



**Kenya Plantation & Agricultural Workers Union v Migotiyo Plantations Limited  
(Cause 976 of 2016) [2022] KEELRC 1358 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1358 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 976 OF 2016**

**JK GAKERI, J**

**JULY 12, 2022**

**BETWEEN**

**KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT**

**AND**

**MIGOTIYO PLANTATIONS LIMITED ..... RESPONDENT**

**RULING**

1. Before the Court for determination is an application dated 19<sup>th</sup> May, 2022 seeking review of the Court's Judgement delivered on 15<sup>th</sup> December, 2021.

The Respondent/Applicant prays for Orders that:

- i. The application be certified urgent and service be dispensed with in the first instance.
- ii. The Court be pleased to clarify/or review the orders made on 15<sup>th</sup> December 2021 to remove the names of the claimants/Respondents erroneously or inadvertently repeated in the tabulation for damages and remove the names of Claimants/respondents who had been paid their final dues prior to the determination of the case and to remove the names of Claimants who were not summarily dismissed by the respondents/Applicant.
- iii. The Court be pleased to make all such furthers orders and/or directions as it may deem fit.
- iv. The costs of this application be provided for.

The Application is supported by the affidavit of Peter Kamau Gachoka dated 19<sup>th</sup> May 2022 who depones that:

1. The respondent dismissed 324 employees on 21<sup>st</sup> May 2016 and the court, in its Judgment dated 15<sup>th</sup> December 2021 found that the dismissal was unfair and awarded 2 months salary compensation across the board.



2. That the court did not indicate how many claimants were to be compensated.
3. That on 6<sup>th</sup> January 2022 the claimant's counsel sent a list of tabulation of payments to the respondents counsel (annexture TK 3).
4. Certain errors were noticed in the tabulation and the respondent's counsel was notified and wrote to the claimant's counsel on 12<sup>th</sup> January 2022 on the errors including;
  - (i) repeated names and
  - (ii) those in active employment
  - (iii) those who quit voluntarily before the cause of action arose and
  - (iv) those terminated before 21<sup>st</sup> May 2016.
2. By letter dated 13<sup>th</sup> January 2022 the claimant's counsel responded and admitted errors with regard to repeated names and removed 19 names captured more than ones but declined to consider other concerns citing re-opening of the Judgement.
3. The Claimant's counsel agreed to remove the names of those who were in active employment including Selly, Tobias, Hezekiah, Patrick, Richard, Agnes, George, Kennedy and Margaret, a total of 8 employees but refused to remove those who were terminated on different grounds before the cause of action arose.
4. The respondent paid the sum of Kshs 7,166,656 as compensation with costs leaving out only those whose final dues had been paid in full and 4 who had quit before the action arose. That Risper, Rebecca, Jane and Seline quit voluntarily sometime in 2014.
5. Amos, Peter, Rose Phelisia, Odinga, Risper, Boniface, Fransisca and Eunice were paid final dues of respective amounts in July 2016 upon termination unrelated to the termination on 21<sup>st</sup> May 2016, but were added irregularly by the Claimant.
6. The claimant testified that 372 employees were terminated unfairly but the respondent/Applicant gave evidence that the number of those terminated was 324 and presented dismissal letters of the 324.
7. That the Claimant's list had;
  - i. 19 repeated names
  - ii. 8 in active service.
  - iii. 8 who had been paid dues in full.
  - iv. 16 who were terminated earlier before the case arose.
8. That the Courts failure to address the number eligible for compensation when it was contested occasioned the error.
9. The court overlooked additional names listed by the claimant who had not been terminated and those who had quit voluntarily and the errors were pointed out to the claimants advocate after Judgement was delivered.
10. It is deponed the respondent had 324 dismissal letters as evidence of termination and the court had to determine how many were eligible for compensation a mistake of the court which has caused great confusion as it is unclear whether it is 324 or 372.



