry at Bungoma Employment & Labour Court.
5. The Applicant further submits he filed this petition under Constitutional Public Interest of residents of Bungoma County Tax payers not for gains but for the court interpretation of the law pursuant to Articles 1,2,3,(1) , 22 (1) of *the Constitution* of Kenya 2010. That it is prudent and in the interest of Justice that the orders sought in the Application be granted without undue delay.
6. The Application is opposed. The Respondent filed grounds of opposition to the Application which are dated 9<sup>th</sup> March 2022 raising the following grounds:-
- a. The Application lacks merit, is made in bad faith, an after thought, bad in law , the same having been filed after an ordinate delay and the same ought to be dismissed with costs.
- b. The Petitioner is not candid and has come to court with unclean hands.
- c. The Application does not met the threshold of section 80 of the *Civil Procedure Act* and order 45 Rule 1 (a) (b) of the Civil Procedure Rules.
- d. The Petitioner /Applicant is misled by seeking to review the orders issued on 31<sup>st</sup> March 2021 when he claims he has as well filed a Notice of Appeal.
- e. That the grounds raised in the Application are issues to be canvassed in an appeal.
- f. The application is a plot aimed at denying and/or delaying the Respondents to enjoy fruits of successful litigation.
- g. It is imperative and in the interest of Justice that the Application herein be dismissed with costs.
- h. The Application was canvassed by way of written submissions. The Applicant's written submissions in person are dated 29<sup>th</sup> March 2022. The Respondent's written submissions drawn by Ibrahim Alubala Advocates are dated 27<sup>th</sup> April, 2022 .



## Background to the Application

7. The Application seeks for the court to review the judgment delivered by Justice Radido Stephen dated 31<sup>st</sup> March 2021 which dismissed the Petition lodged in court on the 6<sup>th</sup> November 2020. During the delivery of the Petition it is recorded the Applicant was present in person. The court considered the failure to prosecute the Petition /comply with court orders, issue of Resjudicata/Abuse of court process and in paragraph 19 states that the Petition herein is caught up by the doctrine of estoppel a species of Resjudicata.
8. The court also considered the merits of the Petition and made its finds in paragraphs 24, and 25 of the judgement. The court finds that the impugned judgment gave reasons for the decision.

## Determination

9. The court having considered the pleadings before the court then determines if the Application is merited. The Applicant brought the Application under various provision of the law requesting for the review of the impugned judgment summarized ( supra).  
The invoked provisions of the law on the review application
10. Section 3 of the [Civil Procedure Act](#) saves the penal jurisdiction and powers of the court.  
Section 3A of the [Civil Procedure Act](#) provides for the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.
11. Section 63 ( c ) of the [Civil Procedure Act](#) provides for supplemental proceedings in order to prevent the ends of justice from being defeated the court may:- “ make such other interlocutory orders as may appear to the court to be just and convenient”.
12. Section 80 of the [Civil Procedure Act](#) provides for review as follows:- “ Any person who considers himself aggrieved:-
  - a. By a decree or order for which an appeal is allowed by this Act but from which no appeal has been preferred or
  - b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or make the order and the court may make such order thereon as it thinks fit.”
13. The Applicant further cited Order 45 of the Civil Procedure Rules which provides for Review where no appeal has been preferred and where the Applicant “from discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of record or for any other sufficient reasons desire to obtain review of Judgment to the court a review of the decree or order may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay inordinate delay.”
14. The judgment of the court was delivered on the 31<sup>st</sup> March 2021. The instant application was filed in court on the 24<sup>th</sup> February 2022. The court finds this to be inordinate delay.
15. The Applicant states it was not aware of the judgment until his friend Mr. Barasa Nyukuri alerted him of an Article in the newspaper. The annexure (J.W K. – 3 ) does not contain the date of the newspaper article. The Applicant filed a Notice of Appeal dated 19<sup>th</sup> May 2021 on the impugned judgment. The



court then draws conclusion that this Application is an afterthought for reasons best known to the Applicant.

