



**Wanjala v Permanent Secretary, Ministry of Medical Services & 4 others
(Petition 15 of 2012) [2022] KEELRC 4072 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4072 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 15 OF 2012**

**M MBARŪ, J
MAY 19, 2022**

BETWEEN

PIUS WANJALA PETITIONER

AND

**PERMANENT SECRETARY, MINISTRY OF MEDICAL SERVICES 1ST
RESPONDENT**

DIRECTOR OF MEDICAL SERVICES 2ND RESPONDENT

MINISTRY OF MEDICAL SERVICES 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

PUBLIC SERVICE COMMISSION 5TH RESPONDENT

RULING

1. The petitioner filed application dated April 22, 2021 under the provisions of article 159 of the Constitution, section 1A, 3A, 63(e) and 80(a) of the Civil Procedure Act and rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (the rules) and seeking for orders that ruling of the court delivered on April 19, 2021 be reviewed and/or varied and/or set aside so as to meet the ends of justice.
2. The application is supported by the petitioner's affidavit and on the grounds that the court made a fundamental mistake and or error on the face of record and made a finding that the respondents have moved the court on the basis that the petitioner has failed to take any action to prosecute his petition over a year and the last action *vide* letter dated February 25, 2020 and instant application of March 8, 2021 is exactly one year and 11 days after the fact. But the correct position is that the last action taken was through letter dated March 11, 2020 which was annexed to the application and received in court



- on March 12, 2020 and since the application seeking dismissal for want of prosecution was filed on March 8, 2021 the period lapsed without any action is less than a year.
3. The court therefore made a fundamental mistake on the record by counting days from February 25, 2020 instead of March 11, 2020. The petitioner had addressed this fact in his written submissions.
 4. The court had no jurisdiction or power under rule 16 of the court rules to dismiss a suit for want of prosecution before a year of inactivity from either party or therefore the court had no discretion to dismiss the petition. The minimum threshold for application for dismissal of a suit for want of prosecution is one year without any step being taken by either party as held in *George Gatere Kibata v George Kuria Mwura & another* [2017] eKLR.
 5. In his affidavit, the petitioner avers that he noted an error apparent on the face of the record with regard to ruling delivered on April 19, 2021 where the court at paragraph 7 held that he had failed to take any action in the matter for over a year and the last action was through letter dated February 25, 2020 and an application seeking dismissal of the suit was filed on March 8, 2021 but the last action taken was on March 1, 2020 and application for dismissal was filed on March 8, 2021 before a year lapsed. The letter of March 11, 2020 was annexed to the application as proof that there was activity in the file within the one year rule as required under rule 16 of the *court rules*.
 6. In reply, the respondents filed grounds of opposition that the court is *factus officio* by dint of the ruling of April 19, 2021 and the petitioner has failed to satisfy the conditions of rule 33 of the *court rules*. The matters addressed lie in an appeal and not as done herein.
 7. Further proceedings in this matter will be superfluous and a waste of court resources in view of the fact that the issues raised herein are now moot and the court orders cannot be issued in vain. The instant application is in abuse of court process and should be dismissed with costs.
 8. On March 16, 2022 both parties attended and agreed to address the application by way of written submissions. Only the petitioner complied.
 9. The petitioner submitted that the court's failure to cite letter dated March 11, 2020 as the actual last action taken on record amounted to fundamental mistake and error herein in tabulation of time within which an application seeking dismissal of a suit for want of prosecution should lie pursuant to rule 16 of the court rules and taking into account the application seeking dismissal dated March 8, 2021. Being aggrieved by the ruling of the court, the petitioner applied for a review pursuant to rule 33 of the *court rules* and order 45 rule (1) and (2) of the *Civil Procedure Rules*.
 10. A mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree can be granted as held in *Associated Insurance Brokers v Kenindia Assurance Co Ltd* [2018] eKLR.
 11. The petitioner further submitted that the opposition to the application by the respondents on the grounds that the court lacks jurisdiction to hear this application is not justified since jurisdiction has already been admitted. The respondents conceded that letter dated March 11, 2020 was filed in court on March 12, 2020 and on the face of it addressed the provisions of rule 16(1) of the *court rules*.
 12. The petition is not moot since the issue of his transfer by the respondents has not been resolved and is pending determination.