11. The number presented by the claimant was not accurate due to repetition and those others some still in employment or had left earlier. That the issue in dispute was the dismissal only and only those who were terminated deserve compensation.
12. There is need to clarify the number of employees to be compensated by the respondent /Applicant to obviate the claimant's scheme to vary the terms of Judgement. No prejudice shall be occasioned to any of the parties and it is in the interest of justice to grant the orders sought.
13. The Claimant/respondent filed a Replying Affidavit dated 17<sup>th</sup> May 2022 sworn by Michael Ochieng Amuom who depones that he swears the affidavit in opposition to the Notice of Motion Application dated 19<sup>th</sup> May 2022 on the ground that it does not raise any error apparent on the face of the record to warrant a review of the Judgement that the purported review amounts to a re-opening of a matter already settled.
14. It is the claimant's case that the respondent is trying to avoid liability to pay the remaining 8 employees and have not demonstrated why evidence of payment or dismissal was not led in court more than 6 years after the response was filed and no objection was made that some claimants had been paid.
15. It is deponed that the claimants were not paid their dues and the court is being invited to rehear the matter, an invitation it should reject.
16. That the names in Annexure TK3 were filed together with the pleadings on 26<sup>th</sup> May 2016 and the respondent took no steps to ascertain the names of the claimants they had allegedly paid.
17. That the 20 workers dismissed on 17<sup>th</sup> May 2016 were not among those terminated on 21<sup>st</sup> May 2016.
18. That the respondent closed the Farm/Factory on 21<sup>st</sup> May 2016 and all employees vacated other than those who had to be evicted.
19. That all the 324 were terminated and were issued with dismissal letters.
20. That 31 had no dismissal letters.
21. That the farm re-opened on 2<sup>nd</sup> August 2016 with new workers, thus, those who may be in employment may have been employed after dismissal under a new contract and are still claimants in this case.
22. That the claimant's counsel corrected the repeated names and the number of days from 30 to 26 but refused to exclude those allegedly in employment, dismissed earlier or quit voluntarily.
23. That the application herein is unnecessary and prolongs the misery and anguish of the claimants aggrieved by the unlawful termination.
24. That the 32 names listed have not been paid the respective amounts shown despite a court order. The deponent prays for dismissal of the application with costs.
25. In its Replying Affidavit sworn by Peter Kamau Gachoka, the respondent depones that individuals listed as claimants who are in employment of the respondent have no claim against the respondent despite their names appearing in TK 3.
26. That the respondent has complied with the Judgement of the court.
27. That those who were terminated before the dismissal on 21<sup>st</sup> May 2016 intend to swindle money from the company.
28. That the Claimant captured names of employees who resigned in 2014. The Judgement dated 15<sup>th</sup> December, 2016 affected those dismissed on 21<sup>st</sup> May 2016.



## **Respondent/Applicants Submissions**

29. The applicant identifies a singular issue namely; whether the prayers sought should be granted.
30. Reliance is made on Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provide for review of Judgement in the instances therein prescribed, such as discovery of new and important evidence, mistake or error apparent in the face of the record, clarification or for any other sufficient reason.
31. It is submitted that although the claimant's witness testified that 324 people were dismissed, it was critical to ascertain the number eligible for compensation hence the judgment requires clarification of those to be compensated.
32. That TK3 had 375 names some of whom were never dismissed on 21<sup>st</sup> May 2016 and the court did not determine who was dismissed and who was not and only 324 were dismissed on 21<sup>st</sup> May 2016 and all have been compensated.
33. That the respondent had realized that the list supplied by the claimant's counsel included serving employees and some names had been repeated.
34. Reliance is made on the decision of *National Bank of Kenya Ltd v Ndungu Njau* (1996) KLR 469 page 381 on the granting of review.
35. That parties confirmed that 324 employees had been dismissed and were compensated as ordered by the court.
36. That the judgment was not a blanket award to all employees who had been terminated by the respondent since the company came into being.
37. That the court should clarify whether only those dismissed on 21<sup>st</sup> May 2016 are eligible for compensation or others are included.
38. It is submitted that the court did not state the number of grievants eligible for compensation but found the dismissal on 21<sup>st</sup> May 2016 unfair.
39. It is further submitted that the claimant's witnesses did not produce letters of authority by all the other grievants who did not testify before the court and had no authority to testify on their behalf.
40. That those mentioned in paragraph 18 of the claimant's affidavit were paid in full at the time of termination.
41. It is the Applicant's submission that compensating persons who were not dismissed on 21<sup>st</sup> May 2016 would be a termination by court itself. It is agreed that annexure TK 3 had errors and the claimant admitted as much.
42. Finally, the court is urged to rely on Rule 33 as supposed to order 45 of the *Civil Procedure Rules*. Puzzlingly, the Applicant submits that there was no dispute that the summary dismissal involved 324 employees of the respondent on 21<sup>st</sup> May 2016 and the court should review its judgement based on the evidence of 324 persons.