### **Merits of the Application .**

16. The grounds for review are limited as stated under Order 45 (1) of the Civil Procedure Rules(supra). As stated earlier the impugned judgement was a reasoned one. The case was dismissed on merit. The court considered the delay in prosecution of the Petition and failure to comply with court orders. At paragraph 10 of the judgment it is stated “ When the file was next placed before the court on 14<sup>th</sup> December, 20220, Ms Nyikuru for the 2<sup>nd</sup> & 4<sup>th</sup> Respondents informed the court that she had met the petitioner and alerted him about today’s session”. The Petitioner did not attend the session. The court on same day directed parties to file and exchange submissions. The order was not complied with (paragraph 12 of the judgment)’.
17. The Applicant has sworn affidavit explaining the chronicles of events of which the court had already made a finding on . No new evidence has been placed to contradict the fact that he was informed of the date of 14<sup>th</sup> December 2020 as stated in paragraph 10 of the judgment.
18. The Judgement states that parties did not comply with order to file and exchange submissions ( paragraph 12) so that is not a relevant issue in the review. There is no error pointed in the judgment in the Application. The court also finds the applicant had earlier last year, on 19<sup>th</sup> May 2021, filed a Notice of Appeal on the impugned judgment.
19. The Applicant in his submission repeats the same issues under the affidavit. The issues raised all touch on the merit of the judgment especially on the finding of non-prosecution of the Petition and failure to adhere to court directions on the disposal of the Petition.
20. The Respondent in their submissions submits that review is a creature of statute and the courts only exercise this power for the limited purpose of correcting clerical and mathematical errors. To buttress their point they rely on the decision of Justice -Visram (Rtd) in James Kingani -vs J. M Kangari observed that “ in order to obtain a review the Applicant must show to the satisfaction of the court that there has been discovery of new and important matter of evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made....The Applicant must show that, he would not have produced the evidence in spite of due diligence, that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of that,,,,,,” .
21. The court finds the above authority persuasive as it reiterates the provisions of order 45 (1) of the Civil Procedure Rules. The Respondent further submits that the main prayer sought before my brother Justice Radido have been a point of litigation in many cases and it is instructive to note that they have all been dismissed. That the legal maximum interest Reipublicae ut sit finis litium finds a place in this case. That the Applicant is attempting to re-litigate issues the courts of law have applied their minds to. What the cited latin maxim means is that it is to the interest of the state that there should be a limit to litigation.
22. The court finds and determines that Justice Radido in the impugned Judgement made a finding in paragraph 20, that the court was being asked to adjudicate issues that had been presented before the High Court. The court agrees that it is in the interest of the state and adds justice that litigation must come to an end.
23. The Respondent further relies on the decision in the case of *Abasi Belinda -vs Fredrick Kangwaro* ( 1963) EA 557 where Bennett J stated that, “a point which may be a good ground of appeal may not be a good point for an application for review and an erroneous view of evidence or of law is not a ground



for review though it may be a good ground of appeal. The Respondent submits that the Applicant has not demonstrated that his application meets the threshold for review.” The court finds the cited decision sound in law and uphold the same.

24. The Respondent further submits that granting of orders sought will not serve useful purpose as the petition will still be dismissed and the same will be a waste of court’s useful time and delay the Respondents from enjoying the fruits of their successful litigation. To buttress their point the Respondent relies on the decision of Justice Odinga in Nur Nassir -v- Ali Wario ( citation not given) where it is stated the Judge held review of earlier orders was an exercise of judicial discretion and the court would only exercise such discretion if so to do would serve a useful purpose”.
25. The court has already stated the impugned decision was reasoned and on merit.
26. The courts finds that the Applicant in his application has not introduced new evidence or new material to persuade the court to exercise its judicial discretion to review the Judgment of the Court. The Applicant has also not pointed an error on the face of the record or mathematical error.
27. The Court finds that there is zero compliance with the threshold under Order 45 (1) of the Civil Procedure Rules. Review is a limited process and is limited to the factors under Order 45 (1) as stated in Judgment of Visram (Rtd) ( Supra). What is brought up in the Application are challenges of the merit to the decision, for example, whether or not the Applicant was aware of the court dates as outlined in the judgment.
28. The court finds and determines that the Application was brought after inordinate delay. Was an afterthought a notice of appeal having been filed on 19<sup>th</sup> May 2021, and does not meet the threshold of review under Order 45 (1) of the Civil Procedure Rules.
29. The Application by way of Notice of motion dated 24<sup>th</sup> February 2022 is dismissed for those reasons.
30. No order as to costs.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26<sup>TH</sup> DAY OF MAY, 2022**

**J. W KELI**

**JUDGE**

**In the presence of :-**

Court Assistant : Brenda Wesonga

Petitioner : In person

Respondent : Absent

