



**Nganga v Kiambu Water & Sewerage Company Limited (Cause
829 of 2016) [2022] KEELRC 1669 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1669 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 829 OF 2016
SC RUTTO, J
JULY 22, 2022**

BETWEEN

JAMES MBUGUA NGANGA CLAIMANT

AND

KIAMBU WATER & SEWERAGE COMPANY LIMITED RESPONDENT

RULING

1. The Claimant/Respondent filed the statement of claim on May 12, 2016 through which he sought against the Applicant/Respondent, the following reliefs: -
 - a) Airtime and entertainment allowance as particularized in paragraph 27 since his stepping aside be paid;
 - b) The sum of Kshs 1,932,000/= owing as maximum compensation, the equivalent of 12 months salary for unfair, unlawful termination, the equivalent of 12 months salary (i.e 161,000x12 months);
 - c) General damages as prayed in paragraphs 28 of the claim;
 - d) Issuance of a certificate of service;
 - e) Costs of the claim;
 - f) Monetary interests on (i), (ii), (iii), (v);
 - g) Any other relief this Honourable Court shall find fit and deem to award.
2. The Court delivered its Judgement on January 21, 2022 and determined as follows: -



- a) Having found that the claimant was not terminated and his purported “secondment” was ineffective, the only logical determination is to lift the suspension and direct that he resumes duty in his previous capacity.
 - b) The court also finds that the prolonged suspension of the claimant was unfair and unlawful. However, the court will not award any damages in that regard, given that the claimant was on full salary during the period he was on suspension.
 - c) In view of the existing employment relationship between the parties, each party will bear its own costs.
3. The Applicant was dissatisfied with the Judgment and filed the instant Application for review on February 25, 2022. The Application is expressed to be brought under Article 50 of the Constitution of Kenya, Order 9 Rule 9 and Order 51 Rule 1 of the Civil Procedure Rules and section 45(1), 1A and 1B of the Civil Procedure Act and all enabling provisions of the law.
4. The Applicant seeks the following orders: -
- a) Spent
 - b) That this Honorable Court be pleased to grant the respondent's advocates herein leave to come on record.
 - c) That stay of execution of the judgment delivered on January 21, 2022 be and is hereby issued pending hearing and determination of this application inter-parties.
 - d) That judgment delivered on January 21, 2022 be and is hereby reviewed directing that the claimant herein proceeds on early retirement owing to the changes in the character of the respondent company, abolishing the position previously held by the claimant.
 - e) That judgment delivered on January 21, 2022 be and is hereby reviewed as the orders for reinstatement and or resumption of duty had not been sought for in the claimant's pleadings.
 - f) That this Honorable Court be pleased to grant any other relief that it may deem fit and just to grant in the interest of justice.
 - g) That the costs of the application be borne by the claimant/respondent.
5. The Application was premised on the annexed Supporting Affidavit of Prof Bernard Njoroge who describes himself as the Chairman of the Applicant's Board. Briefly that: -
- a) At the time of delivery of judgment of this Honorable court, evidence which would have been material for consideration was not availed due to inadvertence of the part of the respondent's advocates.
 - b) The character of the respondent company has since changed after the change of name and merger of all water companies in Kiambu County forming a single company.
 - c) After the merger process and resolutions by the various companies, the positions of the various Managing Directors have been abolished with view of having a single Managing Director and Regional Directors.
 - d) The order directing the claimant herein to resume work in his previous capacity is not capable of compliance as the position has since been abolished after the merger.



