



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. E6501 OF 2020**

**MICHAEL MUNGA MAHIA.....CLAIMANT**

**VERSUS**

**KENYA UNIVERSITIES & COLLEGES**

**CENTRAL PLACEMENT SERVICES.....RESPONDENT**

**RULING**

1. The Claimant/Applicant filed a Notice of Motion Application dated 29<sup>th</sup> January 2021 seeking for Orders that:

*(a) Spent*

*(b) That pending the hearing and determination of this Application, that this Honourable Court be pleased to reinstate its Interim Orders issued on 30<sup>th</sup> November 2020.*

*(c) This Honourable Court be pleased to set aside, amend or review the Orders of this Honourable Court made by Honourable Justice Nzioki wa Makau on 20<sup>th</sup> January 2021.*

*(d) The Costs of the Application be borne by the Respondent.*

2. When the Application was heard on 4<sup>th</sup> February 2021, this Honourable Court certified the same as urgent and granted prayer 2 in the notice of motion, staying the stated orders of 20<sup>th</sup> January 2021 pending hearing and determination of the application *inter partes*. The Application is premised on grounds that the Claimant filed his Application dated 27<sup>th</sup> November 2020 seeking for conservatory/preservatory orders and the Court later instructed parties to file written submissions in respect of the same. That on 22<sup>nd</sup> December 2020 the Claimant filed his Written Submissions in respect of his Application and further served the same on the Respondent's Advocates. That the said Respondent's Advocates later claimed to have not received the Claimant's Written Submissions and were directed to the e-Filing Portal as it was during the December 2020 holidays. That this Honourable Court then delivered a Ruling on 20<sup>th</sup> January 2021 dismissing the Claimant's application and consequently stopped his enjoyment of the protection of the Interim Orders issued by the Court on 30<sup>th</sup> November 2020, which had allowed him to continue working as an employee of the Respondent. That a reading of the said Ruling implies that the Claimant's Submissions dated 21<sup>st</sup> December 2020 in respect of his Application dated 27<sup>th</sup> November 2020 might not have been placed before the Honourable Judge for purposes of writing his Ruling. That it is therefore imperative that the Court reviews its Ruling to take into consideration the issues of fact and law as raised in the said Claimant's Written Submissions since parties did not have an opportunity to address the Court orally on the issues. Further, that it is only just and expedient that that this Application is allowed. The Application is supported by the Affidavit sworn by the Claimant/Applicant who avers that he is informed that both parties were ready to proceed for the hearing of the matter on 15<sup>th</sup> December 2020 but owing to technical difficulties in the Microsoft Teams platform, this Court directed both parties to file Written Submissions. He annexes in his affidavit copies of the Written Submissions and authorities filed on the Judiciary e-filing portal and copies of the filing receipt, generated invoice and payment mode document and receipt. It is the Claimant/Applicant's averment that since the Judiciary had through the e-Filing Portal confirmed receipt of his written submissions, the same should have been placed before the Honourable Court. He notes that the incorrect Case Number on the Submissions might have led to them not being placed in the relevant Court File although the names of the parties are correct. That the e-Filing Portal had nevertheless admitted the Written Submission in the correct e-File as shown in annexures *MMM-2, 3 and 5* and there therefore ought to have been harmony between the e-File and the physical file. That there was further no response from Judiciary indicating that the said Submissions would not be placed in the concerned file or rejecting the same so that his advocate takes appropriate action. He avers that this is a proper case for the exercise of this Honourable Court's jurisdiction and that he has brought the application herein without any delay and which should therefore be allowed in its entirety in the interest of justice.