## **Claimants Submissions**

43. The claimant relies on section 80 of the *Civil Procedure Act*, and Order 45(1) of the Civil Procedure Rules, 2010 on review of judgement.



44. The claimant states that the court is being called upon to review the Judgment to;
- i. Remove names of claimants erroneously repeated.
  - ii. Remove names of those who had been paid final dues prior to the determination of the suit.
  - iii. Remove those who were not summarily dismissed.
45. On removal of those whose names are erroneously repeated, it is submitted that the same is unwarranted because the parties have mutually agreed on the same and rectified the list and the court's intervention is unnecessary.
46. On the second list of names of those whose dues were paid prior to the determination of the case, it is submitted that the Respondent/Applicant has led no evidence of discovery of new and important evidence not within its knowledge at the time.
47. That the 8 referred to are not aware of the payment alleged and the respondent has had the names since 2016.
48. That this was not the discovery of new evidence not within their knowledge at the time.
49. As regards mistake or error as alleged by the Respondent/Applicant, it is submitted that there is neither a mistake nor error. The decision in *Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* (2019) eKLR is relied upon to demonstrate what amounted to error on the face of the record with specific reference to the holding in *Nyamongo & Nyamongo v Kogo*.
50. As regards the request to remove names of claimants who were paid final dues prior to the determination of the case, it is submitted that the Applicant was in a position to bring this information to the court's attention during the subsistence of the suit and blames the court for being unaware that some claimants had been paid, a matter the respondent/Applicant did not bring to the fore.
51. The last request by the Applicant is the removal of Claimants who were not summarily dismissed by the Respondent/Applicant i.e Risper Odigo, Rebecca Khakasa, Jane Adhiambo and Seline Akoth. It is submitted that they were dismissed as the rest and cannot be singled out after judgement and were on the list since the filing of the suit and thus not new evidence the respondent had no knowledge of. The four (4) were on the list TK3 which is not an error or mistake.
52. The decision in *Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* (Supra) is relied on to demonstrate circumstances in which a review of Judgement is not allowable such as an erroneous order or decision, the alleged new discovery or important matter or evidence was within the knowledge of the party or the mistake or error requires detailed examination as it is not visible.
53. It is submitted that the payment documents attached by the Applicant are being furnished to the claimant for the first time since the suit was filed.
54. The Claimant further submits that it did not accept to remove the 8 names alleged to be in active employment of the respondent. The same was declined vide letter dated 13<sup>th</sup> January 2022 that the 8 never requested the claimant to remove their names from the list.
55. Finally, it is the claimant's submissions that TK3 contained the names of claimants as follows;
- Permanent staff are 139
- Contracted staff 236
- Total 375



Less 19 repeated names

56. That the 32 employees identified by the claimant are in the TK3 annexure and are legitimate claimants having been unfairly terminated and the issue of names was never raised.

### **Analysis and determination**

57. The issues for termination are;
- i. Whether the Respondent/Applicant has made a case for review of the Judgement delivered on 15<sup>th</sup> December 2021.
  - ii. Who is eligible for the 2 months salary compensation as ordered by the court on 15<sup>th</sup> December 2015.
  - iii. Costs of the application.
58. As to whether the Respondent/Applicant has established a case for review of the Judgement herein, the home port is the law on review of judgements or orders.
59. Whereas the Applicant relies on Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 exclusively, the claimant relies on section 80 of the *Civil Procedure Act* and Order 45 Rule of the Civil Procedure Rules, 2010.
60. Both Rules are founded on the same principles and the parameters are the same. Rule 33(1) provides;
- 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 apply for a review of the Judgement;-
- 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 Judgement or ruling requires clarification; or
  - (d) For any other sufficient reason.
61. The Applicant seeks review of the Judgement under this rule but without setting out the specific ground relied upon, but appears to be urging that there is need to clarify the number of persons entitled to compensation under the Judgement which issue though testified about by both parties was not raised by any of the parties in the proceedings or submissions.
62. Witnesses for both parties confirmed that the list of the persons dismissed on 21<sup>st</sup> May 2016 had 324 names and the respondent filed and served the notices to show cause, invitation for disciplinary and summary dismissal letters to all the affected persons. The claimant did not contest the lists of the particular letters.
63. Instructively, none of the parties examined witness on the contents of annexure 'TK3' nor was it alleged to be a comprehensive list of all persons who were dismissed by the respondent on 21<sup>st</sup> May 2015. The list was never scrutinized to ascertain its contents as no party raised any issue with it.



