



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 77 OF 2020

KENYA ASSOCIATION OF HEALTH WORKERS ADMINISTRATION.....PETITIONER

VERSUS

SALARIES & REMUNERATION COMMISSION.....1ST RESPONDENT

MINISTRY OF HEALTH.....2ND RESPONDENT

MINISTRY OF FINANCE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

KENYA HEALTH PROFESSIONALS SOCIETY.....1ST INTERESTED PARTY

COUNCIL OF GOVERNORS.....2ND INTERESTED PARTY

RULING

1. Before me for determination is a jurisdictional question posed by the 2nd Interested Party and the 2nd, 3rd and 4th Respondents in response to the Petitioner’s application review dated 30th October 2020. The Council of Governors which is the 2nd Interested Party herein filed its Grounds of Opposition dated 1st February 2021 against the Petitioner’s application for review dated 30th October 2020 on the ground that the same is bad in law, incompetent, misinterpreted and misconceived for reasons:

i. THAT the court is bereft of jurisdiction to hear and determine the application.

ii. THAT the applicant is attempting to file an appeal of the judgment delivered by the instant court on the 7th day of August 2020 which has been disguised in the form of an application for review.

iii. THAT the application at hand does not meet the threshold for review as provided for under Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016.

iv. THAT application is defective in view of the fact that the Petitioner is not a registered Trade Union within the meaning of the Labour Relations Act No. 14 of 2007. Consequently, the Petitioner has not signed a Recognition Agreement with the County Governments and as such cannot agitate for the conditions of employment of employees working in the County Governments.

v. THAT the instant application is merely an afterthought and intended to circumvent a laid down procedure in law where a party is not satisfied with the decision of a court.

2. The 2nd, 3rd and 4th Respondents also raised a preliminary objection on grounds similar to those raised by the 2nd Interested Party and assert that the Court is *functus officio* as judgment was passed after a lawful hearing and is thus binding upon the Petitioner.

3. The issues were canvassed via submissions and the 2nd Interested Party’s submissions were to the effect that this Court is bereft of jurisdiction to entertain the Petitioner’s Application. The 2nd Interested Party relied on the decision of the Supreme Court in **Menginya**

Salim Murgani v Kenya Revenue Authority [2014] eKLR, Civil Application No. 4 of 2014 that: it is a general principle of law that a Court after passing judgment becomes *functus officio* and cannot revisit the Judgment on merits, or purport to exercise judicial power over the same matter, save as provided by law. The 2nd Interested Party submitted that this Court ought to down its tools and dismiss the Petitioner's Application relying on the case of **Mereka & Co. Advocates v Eng. A. S. Kitololo [2015] eKLR, Civil Suit 329 of 2011** where the court adopted the Court of Appeal's decision in **Dickson Muricho Muriuki v Timothy Kagundu Muriuki & 6 Others, [2013] eKLR, Civil Application No. NYR 21 of 2013 (UR 5/2013)** that:

"In the absence of statutory authority, the principle of functus officio prevents this Court from re-opening a case where a final decision and judgment has been made...We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceedings...Upon delivery of judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment should be executed....If there are new points of law or circumstances that arise after judgment, this Court is functus officio and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Supreme Court."