- e) The respondent company herein has increased its production and widened its responsibilities which the claimant herein cannot be able to handle due to his long absence from office.
 - f) The claimant herein is 57 years of age with 3 years left to his retirement and therefore the board offers to grant him an early retirement and undertakes to pay his full benefits.
 - g) Ordering that the claimant resumes his previous position is untenable because relationships between him, the board and members of staff have already been severed and there is a high risk of frequent confrontations which might end up affecting performance of the company.
 - h) That the previous advocates failed to demonstrate to the Court that during the previous working life of the Applicant, the Company was making loses to the extent of failing to pay utility bills among other liabilities.
 - i) In the last six years of his absence, the Company has made great progress as demonstrated by the audited statement of accounts. The Board is concerned that reinstating the Applicant would result in the Company making loses, and this may not just affect the respondent Company, but also the merging utilities within the County.
 - j) That the prayer for reinstatement was never prayed for by the claimant in his memorandum of claim.
6. The Claimant opposed the Application by filing Grounds of Opposition and a Replying Affidavit. The Grounds of Opposition are as follows: -
- a) Kiambu Water & Sewerage Company Ltd has never been wound up and therefore continues to exist.
 - b) Petitions Number 54, 52, and 41 of 2018, which were all consolidated as Petition Number 54 of 2018, declared the purported merger of the Water companies including the Respondent/ Applicant herein as illegal and unconstitutional.
 - c) The Applicant herein has come to court with unclean hands, as it is seized of the fact that the merger was declared null and void and there is no appeal or staying pending appeal declaring such merger of Water Companies in Kiambu as null and void.
 - d) The Applicant's sole witness averred in court that the Claimant has never been terminated from his employment and hence the continued receipt of his salary pending the outcome of the court process.
 - e) The law does not assist the indolent. If indeed it is true, which is denied, that the Water companies were merged in 2018, this should have been brought to the attention of this Honourable court by then.
 - f) There exist no grounds for review of the Court decision.
7. The Claimant averred through its Replying Affidavit that: -
- a) Upon the entry of the said judgment, the Applicant herein through their advocates, Manasses, Mwangi & Associates MMAS filed a Notice of Appeal dated the February 1, 2022.
 - b) The law prohibits a litigant from filing an appeal and review of judgment on the same matter.
 - c) The said Notice of Appeal has not been withdrawn and therefore the appeal has been set in motion.



- d) The current application by the Respondent fails to meet the test for review of judgment as espoused under Order 45 of the [Civil Procedure Rules](#) 2010.
 - e) The Applicant herein averred in his Reply to statement of claim dated February 1, 2017 and more particularly in paragraph (j), that “The Respondent contends that the services of the claimant have not been terminated as he continues to draw his monthly salary from the Respondent a fact that he has admitted in his pleadings and as such a confirmation that no statutory breaches occurred”.
 - f) The orders sought by the Applicant herein are akin to opening the hearing a fresh in a matter which will then amount to *Res Judicata*.
 - g) The order to have the Claimant sent on compulsory leave pending retirement is a disciplinary action. There is no disciplinary process which has been undertaken against the claimant herein.
 - h) Whereas there is an entity know as Kiambu County Water and Sewerage Company Limited, (going by the change of name), such name change does not affect the liability or the obligations of the Applicant.
 - i) The Applicant having pleaded and averred that the claimant’s services were never terminated, the issue of reinstatement does not apply or is a non issue.
8. In a rejoinder to the Claimant’s response, the Applicant filed a supplementary Affidavit through Prof Bernard Njoroge who avers that: -
- a) The respondent herein was never wound up but it changed its name to Kiambu County Water & Sewerage Company where it is in the process of absorbing other water companies and therefore the respondent changed name to become the parent company of the other companies which are to become subsidiaries.
 - b) In petitions 54, 52 and 41 of 2018 the issue in dispute was the enactment of the Kiambu County Water & Sanitation Company (Amendment) Act of 2018 which the petitioners challenged for failing the public participation test and was thus declared null and void and thus unconstitutional.
 - c) After the declaration that the said Act as unconstitutional, the 2015 Act remained operational which is the operational Act.
 - d) The continued receipt of salary by the claimant/respondent herein was pending the outcome of the disciplinary proceedings pending against him.
 - e) Failure to bring it to the attention of the court that the companies began the merger process in 2018 was purely mistake of counsel, which the applicant herein prays that it should not be visited upon the innocent client.
 - f) The notice of appeal dated February 1, 2022 was withdrawn as the same was filed without instructions.
 - g) The orders sought herein are purely to assist the Respondent/Applicant comply with the orders of the court.
 - h) The claimant herein was very categorical and or specific on the reliefs he was seeking to this Honourable Court.



