



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. 123 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 1, 2, 3, 4(2), 10, 12(1)(A), 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 75, 159, 162, 165, 232, 234, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGES VIOLATION OF ARTICLES 2, 10, 27, 41(1), 47, 73, 232, 234 AND 259(1) OF THE CONSTITUTION; THE STATUTORY INSTRUMENTS ACT 2013; GOVERNMENT CIRCULAR REF. NO. OP. CBA.2/7A OF 20TH MARCH 2009, ON THE MANDATORY RETIREMENT AGE FOR PUBLIC SERVANTS

AND

IN THE MATTER OF: THE MANDATORY RETIREMENT AGE FOR PUBLIC SERVANTS

AND

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF RETAINING EDWARD KIPTOO KOSGEI AS THE DIRECTOR, LAND ADMINISTRATION BEYOND THE MANDATORY RETIREMENT AGE OF 60 YEARS FOR PUBLIC SERVANTS

BETWEEN

STEPHEN OCHIENG.....PETITIONER

VERSUS

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF LANDS

AND PHYSICAL PLANNING.....2ND RESPONDENT

AND

EDWARD KIPTOO KOSGEI.....INTERESTED PARTY

RULING

Introduction

The Application before me is the petitioner’s application by way of a Notice of Motion dated **25th August, 2020**. It is brought under order 45 Rule 1 of the civil procedure Act, Section 16 of the Employment & Labour Relations Court Act 2011, Rule 33 of the Employment & Labour Relations Court (Procedure) Rules, 2016 seeking for the following Orders **THAT**: -

1) Spent

2) That the Court be pleased to, review, vacate, vary and set aside the Judgment delivered on 24th July, 2020 by the Onyango J.

3) The Court be pleased to allow the petition and grant the orders sought therein

4) Costs of this application be provided for.

The Motion is premised on the grounds that there exists an error apparent on the face of the record. That the court delivered a judgment on 24th July 2020 dismissing the petition on the ground that the orders sought had been rendered redundant as the interested party had already served the contract period.

Fresh evidence has been brought to the attention of the petitioner that the 1st Respondent renewed the contract of the interested party whose contract was to end on 30th June, 2020 during the pendency of the suit. The petitioner had not anticipated that at the time the court issued its judgment the 1st Respondent will renew the appointment of the Interested Party for a further period of one year as the Director Land Administrator which is a show of contempt.

That the information on the renewal of the contract was not within the knowledge of the petitioner or could not be produced by him at the time when the judgment was delivered or the order made and that this is an account of some mistake or error apparent on the face of the record.

The notice of Motion is supported by the grounds set out in the body of the Motion and is further supported by the Supporting Affidavit sworn by **STEPHEN OCHIENG**, the petitioner.

Respondents case

The petitioner's application was opposed by the respondents by way of Amended Grounds of opposition and replying Affidavits by both respondents.

1st Respondents case

The 1st respondent through a replying affidavit sworn by **Remmy Mulati**, The Deputy Secretary/Chief Executive Officer corporate services of the Public Service Commission dated 2nd September, 2020 averred that the application is grounded on misrepresentation as to the rationale of the judgment delivered by court on 24th July, 2020. He further avers that the court in dismissing the petition found that;

i) The government like any other employer should subject to the rules of natural justice and the constitution and be given managerial discretion to deal with its human resource

ii) Except where there is violation of the constitution and statute the court would be reluctant to interrogate the veracity of the reasons given for appointment if ex-facie they appear justifiable and reasonable.

The affiant averred that the appointment of the interested party was lawful and for justifiable reasons and that it was not true the petition was dismissed because the interested party had already served the extended contract period. The affiant further stated that the court concluded that the appointment of the interested party on local agreement terms was lawful and therefore it is not true that the petition was dismissed on the ground that the interested party had already served their extended contract period. the affiant avers that the 2nd respondent through a letter dated 14th June 2019 requested the extension of service of the interested party for a period of 2 years, which the 1st respondent considered on local agreement terms for a period of 1 year anticipating the succession management process would be concluded within the said period. Unfortunately, COVID-19 pandemic happened thus hampering the functioning of the Commission which further affected the achievement of the targets on the succession management. For this reason, the 2nd respondent requested for renewal and the Commission considered the same to be justifiable as the 2nd respondent is in the process of digitization and the interested party is playing a strategic role in supervising the business community component of digitization program. The affiant avers that the application lacks merit and should be dismissed.

