



**Wandaba & 11 others v County Government of Bungoma (Cause
7 of 2017) [2022] KEELRC 13051 (KLR) (1 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13051 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 7 OF 2017
JW KELI, J
NOVEMBER 1, 2022**

**BETWEEN
ELIUD NYONGESA WANDABA & 11 OTHERS CLAIMANT
AND
COUNTY GOVERNMENT OF BUNGOMA RESPONDENT**

RULING

1. The claimant having obtained judgment in his favour before the trial court filed an application by way of notice of motion dated May 24, 2022 invoking the provisions of section 99 of the [Civil Procedure Act](#) and order 45 rule (1)(1),2(1) and order 51 of the [Civil Procedure Rules](#) seeking the following orders:-
 - a. That the application be certified as urgent and be heard in the first instance.
 - b. This honorable court be pleaded to vary and review its judgment and orders issued on the July 27, 2018
 - c. Costs of this application be provided for.
2. The application was grounded on reason that the claimant having obtained the decree was unable to enforce the decision for the reason that the order stated payment of all arrears of salary as computed under schedule 15 to the claimant's within 30 days but schedule 15 does not exist in the records of the suit hence making it an error apparent on the face of the record. That the trial judge in the determination relied on exhibit 11 which was payment schedule for the youth polytechnics for the month of July 2011 at page 76 on the claimant's bundle of documents dated April 3, 2017. The application is supported by the affidavit of Benjamin Jeremiah Otsiula advocate for the claimant annexing the judgment and copies of the decree and warrant of attachment.
3. Prayer (a) is spent.



4. The application is opposed by the respondent vide grounds of opposition dated June 21, 2022 to the effect that:-
 - a. The application is brought after inordinate delay from date of judgment and decree.
 - b. It is bad in law, defective and ought to be struck out as the respondent has filed appeal in Kisumu Court of Appeal being appeal No 121 of 2012 hence contrary to provisions of order 45(1)(a) of the [Civil Procedure Rules](#).
 - c. That the court cannot review a decree or judgment and substitute it with an order or judgment that was never pleaded in the claim.
 - d. That the application seeks to review and enforce orders which are unenforceable and illegal hence should be dismissed,
5. The court directed that the application be canvassed by way of written submissions. The parties complied.

Determination.

6. The claimant submits that the issue for determination is whether the court should vary and review its judgment issued on July 27, 2022. The court notes an error on that submission as the judgment by Justice Mathews N Nduma in the suit is dated July 27, 2018. The court considered that to be a typing error.
7. The respondents in their submissions addressed the question whether the application dated May 24, 2022 should be granted.

The court considered the issue for determination to be whether the application should be allowed.
8. The respondent relies on the provision of section 99 of the [Civil Procedure Act](#) and order 45 of the [Civil Procedure Rules](#) on review. Section 99 of the [Civil Procedure Act](#) states:-“ clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”
9. Order 45 rule 1(1),2(1) of the [Civil Procedure Rules](#) provides as follows :- (1) any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the 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 the record, or for any other sufficient reason, desires to obtain 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. (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”
10. The respondent submits that, the respondent having filed appeal against the judgment of trial court in Kisumu Court of Appeal being appeal No 121 of 2017 which appeal was acknowledged by the applicant in his pleadings the order of review is not available under order 45, rule 1 (a) and (b) which provides:- ‘any person considering himself aggrieved



- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed”
11. The respondent submits that order 45(1) a and b is in tandem with section 80 of the *Civil Procedure Act*. To buttress its submissions the respondent relies on the decision of the Court of Appeal in *Multi Choice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 others* (2020) eKLR where the court held:- “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.”
12. The applicant submits that the court under section 99 of the *Civil Procedure Act* may correct the error which is self evident and does not require elaborate argument for it to be established. That the court has mandate to correct any clerical or arithmetical mistake or any error arising therein from accidental slip or omission. The applicant relies on the decision of Court of Appeal in *National Bank of Kenya Ltd v Ndungu Njau* (1996) KLR 469 where the court stated ‘ a review may be granted whenever the court considered that it is necessary to correct an apparent error or omission on the part of the court. The error or omissions must be self evidence and should not require an elaborate argument to be established.”
13. Section 16 of the *Employment and Labour Relations Court Act* No 20 of 2011 provides for review of the orders of the court as follows:- “ the court shall have power to review its judgment, awards, orders or decrees in accordance with the rules”. The 2016 Rules of the court then provides under rule 33 for review procedure as follows:- “
- (i) 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 appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling.
 - (a) If there is discovery or 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 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.”
14. The procedure invoked by the applicant was under order 45(1) and 2 of the *Civil Procedure Rules* which the court finds to be similar to rule 33 of the *Employment and Labour Relations Court Rules of 2016* as outlined above.
15. The Court of Appeal has guided on the interpretation of order 45 of the *Civil Procedure Rules* in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 others* [2020] eKLR where the court held:- “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. So, quite clearly, the learned judge had jurisdiction to entertain the application for review as no appeal had been filed”

16. In the instant case in paragraph 12 of the supporting affidavit of Benjamin Jeremiah Otsiula it is averred: ‘that even though the claimant/respondent appealed against the decision the said appeal has never been heard and neither was a stay of execution issued.’”
17. Applying the binding decision of the Court of Appeal interpreting the provisions order 45 of the *Civil Procedure Rules* in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 others* [2020] eKLR to extent that where a substantive appeal has been filed orders of review are not applicable, the court then finds there is appeal against the judgment of trial court pending before the court of appeal at Kisumu hence this court has no jurisdiction to entertain the application for review.
18. This court is further mindful of the Supreme Court decision in *Law Society of Kenya v Attorney General & another* [2019] eKLR where the Supreme Court regarding High Court decision rendered on subject matter pending before it held that; ‘the learned judge ought to have held his horses and acknowledged the hierarchy of the courts and await for this court to pronounce itself before rendering himself, if at all.’”
19. The foregoing decisions of the superior courts in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 others* [2020] eKLR and *Law Society of Kenya v Attorney General & another* [2019] eKLR are binding on this court. There is an appeal pending before the Court of Appeal against the judgment sought to be reviewed. The court for that reason declines jurisdiction and dismisses the application dated May 24, 2022.
20. Costs to the respondent.
21. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 1ST DAY OF NOVEMBER, 2022.

**J. W KELI,
JUDGE.**

In The Presence Of :-

Court Assistant: Brenda

Claimant:- Mr Tarus holding brief for Otsiula Advocate

Respondent:- Mr Kituyi Advocate