- i) At no time did the claimant amend his memorandum of claim seeking for prayers of reinstatement to his previous position and or resumption to office and therefore the only prudent and fair thing after finding that the claimant had never been terminated was to dismiss the claim, and have him move the court for proper reliefs.
- j) Constitutional petition numbers 54, 52 and 41, never declared that the merger is illegal or null and void, the ratio decidendi of the judgment was to the effect that the Kiambu County Water and Sanitation Amendment Act 2018 was null and void for having failed to meet the test of public participation thus declared unconstitutional.

Submissions

9. The Application was canvassed by written submissions. The Applicant submitted that due to the mistake on the part of its counsel, it was not brought to the Court's attention that there had been a change of structure of the said company. It was further submitted that the relationship between the Claimant, the employees and the Applicant is so severable such that the same cannot be mended as there is a likelihood of constant boardroom and staff wars which might end up derailing and disputing service delivery.
10. The Applicant further submitted that the Notice of Appeal was filed without instructions and that in light of Rule 83 of the *Court of Appeal Rules*, the same was deemed as withdrawn for want of compliance. To buttress this argument the Applicant cited the case of *MAE properties Limited vs Joseph Kibe & another* (2017) eKLR,
11. That in Petitions Nos 54, 52 and 41 of 2018, the Kiambu County Water and Sanitation (Amendment) Act was found unconstitutional, null and void for having failed to meet the public participation threshold.
12. In further submission, the Applicant stated that the Claimant did not seek reinstatement to his earlier position and that the only proper thing to do was to dismiss the claim and leave it at that. In support of this argument, the Applicant cited the case of *Raila Amolo Odinga & another vs IEBC & 2 others* (2017) eKLR.
13. The Claimant on the other hand submitted that the Application violates the provisions of Order 45 (1) of the *Civil Procedure Rules* as there exists a Notice of Appeal dated 1st February, 2022. That the Notice of Appeal has never been withdrawn. The Claimant further submitted that Rule 83 of the *Court of Appeal Rules* is not applicable as the Court has not on its own motion withdrawn the Appeal. That in any event, the law allows a party who has failed to file an appeal out of time, to extend time for the filing of the appeal. That therefore, the filing of the Notice of Appeal and Review Order simultaneously is prejudicial to the Claimant.
14. In further submission, the Applicant stated that the firm of MB Mwangi & Co Advocates was not properly on record as there was no consent between the said firm and that of Ngaywa & Kibet Partners who were previously on record for the Applicant.
15. That further, the assertion that the relationship of the parties was severable and cannot be mended was an afterthought and has the effect of introducing new evidence after Judgment and is speculative. That further, the Applicant's witness confirmed that the Claimant has never been terminated from his position and was still on salary.
16. The Claimant further submitted that there is no law that compels him to take early retirement. In further submission, the Claimant stated that change of a company name from Kiambu Water &



Sewerage Company Limited to Kiambu County Water and Sewerage Company Limited does not change the character of the company.

Analysis and determination

17. The Court has considered the Application, the responses thereto and the opposing submissions and isolated the following issue for determination: -
- a) Whether the firm of MB Mwangi & Co Advocates is properly on record for the Applicant?
 - b) Whether the filing of the Notice of Appeal barred the Applicant from filing the Application for review?
 - c) Whether the Applicant had satisfied the requirements for the grant of an order for review?

Whether the firm of MB Mwangi & Co Advocates is properly on record for the Applicant?

18. The Claimant has contended that the firm of MB Mwangi & Co Advocates, which has brought the instant Application on behalf of the Applicant, is not properly on record.
19. Order 9 Rule 9 of the *Civil Procedure Rules*, 2010 provides for change of Advocates to be effected by order of Court or consent of parties thus: -
- “When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —
- a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”
20. On record, is a consent dated March 29, 2022 executed between the firm of MB Mwangi & Co Advocates and Ngaywa & Kibet Partners, who were previously on record for the Applicant. The said consent has not been challenged and is ostensibly filed pursuant to order 9 Rule 9.
21. In the circumstances, it is apparent that the requirements of order 9 Rule 9 have been satisfied and the said firm MB Mwangi & Co Advocates is properly on record for the Applicant.

