



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND ABOUT RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.1966 OF 2015

MUCHIRI KIRATHECLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

The ruling herein relates to two applications; one dated 15th December 2020 filed by the respondent, Teachers Service Commission and application dated 20th December, 2020 filed by the claimant.

The claimant is acting in person vide his notice dated 16th November, 2020 being Notice to Act in Person.

Parties attended court on 25th February, 2021 for taking directions and the court allocated 4th March, 2021 but the claimant failed to attend. The date for ruling issued.

Application dated 15th December, 2020 is seeking for orders that;

1. *Spent.*
2. *The court be pleased to extend time for filing Notice of Appeal against the judgement of this court delivered on 27th October, 2020.*
3. *This court be pleased to grant leave and allow the filing of a new Notice of Appeal.*
4. *The court be pleased to extend time to service the Notice of Appeal for purposes of the intended appeal.*

The application is supported by the Supporting Affidavit of Flora Manyasa and on the grounds that the judgement herein was delivered virtually on 27th October, 2020 in the absence of the respondent. There has been no delay in filing the instant application and there is a draft Notice of Appeal and Memorandum of Appeal filed and forming part of the record before this court.

Other grounds are that that unless the orders sought are granted there shall be great prejudice and the respondent stands to suffer irreparable loss and damage and would not be adequately compensated.

In her affidavit, Ms Manyasa avers that when the judgement was delivered she was indisposed and in isolation with COVID-19 and thus could attend and file the Notice of Appeal. That due to such indisposition and inability to attend, the application herein is filed to ensure the respondent is able to file Notice of Appeal out of time to address its appeal which has high chances of success.

In reply, the claimant avers that Ms Manyasa has not stated the place where she was isolated and under quarantine with COVID-19 and the application made should not be allowed as such will cause him irreparable harm and prejudice. That Ms Faith Kaluai was in court representing Ms Manyasa and there is no notice of change of advocate.

The claimant filed various documents and including his application dated 20th December, 2021 seeking the following orders;

Application for the review/revision of the award for the judgement made on 27th October, 2020 citing the following;

- (1) *Section 12 subsection 3(v) and (vi) of the Employment and Labour Relations Act on the power of the Court to award compensation and damages respectively.*

(2) Section 16 of the Employment and Labour Relations Act on the court power to review awards and

(3) Article 47(1) of the Kenyan Constitution on the claimant's right to fair administrative action.

This application as set out above is based on the grounds that;

The claimant in the Memorandum of Claim had claimed to be paid the following;

- i. Salary for the 12 months that he had been wrongfully suspended amounting to Ksh.879,240
- ii. Loss incurred due to inability to complete post graduate studies at Kenyatta University amounting to ksh.200,000
- iii. Loss incurred due to lack of promotion after graduating with a first class degree at Kenyatta University on July, 2008 amounting to ksh.403,200
- iv. Loss incurred due to inability to service loan amounting to Ksh.1,132,219.30
- v. Interests on the above amounts
- vi. Damages arising from wrongful disciplinary action.

The claimant filed a list of documents, Additional points and written submissions.

The respondent filed grounds of Opposition to the claimant's application that the same has no merit and does not comply with the conditions under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules. The court having rendered judgement it is *functus officio*.

Determination

On the two applications the issues for determination are;

Whether the court should extend time to file Notice of Appeal out of time; and

Whether the court should review the judgement herein delivered on 27th October, 2020.

Section 17 of the Employment and Labour Relations Court Act, 2011 give a right of appeal to parties dissatisfied with orders of this court. where a party files a Notice of Appeal, such is with regard to secure this right.

The court having rendered itself upon delivery of judgement, where a party is keen to file an appeal, the rules governing the appellate court apply. this court is denied further jurisdiction to address any appeal arising out of own decision, order or judgement.

Where the respondent is keen to file a Notice of Appeal out of time, the appellate court shall deal.

On the application for review, Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 govern the grounds upon which a review of the court judgement should be premised on. Rule 33(1) requires that;

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, 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) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.

There must be discovery of new and important evidence; a mistake or error; need for clarification; and or a sufficient cause to justify a review of the court judgement.

The claimant application is that in his Memorandum of Claim he had sought for various remedies and including for the payment of salary during his suspension, losses incurred due to inability to complete post graduate studies and losses for lack of a promotion after graduating, losses incurred due to inability to service a loan, damages for wrongful disciplinary action and interests on the awards claimed. These claims were addressed by the court and judgement rendered on 27th October, 2020.

In the judgement at paragraph 53, the court addressed the remedies and awarded in salary from June, 2012 to May, 2013 when the claimant was on suspension, damages for wrongful disciplinary action and payment of costs.

At paragraph 25 of the judgement, the court had addressed the issues established as being in dispute. These related to the decision to suspend and interdict the claimant, and being denied the right of appeal during the disciplinary hearing. These issues were summarised upon the court assessment of the claims made and outlined at paragraph 5 of the judgement.

Are there sufficient grounds for a review of the judgement?

On the application and various documents filed by the claimant, I find no new matter, no error on the record or need for clarification to form a basis or any sufficient cause to warrant a review. The court having framed issues for determination as set out in paragraph 25 of the judgement, it proceeded to analyse the same and made findings. Where the claimant was dissatisfied with the findings of the court, a review is not the way to go as such a review is regulated under section 16 of the Employment and Labour Relations Court Act, 2011 and Rule 33 of the Court Rules.

In the penultimate, where a party wishes to challenge the merits of an order, an appeal should suffice while a review ought to be framed pursuant to Rule 33 as set out above and as held in **Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR**.

In this regard, the court finds no matter herein which justify application for review.

Accordingly, applications dated 15th December 2020 filed by the respondent and application dated 20th December, 2020 by the claimant are hereby found without merit and dismissed. each party shall bear own costs.

Delivered in open court at Nairobi this 23rd day of March, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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