4. The 2nd Interested Party submitted that as regards the grounds for review under Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016, the Petitioner/Applicant has not established any new and important evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced pending the hearing and determination of its Petition. It submits that the letter dated 24th January 2020 does not introduce any new evidence before this Court and is simply concurrence from the 1st Respondent on Extraneous and Risk Allowances as opposed to the COVID-19 Emergency Allowance and benefits which was in issue. The 2nd Interested Party submits that the Petitioner's members have not been getting Extraneous and Risk Allowances even prior to the COVID-19 Pandemic owing to the nature of their work and interaction with patients. The 2nd Interested Party submitted that the Petitioner's Application does not merit review on account of some mistake or error apparent on the face of the record alleged to be on the ground that the court employed an erroneous procedure to hear and determine both the Notice of Motion and the Petition both dated 13th May 2020 together. The 2nd Interested Party submitted that the Petitioner did not at any time or stage of the proceedings oppose or challenge these directions which were issued by the court on 14th May 2020 and submits that the Petitioner in fact duly complied with the said directions before the Court delivered judgment dismissing the Petition. It further submits that Rules 20 to 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 do not provide that Petitions and Applications for conservatory orders shall be heard separately as alleged by the Applicant. Further, that from the face of the Application, the Petitioner makes contentions that are not within the ambit of review which can only be exercised for correction of a patent error of law or fact which stares in the face, without establishing any elaborate argument as stated by the Court of Appeal in the case of **Pancras T. Swai vs Kenya Breweries Limited [2014] eKLR, Nairobi Civil Appeal No. 275 of 2010**. The 2nd Interested Party submitted that the Court of Appeal in the said case adopted the reasoning of **Chittaley & Rao in the Code of Civil Procedure (4th Edn) Vol. 3 pg 3227** in which it was observed that an erroneous view of evidence or of law is no ground for review though it may be good ground for an appeal. As to whether the Petitioner's Application was filed within reasonable time, the 2nd Interested Party submits that the Petitioner has exhibited dilatory conduct as it filed its application three months after the court's ruling of 7th August 2020. To this end it relies on the Court of Appeal case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR, Nyeri Civil Appeal No. 142 of 2012**. The 2nd Interested Party submitted that an aggrieved party seeking a review of a decree or order on whatever basis must apply without unreasonable delay and that a delay of even a day or two calls for an explanation. It cited the case of **Abdulrahman Adam Hassan v National Bank of Kenya Ltd, (unreported) Civil Case No. 446 of 2001**, in the High Court at Kisumu and submitted that it will not be proper for the court to exercise its discretion in favour of the Petitioner/Applicant in the absence of any good explanation as to why it did not file its application at the earliest opportunity. The 2nd Interested Party submitted that the Petitioner's Application for review was only fit for dismissal with costs.

5. The 2nd, 3rd and 4th Respondents' filed joint submissions and in their submissions assert that the Employment and Labour Relations Court (Procedure) Rules, 2016 guarantees the right to review under Rule 33 which provides the following as the grounds for an application for Review:

(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.

6. The Respondents submit that while construing what amounts to sufficient reason, the court in **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers supra** observed that 'any other sufficient reason' as used means a reason sufficiently analogous to those specified in the rule. The 2nd, 3rd and 4th Respondents submit that on the strength of this holding the reasons advanced by the Petitioner/Applicant are not analogous to those specified under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016

namely discovery of a new and important matter and some mistake or error apparent on the face of the record. They submit that an attempt by this Court therefore to review the judgement dated 7th August 2020 without basis on any ground set out in Rule 33 would amount to an abuse of the liberty to review its judgment given to this Court under the Rules. The 2nd, 3rd and 4th Respondents submit that the learned

Judge in the Judgment dated 7th August 2020 fully canvassed all matters in dispute as raised in the Petition, made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondents. They cite the case of **National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR, Civil Appeal 211 of 1996** where the Court of Appeal held that:

“...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.”

7. They similarly submit that the Petitioner cannot allege that the procedure taken by the Honourable Court was erroneous because it complied with the said procedure which it is now attempting to challenge way after Judgment. The Respondents submitted that they have clearly illustrated that the Petitioner/Applicant has not satisfied the grounds for a Review and that it is in the best interest of justice that this Honourable Court upholds its decision dated 7th August 2020 and dismiss the Petitioner's Application. The 1st Respondent Commission did not file any submissions and simply associated themselves with the submissions by the Attorney General and the 2nd Interested Party.

8. The issue of jurisdiction is, I think, settled. Where a court seized of a matter is of the view that it lacks jurisdiction it must down its tools and not take one more step. In this case, it is asserted that the Court is *functus officio* having pronounced itself in its judgment. The Petitioner seeks to review the said judgment and from the record before me, it is clear that there would be a review permitted in law if there was satisfaction of the criteria under Rule 33(1). Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:

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.

From the foregoing, it is clear the motion by the Petitioner/Applicant is incapable of grant as none of the grounds under Rule 33(1) are satisfied. No mistake or error is apparent on the face of the record. No clarification is required. There is no discovery of any new or 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. The grounds presented to Court would be perhaps basis for an appeal. As no grounds exist for a review, I am *functus officio* and there is nothing to do other than dismiss the application by the Petitioner/Applicant with costs to the 2nd Interested Party, the 2nd, 3rd and 4th Respondents.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2021

NZIOKI WA MAKAU

JUDGE