Whether the filing of the Notice of Appeal barred the Applicant from filing the Application for review?

22. Rule 33 of the Employment and Labour Relations Rules, which is a near replica of Order 45 of the *Civil Procedure Rules*, 2010 provides for Applications for Review in the following manner: -
- “ [33.] (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time...”
23. A clear construction of the above provision is that a party may only seek a review of the court’s orders where no appeal has been preferred.
24. In the instant case, there is a Notice of Appeal dated February 1, 2022 filed on behalf of the Applicant by the firm of Manasses, Mwangi & Associates. The Applicant has denied instructing the said firm of advocates to lodge the Appeal.



25. In *Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR, a five Judge bench of the Court of Appeal extensively considered the effect of filing an Application for review where the same party has filed a Notice of Appeal. The Court had this to say on the issue: -

“Save for the case of Kisy Investments Ltd, (*supra*), all the rest of the decisions cited to us by both sides are actually in agreement, as I will shortly illustrated by the review of sampled decisions, including those cited in the appeal; that the court has jurisdiction to entertain an application for review where only the notice of appeal has been lodged. Conversely, the court will not hear an application for review when an appeal has been instituted under Rule 82 of this Court’s rules.....While it cannot be denied that Kisy Investments (*supra*) case has been followed in some cases, it is equally true that the predominant position by the courts is that the mere filing of the notice of appeal will not bar a party from taking out an application for review. I endorse that as the correct position.” Emphasis mine

26. Ultimately, the Court determined that: -

“In concluding this limb of the judgment, it has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the *Civil Procedure Rules* and the *Court of Appeal Rules* did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.” Emphasis mine

27. From the determination by the Court of Appeal, which I am bound to follow, it is apparent that a mere filing of a Notice of Appeal does not in essence constitute an appeal as to bar a party from filing an Application for review.

28. This therefore means that the Applicant is not barred from proceeding with the instant Application on account of the said Notice of Appeal.

Whether the Applicant had satisfied the requirements for the grant of an order for review?

29. The crux of the Application is review of the Court’s orders, as regards resumption of duty by the Claimant. The basis of the Application is that at the time of the delivery of Judgment, evidence which would have been available for consideration was not availed due to inadvertence on the part of the Applicant’s erstwhile counsel. That the character of the Applicant company has since changed after the change of name and merger of all water companies in Kiambu forming a single company. That further, after the merger process and resolutions by the various companies, the positions of the various Managing Directors were abolished with view of having a single Managing Director and Regional Directors.

30. Rule 33 of the *Employment and Labour Relations Court Rules* is very explicit that the Court can only review its orders if the following grounds exist: -

- (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
- (b) on account of some mistake or error apparent on the face of the record;



- (c) if the judgment or ruling requires clarification; or
- (d) for any other sufficient reason.

31. The Court of Appeal in *Pancras T Swai vs Kenya Breweries Limited* [2014] eKLR held as follows in regards to discovery of new evidence and important matter which was not within the knowledge of an Applicant.

“In *Francis Origo & another vs Jacob Kumali Mungala* (CA Civil Appeal No 149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-

“our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”

We do not find it necessary to comment on the exercise of Court’s discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.

We think Bennett J was correct in *Abasi Belinda v Frederick Kangwamu and another* [1963] EA 557 when he held that:

“a point which may be a good ground of appeal may not be a good ground 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 for appeal” Underlined for emphasis