3. The Respondent filed a Replying Affidavit sworn on 1<sup>st</sup> March 2021 by its CEO, Mercy Muthoni Wahome. She avers that both parties filed their submissions before Court in accordance with the Court's directions but the Claimant refused to furnish the Respondent with his submissions and instead discourteously directed the Respondent to the Judiciary website. That this Court thereafter dismissed the Claimant's Application dated 27<sup>th</sup> November 2020 on the basis that the Claimant did not demonstrate the requirements set out in the *locus classica* case of **Giella v Cassman Brown**. That she is also aware that at the time of delivering the Ruling, the Claimant's Counsel on record sought clarification as to the status of employment of the Claimant, to which the Court clarified that the Claimant had been terminated as per the Respondent's decision made on 11<sup>th</sup> November 2020. That the same is the reason why the Claimant/Applicant seeks the orders enumerated in the application herein on the basis that his submissions were not considered by this Honourable Court. She avers that it is the Respondent's contention that once the said application dated 27<sup>th</sup> November 2020 was determined on merit, the interim orders issued *ex parte* on 30<sup>th</sup> November 2020 legally dissipated as they had been issued pending the hearing and determination of the said application. That therefore the Claimant/Applicant's application for reinstatement of the orders issued on 30<sup>th</sup> November 2020 has no basis in law. Secondly, that since the Applicant was effectively dismissed from the employ of the Respondent on account of this Court's Ruling, it is against the principles of Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016 for the said Claimant to be reinstated again *ex parte*. Thirdly, that it is contemptuous for the Applicant to allege that the Court disregarded his submissions while simultaneously contending and producing evidence that the said submissions were indeed properly filed through the Judiciary e-filing portal. Fourthly, that the allegation of Submissions not being considered is a ground of appeal and not for review and the Claimant has thus filed an Application for review under an unfounded and unsubstantiated ground. She further avers that following the *ex-parte* Orders of this Court of 4<sup>th</sup> February 2021, the Claimant/Applicant has been hounding the Respondent to reinstate his credentials and passwords to the national infrastructure i.e. the database used to select students for admission to universities, national polytechnics, technical training institutes and other accredited higher learning institutions for Government of Kenya sponsored programmes. That the Respondent is apprehensive that reinstating the Claimant to his previous status will be a national security issue as he was among the 3 officials at the Respondent with access to the said database. That it is clear the Claimant has no intention of prioritizing hearing of the main suit since he is filing frivolous and vexatious Applications and that it is in the interest of justice that the orders issued on 4<sup>th</sup> February 2021 are set aside and the Application dated 29<sup>th</sup> January 2021 is dismissed with costs.

4. In a rejoinder, the Claimant/Applicant filed a Further Affidavit dated 16<sup>th</sup> March 2021 averring that contrary to the Respondent's assertion, this Honourable Court has discretion to return parties to *status quo ante* pending hearing and determination of the Application for Review. Further, the Employment Act 2007 has not limited this Court's jurisdiction to issue reinstatement orders at the *inter partes* stage; the Regulations cannot derogate powers contained in the Act. He denies that he has approached the Court with unclean hands and asserts that it is the Respondent who is misleading this Court by stating at paragraph 10 of their submissions dated 24<sup>th</sup> December 2020 that they were unaware of the Claimant's submissions when they were in fact aware that the Claimant had filed submissions. The Claimant/Applicant further avers that he proceeded on annual leave from 21<sup>st</sup> December 2020 and was scheduled to resume on 2<sup>nd</sup> February 2021. That the 4 years he has had access to the database government portal has never been a national security issue because the access codes he has are restricted to user rights to access and download data and any data changes can be traced back to him. He contends that the Respondent's contention is therefore fictitious and meant at sensationalism.

5. Parties filed submissions and the Claimant/Applicant submits that this Honourable Court has jurisdiction to review and set aside its orders by dint of Section 16 of the Employment and Labour Relations Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. That the circumstances under which this Honourable court may exercise its discretion to review its decision are set out under Rule 33 (1) of the Employment and Labour Relations Court (Procedure), 2016 as follows:

*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. That the core issue for determination by this Honourable Court is whether the Claimant/Applicant has brought himself within the ambit of the prerequisite set by the parameters in **National Bank of Kenya Ltd v Ndungu Njau** where the Court stated that a review may be granted whenever the court considers it is necessary to correct an apparent error or omission on the part of the court. The said Court further observed that the error or omission must be self-evident and should not require an elaborate argument to be established. He further submits that the orders of this Honourable Court ought to be reviewed because pursuant to Rule 33(1) (a) of the Employment and Labour Relations Court (Procedure) Rules, he discovered that his Submissions were not placed in the court file after the court issued its orders. That this Court can also review its orders for any other sufficient reason as under Rule 33(1) (d) and that in the case of **Chemoiwa Ole Sayiale & Another v Joseph Ole Santian & 2 Others [2015] eKLR**, the Court was of the view that failure by the Court to consider the Plaintiff's Submissions was a sufficient reason for a court to review its orders. It is the Claimant/Applicant's submission that the meaning of 'any other sufficient reason' was discussed in the case of **Nathan Chesang Moson v Grand Creek LLC & Another [2020] eKLR** with the Court referring to the case of **The Official Receiver and Liquidator v Freight Forwarders Kenya Limited [2000] eKLR** where the Court stated that:

*“these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice ‘be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record.’”*