Determination

13. Under rule 33 of the *court rules*, a party is allowed to apply for a review of the court order, decree or directions on the principles that where there is 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 an applicant at the time when the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

14. In this case, the petitioner's case is that in the ruling delivered on April 19, 2021 the court made a mistake and or error on record in tabulation of time within which a suit should be dismissed within one year without any action pursuant to rule 16(1) of the Court rules. On March 11, 2020 there was a letter of the respondents received in court on March 12, 2020 which addressed the one year lapse and by filing application dated March 8, 2021 seeking for the dismissal of the suit for want of prosecution the time had not lapsed.
15. On March 8, 2021 the respondent moved the court with application seeking dismissal of the petition for want of prosecution on the grounds that the petitioner had filed various petitions and had failed to prosecute the matter for over a period of one year and the last court attendance was on November 19, 2019.

Rule 16(1) of the court rules provides that;

- (1) In any suit in which no application has been made in accordance with rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit
16. Where no action is taken by either party within a year, the court on its own motion or upon application by either party can move for the dismissal of the suit for want of prosecution.
17. There exists letter dated March 11, 2020 which was received in court the next day, March 12, 2020 and the next action by the respondents was application dated March 8, 2021 which was filed on equal dates.
18. To ensure justice to both parties, application dated March 8, 2021 and letter dated March 11, 2020 being part of the record, the full years was hence broken. It shall serve justice to review the order of the court issued on April 19, 2021 for this single purpose.
19. However, this was not the only matter which the court addressed as being the subject of the order of dismissal of the suit.
20. The petitioner has filed multiple petitions going back and forth to the Court of Appeal challenging his transfer from the National Quality Control Laboratory/Ministry of Health.
21. A quick scan reveals that through petition dated December 10, 2020 the petitioner together with another filed Hezekiah Chepkwony & another v Cabinet Secretary, Ministry of Health & another [2021] eKLR challenging his transfer/deployment from the National Quality Control Laboratory and on July 8, 2021 the court dismissed the petition on the grounds that the same was *res judicata* and offends the principles of *sub judice* and the reasoning that;

This petition No E099 of 2020 dated December 11, 2020 was filed by the same petitioners against the same respondents in Nairobi Petition No 124 of 2019 and Civil Appeal No 107 of 2020.

This Petition was filed after the ruling delivered by the Court of Appeal on September 28, 2020 and in the court's view and finding to side step the interim orders by the Court of Appeal issued on September 28, 2020.



...

The petitioners herein lack good faith and are bent to set this court on a collision course with an earlier decision of this court and a future decision by the Court of Appeal. Any proceedings regarding this subject matter have in any event been stayed by the Court of Appeal.

This suit having been filed in direct affront to that stay of proceedings by the Court of Appeal cannot be allowed to stand before this court

22. In application dated March 8, 2021 the respondents addressed the fact of ELRC petition 124 of 2019 filed by the petitioner and others; ELRC petition E099 of 2020 filed by the Petitioner and others which is premised on similar facts. All these petitions stem from the same facts, the transfer/deployment of the petitioner.
23. The Court of Appeal in *Cabinet Secretary, Ministry of Health & 2 others v Hezekiah Chepkwony* [2020] eKLR in addressing an application arising out of orders issued in ELRC Petition No 124 of 2019 with regard to contempt of court proceedings was stayed in a ruling delivered on November 20, 2020.
24. Through ELRC Petition No E033 of 2022 the petitioner challenged his transfer/deployment from National Quality Control Laboratory. The court dismissed the application seeking stay of the direction of transfer/deployment.
25. The plethora of suits is apparent. They all revolve around the issue of transfer/deployment of the petitioner from National Quality Control Laboratory and as the court in ELRC Petition E099 of 2020 held, the matter of the petitioner's transfer/deployment from National Quality Control Laboratory is now pending before the Court of Appeal. Similarly, this petition which was filed in the year 2012 has had back and forth to the Court of Appeal
26. Even where the court has discretion to allow the instant application on the basis that time to a year had not lapsed for several days, equity cannot grant in vein. There must be an effective remedy.
27. In *James Titus Kisinga v Said Majid Said* the court in addressing its discretionary powers held that even where a right exists it must consider whether or not in invoking its overriding objectives and inherent jurisdiction to grant a remedy/ orders that have been challenged by an appeal it would meet the ends of justice. See *Eric VJ Makokha & 4 others v Lawrence Sagini & 2 others* [1994] eKLR.
28. In view of the findings above, the instant petition filed on 5th April, 2012 and amended petition filed on May 18, 2012 the petitioner shall attend court on May 25, 2022 and state what remains of his petition to justify the grant of the orders sought.

Orders accordingly.

DELIVERED IN COURT AT NAIROBI THIS 19TH DAY OF MAY, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