32. In support of the Application, the Applicant has annexed the Certificate of Change of Name which indicates change of name from Kiambu Water and Sewerage Company Limited to Kiambu County Water and Sewerage Company Limited. In addition, the Applicant annexed to the Application extracts of minutes of the extraordinary general meetings dated January 19, 2018 in respect of the merger and winding up of Limuru Water & Sewerage Company, Karuri Water & Sewerage Company, Kikuyu Water and Sewerage Company, Githunguri Water & Sewerage Company and Gatundu Water & Sewerage Company and Ruiru-Juja Water & Sewerage Company.
33. It is notable that the Certificate of Change of Name was issued on June 6, 2018 while the minutes are all dated January 19, 2018. By then, the main suit was still pending in Court and in fact, the trial was yet to take off. It is noteworthy that when the main suit proceeded for defence hearing on November 8, 2021, the Applicant’s witness by the name Mr James Gitau, who identified himself as one of its board members, was emphatic in his testimony that the Claimant was still an employee of the Applicant.
34. Coupled with the foregoing, the said witness adopted his witness statement, through which he had averred in 3 paragraphs, that the Claimant’s services were yet to be terminated and that he was still drawing a monthly salary. Indeed, this was not a contested fact during the trial.



35. In addition to the foregoing, the said witness testified that he had served as a board member of the Applicant since 2014 hence was well versed with the facts of the case. As such and going by his capacity in the Applicant company, the said witness ought to have been aware and cognizant of any changes in the structure of the Applicant company. It is at that juncture that he would have tabled the evidence being sought to be presented at this stage by the Applicant.
36. Notably, the Applicant has not disowned the said witness hence his testimony stands.
37. Accordingly, I find that the evidence sought to be adduced in support of the Application was well in the possession and knowledge of the Applicant during the hearing of the suit on November 8, 2011, and with due diligence, it should have made the evidence available at the trial but it failed to do so.
38. In the circumstances, the Court finds that the Applicant has failed to satisfy the set standard and criteria under Rule 33 of this court's Rules that a review may be allowed if there exist new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by the applicant at the time the order or judgment was made.
39. I have also considered the reasons for the Applicant's dissatisfaction with the Court's Judgment. Part of the Applicant's contention is that the Claimant never prayed for reinstatement in his claim. Respectfully, the Court finds that the said ground does not constitute an error of law or fact apparent on the face of the record as would justify a review. As was held in *National Bank of Kenya Ltd vs Ndungu Njau* (1997) eKLR: -

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

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it”. (My Emphasis).

40. The Court therefore finds that the Applicant's dissatisfaction with the findings in the Judgment may constitute grounds of appeal and certainly not review.
41. Indeed, and contrary to its own averments the Applicant has invited the Court to review its own orders and direct the Claimant to proceed on early retirement owing to the change in the character of the company. That is a new issue altogether and was not raised before the Court during trial.
42. What the Applicant is essentially doing, is inviting the Court to reopen the case and entertain new evidence. The review process is not for the purpose of reopening cases that have been concluded and Judgment rendered. As it is, the Court is now *functus officio* and such an order cannot issue at this juncture.
43. In my view, doing so would open litigation to a never ending process.



44. Further, the Judgment was clear that the order of resumption of duty was the only logical order to issue since the Claimant had not been terminated and was drawing a salary from the Applicant.
45. In light of the foregoing and having considered the specific reasons given by the Applicant for seeking an order of review, it is my considered view that it has not satisfied the requirements for grant of the orders of review.
46. Further, the Applicant has stated that ordering the Claimant to resume duty in his previous position is untenable because relationships between him, the board and members of staff have already been severed and there is a high risk of frequent confrontations which might end up affecting performance of the company. With due respect, this reason cannot suffice as a ground for review.
47. The record bears that the Applicant was granted a leeway by the Court on September 28, 2016, to conclude any disciplinary issues against the Claimant but it failed to do so. If anything, and despite the pending suit, the Claimant remained an employee of the Applicant.
48. The Court reiterates the holding in the case of *Francis Njoroge vs Stephen Maina Kamore* [2018] eKLR, thus: -

“Indeed, if parties were allowed to seek review of decisions on grounds that they are not in a position to carry out the orders sought to be reviewed, or rather that the orders are not convenient to them, then a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review... This is a court of justice but not court of convenience such that it has to consider the conflicting interest of the parties.”

49. In the end, the Court finds that the Application is not meritorious as the Applicant has not established any ground for review of the Judgment.
50. Consequently, the Application is dismissed with no orders as costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Mwangi for the Applicant/ Respondent

Mr. Olewe for the Claimant/Respondent

Court Assistant Barille Sora

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of



Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