64. Whereas the applicant submits that all the 324 employees dismissed on 21<sup>st</sup> May 2015 have been compensated, the claimant state that 32 have not been compensated as they were on Annexure ‘TK3’. When the matter first came to court, the claimants counsel stated that only 10 claimants were outstanding. The court has not been told how the number grew to 32 and when.
65. Be that as it may, although the statement of claim is silent on the actual number of claimants, annexure TK3 had the names of the grievants. The lack of specificity did not attract the attention of any of the parties.
66. On its part, the respondent is clear that the dismissal involved 324 employees whose dismissal letters are on record. The claimant did not contest the number of letters of dismissal or the number of employees dismissed. The court was not called upon to pronounce itself on the non-contested issue of numbers. Whereas the repeated names have been agreed upon by the parties some other names remain contentious. The respondent avers that Risper Osigo, Rebecca Khasaka, Jane Adhiambo and Seline Akoth voluntarily resigned from the respondent’s employment sometime in 2014 and were not summarily dismissed on 21<sup>st</sup> May 2016.
67. Relatedly, that Amos Ouma Wambo, Peter Omondi Nyaugu, Rose Akinyi Owiyo, Phelisia Akinyi Achola, Odinga Risper Achieng, Boniface Omondi Ombala, Yula Nzioka and Eunice Adhiambo Owino were paid final dues in July 2016.
- “Upon their termination which was not in any way related to the termination of the 324 employees.”
68. This is not entirely correct. The court has in its attempt to verify the truthfulness of the averment ascertained that Odinga Risper Achieng was summarily terminated on 21<sup>st</sup> May 2016. The Notice to Show Cause dated 19<sup>th</sup> May 2016 is on page 175 of the respondent’s bundle of documents. Invitation for disciplinary is at page 403 and the letter of summary dismissal is on page 689.
69. It is unclear whether the respondent paid her dues after a second dismissal. This instance demonstrates that the respondents list of the contested names require thorough verification. The case of Odinga Risper Adhiambo demonstrates unequivocally that if the 8 employees were paid in July 2016 after termination, the respondent had this information and did not bring it to the attention of the court for the names to be expunged from the record of claimants.
70. It is too late in the day to allege otherwise. The respondent was in possession of this information for 5 years but kept it to itself and the same applies to the names of Risper Osigo, Rebecca Khasaka, Jane Adhiambo and Seline Akoth who the respondent alleges to had left voluntarily in 2014 or the sixteen who are alleged to have been terminated earlier.
71. For the above reasons, the court is satisfied that the respondent has not on a balance of probability shown that there is need to review the Judgement delivered on 15<sup>th</sup> December 2021.
72. The Court is further satisfied that contrary to the Applicants submissions that the review is justifiable on the premise that there is an error on the face on the record; there is no apparent error on the face of the record.
73. The court is guided by the words of Mativo J. in Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya (Supra) as follows;



- (iii) “An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under section 80 . . .
- (viii) A mistake or an error apparent on the face of the record means a mistake or an error which is prima facie visible and does not require any detailed examination on the present case. The petitioner has not been able to point out any error apparent on the face of the record.”
74. Finally annexure TK3 was part of the record before the court and the respondent did not contest any of the names therein for their expunction based on the information in its possession. Sixteen (16) employees had allegedly quit earlier, 8 were paid dues at the time of termination in July 2016 and 8 had not been terminated. The names of the claimants were in TK3 which the respondent does not appear to have gone through with a toothcomb to ascertain whether they were grievants or not. The court did not fault the list and cannot do so now.
75. All names in the list are eligible for the 2 months compensation awarded by the court in its judgement delivered on 15<sup>th</sup> December 2021.
76. In the final analysis, the Notice of Motion Application dated 19<sup>th</sup> May 2022 is unmerited and is accordingly dismissed.
77. Parties to bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF JULY 2022**

**DR. JACOB GAKERI**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

**DR. JACOB GAKERI**

**JUDGE**