2nd Respondents case

The 2nd Respondent responded to the application through a replying affidavit sworn by **L. M Kaburu**, the Human Resource Officer at the Ministry of Lands and Physical Planning on 8th October, 2020. The affiant contends that the application is an abuse of the court process, vexatious, ill motivated, unmerited and misconceived in law and fact and urges the court to dismiss the same with costs. The affiant contends that the issue of the renewal of the Interested Party's contract for a further one year was sufficiently canvassed during hearing and determination of the suit and that the act of renewal or extension of that period by the 1st and 2nd respondents for a further 1 year was a possibility which the court could take judicial notice of and the same cannot be an error apparent on the face of the record. He further states that there are no orders barring the 1st and 2nd respondents from extending/renewing the contract for a further one year. The affiant avers that the extension of the contract cannot be a ground for review as the same was neither an apparent error or omission on the part of the court as appointment and duration of the contract was addressed in the petition.

Parties took directions to dispose the application by way of written submissions.

Petitioner's/Applicant's Submissions

The petitioner submits that review of judgment is governed by Order 45 rule 1 of the Civil Procedure Rules and relies on the principles for granting a review as outlined in the case of **Grace Akinyi v Gladys Obiri & Another (2016) eKLR** quoting with authority the court of **Appeal No. 2111 of 1996 National Bank of Kenya v Ndungu Njau** where the Court of Appeal held that; -

“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 of omission must be self-evidence and should not require an elaborate argument to be established...”

The applicant submits that the court despite having faulted the respondents on poor succession management they still went ahead to aver that the respondents’ have justified the grounds for engagement of the interested party.

The applicant submits that this was erroneous since the court did not outline the grounds that justify the respondents’ engagement of the Interested Party. The applicant further submitted that the court dismissed the petition on the ground that the contract of the interested party had since lapsed and therefore the orders sought by the petitioner had become redundant.

The applicant relied on the provision of Section 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 which provides;

A review maybe allowed if there exist new and important matter or evidence which after the exercise of due diligence was not within the Applicants’ knowledge or could not be produced by the applicant at the time the order or judgment was made.

The applicant submits that the renewal of the contract of the Interested Party was on the 30th September, 2020 which came to his attention after the court had delivered its judgment.

He further submits that he had not anticipated that the respondents had already renewed the Interested Party’s contract for a further 1 year with effect from 1st July, 2020.

The petitioner urges the court to allow its application considering the discovery of the letter dated 9th June, 2020 which was not within his knowledge.

The Applicant further relies on the Supreme Court of India decision in the case of **Ajit Kumar Rath v State of Orisa and Others** where the court held:-

“....A review cannot be claimed or asked for merely for a fresh hearing or argument or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for tabling it. It maybe pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified therein.”

The applicant submits that the respondent’s having clear knowledge that the petition was pending judgment went ahead to renew the interested party’s contract which clearly shows gross violation of the rule of law or contempt of proceedings despite the serious legal issues that had been raised concerning the extension of the contract. He submits that was breach of Articles 10 and 232 of the Constitution of Kenya 2010.

The applicant submits that the discovery of the letter dated 9th June 2020 falls within the ambits of Rule 33(5) of the Employment and Labour Relations Court (Procedure) Rules, 2016. In light of the above he urges the court to exercise its discretion in his favour and allow the application.

Respondents and Interested Party’s Submissions

The Attorney General submits that the petitioner’s application is res judicata as it raises the same issues between the same parties and the court has already pronounced itself through the judgment dated 24th July, 2020. The respondents rely on Section 7 of the Civil Procedure Act that provides

No court shall try any suit in which the matter directly or indirectly in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided in court.

The respondents’ relied in the case of **Benard Mugo Ndegwa v James Nderitu Githae & 2 Others (2010) eKLR** and **Henderson v Handerson (1843) 67 ER 313**.

The respondents’ submit that the petitioner’s application does not meet the threshold for grant of orders sought. It is submitted that the letter dated 9th June 2020 communicating the commission’s decision to renew the appointment of the Interested Party on local agreement terms does not amount to any new evidence.

The respondents submit that the petitioner had a right to move court immediately it came across the so-called new evidence on 9th June 2020. That to come way after the Judgment is Forum shopping since judgment was not in his favour. It is submitted that the petitioner has not indicated who gave him the evidence, when it was given and why the inordinate delay. They pray that the application be dismissed.

