



**Ober & another v County Government of Homa Bay (Cause  
39 of 2013) [2022] KEELRC 1435 (KLR) (22 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1435 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 39 OF 2013  
S RADIDO, J  
JUNE 22, 2022**

**BETWEEN**

**JARED OMONDI OBER ..... 1<sup>ST</sup> CLAIMANT**

**JOHN OLUOCH ORINDA ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF HOMA BAY ..... RESPONDENT**

**RULING**

1. For determination is a Motion dated 10 March 2022 by the 1<sup>st</sup> Claimant seeking orders:
  - (1) ...
  - (2) That this Honourable Court be pleased to review its Ruling, especially in paragraph 13, which states that the Claimants have admitted having received the payment indicated or set out under paragraph 1 of the County Labour Officer report (Kshs 1,637,861/- and Kshs 1,076,573/- respectively and substitute it with the correct figures that the 1<sup>st</sup> Claimant's total money paid is Kshs 1,255,140/- and the 2<sup>nd</sup> Claimant's total money paid is Kshs 844,020/-.
  - (3) That this Honourable Court be pleased to review and set aside its orders issued on 23<sup>rd</sup> February 2022 expunging from the record computation of County Labour Officer paragraph 5 filed in Court on 29<sup>th</sup> June 2021 and fresh and joint computation with further instructions to the County Labour Officer Homa Bay County.
  - (4) That upon granting order 3 above, this Court do order the County Labour Officer to present the said report personally in Court.
  - (5) That the costs of this application be provided for.



2. The Claimants' primary reason in support of the application was that the Court had made an error apparent on the face of the record when it stated that they had made an admission that they had been paid Kshs 1,637,861/- and Kshs 1,076,573/- respectively.
3. The Respondent filed Grounds of Opposition to the Motion on 30 March 2022 wherein it contended that the review application did not meet the threshold for grant of the review orders, and that the application was not only vexatious, an abuse of the court process, but also invoked the wrong provisions of the law.
4. Although the Court directed the parties to file and exchange submissions within set timelines, the submissions were not on record by this morning.
5. Nevertheless, the Court has considered the Motion, affidavits, Grounds of Opposition, and the record.
6. On 1 March 2022, the Claimants lodged a Notice of Appeal against the Ruling of the Court delivered on 23 February 2022. The instant Motion was then filed on 10 March 2022.
7. Section 80 of the *Civil Procedure Act* contemplates a review application in cases where an appeal is allowed, but none has been preferred. The Claimants herein have sought review and also lodged an Appeal.
8. The Court of Appeal addressed itself to the scenario where a party opted to pursue the twin options of review and appeal in *University of Eldoret & Ar v Hosea Sitienei & 3 Ors* (2020) eKLR, where it stated:

“It is evident that following the decision of the Court of Appeal, the applicants were faced with two options – to, either file for review of the decision to the same Court or pursue an appeal before this Court within either of the applicable jurisdictional contours. The applicants, as advised by their advocates, chose the former. We agree with the applicants' advocates that they could not concurrently pursue both options as that would be an outright abuse of judicial process. However, following from our decision in *Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others* [2015] eKLR, where a litigant has more than one option to pursue, he/ she must settle on one of them. The decision on which course to pursue is taken in advance and once it is taken, the other option is no longer available or placed in abeyance to be reverted to at a later stage in the event the initial option does not succeed. This means that when choosing, the litigant is expected to choose the best available option since she may not have any further recourse.

We therefore note that when the applicants preferred to pursue review of the decision, as they were entitled to, that was the best option in their assessment even if it turned out to be unsuccessful. Allowing them to take the second option at this stage, as if they never exercised the first option in the first place, would not only contribute to protracting litigation but also defeat the whole essence of finality of the litigation process. This would mean that precious judicial time and resources would have been unnecessarily expended in not settling the dispute but rather satisfying the litigants' options to cherry-pick and engage in trial and error at the altar of judicial process without the attendant consequences.”

9. Considering that the Claimants lodged a Notice of Appeal against the Ruling sought to be reviewed on 1 March 2022, the Court endorses and adopts the holding by the Court of Appeal and finds the instant Motion is incompetent and an abuse of the Court process.
10. The Motion is dismissed with costs to the Respondent.



**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS  
22ND DAY OF JUNE 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

Claimants in person

For Respondent Otieno, Yogo Ojuro & Co. Advocates

Court Assistant Chrispo Aura