The Applicant submits that he was entitled to be heard through Written Submissions as he did not have the opportunity to address court

orally on the issues raised in his various pleadings and that his right to fair hearing under Article 50(1) of the Constitution of Kenya, 2010 as well as the right to access justice as under Article 48 are protected. He cites the Court of Appeal case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others [2013] eKLR** where the court stated that even if courts have inherent jurisdiction to dismiss suits, it should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and that at the end of the day there should be proportionality. That in **Agip Kenya Ltd v Highlands Tyres Ltd [2001] KLR 630**, the Court stated that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. He further submits that it is a fundamental principle of natural justice applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. That if this principle is not observed then the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside. That it is clear from the foregoing that he has met the threshold for the Court to exercise discretion to review and set aside its orders.

7. The Respondent submits that Section 16 of the Employment and Labour Relations Court Act (Cap. 234 B of the Laws of Kenya) provides that the Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules, which in this case is Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Respondent disputes the Claimant/Applicant's submission that the Court's failure to consider the Claimant's submissions constitutes a ground for review under Rule 33(1)(a) being discovery of new and important matter of evidence. That this is because the said rule presupposes that an evidential discovery unearthed by the Applicant must be brought before Court for interrogation but in this case the Applicant has failed to demonstrate how they knew their submissions were not placed on record and/or how they discern that the Court disregarded the said submissions. That as far as the record is concerned, the Claimant's submissions are filed and which presumed fact the Court did not find otherwise. It submits that from the Ruling delivered on 20<sup>th</sup> January 2021 clearly ascertains that the Court considered the grounds and evidence produced by the Claimant in his application dated 27<sup>th</sup> November 2020 which was thus heard and determined on merit. The Respondent further submits that it is not a novel argument for an application of review to be anchored on the assertion that submissions were not considered. That in the case of **Albert Yawa Katsenga v Kenya Revenue Authority, Nairobi ELRC No. 713 of 2018**, the Court held that:

*"The rule provides circumstances under which this Court can grant orders for review and this include circumstances as indicated, in the Applicant's position, review sought on the account of an error on record because the Court failed to consider their submissions which had been filed, indeed, the time of writing this judgement, the Respondent's submissions had not been filed. They were also not on record. That notwithstanding, this Court considered the evidence of the Respondents on record and also considered the law and facts in arriving at Court's determination. Failure to consider the submissions of the Respondents does not in my view prejudice the Respondents at all since all facts and the law in this case was considered. There is therefore no valid reason for me to consider a review order as sought." (Emphasis supplied)*

8. The Respondent submits that the granting of injunctive orders is a discretionary power that should be exercised judiciously and that the wrong exercise of discretion is not grounds for review, even though they may be good grounds of appeal. The Respondent cited the Court of Appeal case of **National Bank of Kenya Limited v Ndungu Njau: Nairobi CACA No. 211 of 1996**, where the Court of Appeal observed that the learned Judge made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent and if he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. It further submits that the Claimant/Applicant's contention that his rights to a fair hearing and to access justice were denied when the Court disregarded his submissions are weighty constitutional issues are matters of law and not of fact. That the said issues are additionally as contentious as they could be thus rife for appeal and not review. The Respondent submits that the orders granted on 30<sup>th</sup> November 2020 were granted in the interim *ex parte*, pending the hearing and determination of the application dated 27<sup>th</sup> November 2020 and that once the said application was determined on merit, the said orders legally dissipated and are as such not available for reinstatement. It prays that the Application herein is dismissed with costs.

9. The Claimant/Applicant seeks the review and setting aside of orders granted by this Court in January 2021 disallowing his notice of motion application of November 2020. The orders are argued to have effectively terminated his employment. The Respondent on its part responds that the interim orders granted at the *ex parte* stage dissipated upon the dismissal of the Claimant's notice of motion upon which the orders were premised. The Claimant argues that the Court failed to consider his submission and that in effect his rights under Article 50 of the Constitution which guarantee him the right to a fair hearing were abridged. He draws this inference from his reading of the Ruling of the Court issued on 20<sup>th</sup> January 2021 where he asserts the Court did not consider his submissions which he asserts were not placed on the file. In the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR, Nairobi CACA No. 211 of 1996** the Court of Appeal stated that

*The matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.*

10. In my considered view, the position taken by the Claimant gives rise to matters that are grounds for an appeal but not review. As I cannot sit on appeal against my own judgment, the motion is devoid of merit whatsoever. In the premises the motion by the Claimant/Applicant fails and is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of June 2021**

**Nzioki wa Makau**

JUDGE