The respondents further submit that the court is *functus officio* having rendered final judgment on 24th July 2020 and rely on the case of **Telkom Kenya Limited v John Ochanda (Suing on his behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014]** where Githinji, Karanja and Kiage JJA observed thus:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century in the Canadian case of Chandler v Alberta Association of Architects (1989) 2 S.C.R 848.”

The respondents submit that the issues raised in the application had been deliberated and the court delivered its judgment. As such the court cannot purport to alter its own judgment in the manner pleaded by the petitioner in the application. They submit that the application constitutes a new cause of action which should be disallowed if litigation is to come to an end. The respondents submit that after the court rendering its final decision it becomes *functus officio*.

The respondent further submits that by Dint of Regulation No. E.13 the Government could re-employ its own pensioner or those of other administration on temporary terms of service in the following exceptional circumstances: -

- i) The post to be filled is critical*
- ii) The only available candidate to fill it is the pensioner and;*
- iii) It is essential to secure his/her services.*

He further submitted that regulation 19 stipulates the retirement age of a public servant is 60 years with a possibility of extension for appropriate reasons. The respondents’ further submit that the interested party’s extension of contract on local agreement terms was made to enable him continue with the implementation of reforms that are at a critical stage. In addition, the appointment of the Interested Party falls within the ambit of the exceptions provided by the regulations and Section 80(2) of the Public Service Commission Act 2017.

He relied in the case of **Kenya Revenue Authority v Menginya Salim Murgani Civil Appeal No. 108 of 2009** held that;

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down in statute are masters of their own procedures; Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.”

Drawing from the above, the respondents submit that the Commission has mandate to appoint officers on Local Agreement terms under Public Service Commission Act and Code as appointment on contractual terms after attaining the age of 60 years is legal and justified in the circumstance.

The respondent submit that the interested party lawfully retired from service upon attaining the mandatory age of retirement and was separately engaged on contract as per law.

The respondents urge the court to find the application baseless and an abuse of the court process. They pray that the same be dismissed with costs to the respondents and the Interested Party.

Analysis and Determination

Having carefully considered the motion, rival affidavits, submissions and authorities cited, the issue for determination is whether the instant application is merited.

This court is conferred power to review its judgment as provided in section 16 of the Employment and Labour Relations Court Act and Rule 33 of Employment and Labour Relations Court (Procedure) Rules 2016.

Threshold for review

The threshold for granting review is provided by Rule 33(1) of the Employment and Labour Relations Court Rules, thus:

(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 an appeal is allowed, may with reasonable time, apply for a review of the judgment or ruling –

(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) It the judgment or ruling requires clarification; or

(d) For any other sufficient reasons.

In a nutshell, the foregoing rule allows the court to review its order if:

- a) The order has not been appealed against.
- b) The application is made without inordinate delay.
- c) Any or all the grounds set out in Rule 33(1)(a), (b), (c) and (d) above is proved.

The instant Application was filed on 25th August 2020 on the basis that the petition was dismissed but after the judgment the petitioner avers to have discovered new evidence that was not in his knowledge at the time the judgment was delivered on 24th July, 2020.

A review is permissible on the grounds of discovery of new evidence which after exercise of due diligence was not within the knowledge of the applicant. In **Nasibwa Wakenya Moses v University of Nairobi & Another [2019] eKLR** the court held that:

“Review is permissible on the grounds of discovery by the

applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.”

In **Evan Bwire v Andrew Nginda** the court held that: -

“An application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.”

In the current application, I find that the applicant has not clearly shown how the new evidence was obtained in order for the court to rule out that there was no laxity on his part in obtaining the evidence.

From the facts set out in the affidavits of the Applicant, it is clear that the evidence upon which this application for review is anchored was not in existence either at the time of filing the petition herein or at the time of hearing. It is evident that the same happened while this petition was pending judgment. It is evident that the evidence was not in existence during the time of the hearing of the petition. It is thus new evidence that the Petitioner although the intended to prevent eventuality thereof, was no available for the parties or for the court to consider.

Although the Respondent have clearly acted deceptively by doing the very act the Court eventually pronounced itself on and frowned upon, the court cannot review its decision on the basis of evidence that came up after the fact. The only way such evidence could be acted on is upon filing a fresh suit by the petitioner. It is worth noting that the contract that is the subject of this court’s decision expired and that the subject of the review application is a new contract that was not in existence at the time of filing the suit.

For these reasons, I find that the application does not meet the threshold for review on grounds of new evidence as set out in Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The same is accordingly dismissed. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

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 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 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.

MAUREEN ONYANGO

JUDGE