REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

ELRC NO.71 OF 2018

(Before D.K.N.Marete)

KENNETH NJAGI MBURIA.....1ST CLAIMANT

M'BIRAUKA ALBERT MUGAMBI.....2ND CLAIMANT

M'REWA BASILIO GITONGA.....3RD CLAIMANT

NJERU MAGDALINE KARIMI.....4TH CLAIMANT

MUTEGI ARON MUGAMBI.....5TH CLAIMANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....RESPONDENT

RULING

This is an application dated 10th November, 2020 and comes out as follows;

1. *That this Honourable Court be pleased to review its ruling and orders dated 6th October, 2020.*

2. *That costs of this application be provided for.*

It is grounded as follows;

1. *That there is a sufficient cause/error apparent on the face of the record to warrant review of the ruling.*

2. *That this application has been brought in good faith and without unreasonable delay.*

3. *That it is only just and expedient that the application be allowed.*

The Respondent raises the Respondents Grounds of Opposition as follows;

1. *This Honourable Court having delivered its ruling on 6th October, 2020, it lacks jurisdiction to hear the said application as it now functus officio;*

2. *As held by the Court of Appeal in Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of telkom Kenya Limited) (2014) eKLR, where there is finality as to the proceedings, merits and decision in a matter, a court becomes functus officio so that any issues of grievance can only be dealt with by escalation to another Court on appeal;*

3. *As held by the Court of Appeal in National Bank of Kenya Limited v Ndungu Njau (1997) eKLR, 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; in it, the law was stated as follows;*

The error or omission must be self-evident and should not require an elaborate argument to be established. 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 stature or other provision of law cannot be a ground for review.

In the instant case 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.

4. *The said application is fatally defective for want of annexing a copy of the order sought to the reviewed as mandated by both Rule 33 (3) of the Employment & Labour Relations Court (Procedure) Rules and as held by this Honourable court in Wilson Saina v Joshua Cheurich T/a Chirutich Company Ltd (2003) eKLR, Julius Mukami Kanyoko & 2 others v Samuel Mukua Kamere & Another (2014) eKLR and Suleiman Murunga v Nilestar Holdings Limited & another (2015) eKLR;*

5. *As held by the Court of Appeal in Speaker of the National Assembly v Njenga Karume, Court of Appeal, Civil Appeal No.92 OF 1992, where a procedure for obtaining a relief is prescribed, it must be used, in it, the law was stated as follows;*

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

6. *Other grounds and reasons to be adduced at the hearing hereof.*

The matter come to court variously only the 2nd February, 2021 when they agreed on a disposal by way of written submissions.

The Claimants/Applicants in their written submissions dated 15th March , 2021 submit that this application was occasioned by the court's ruling on 6th October, 2020 thereby dismissing the Claimant's cause for want of jurisdiction.

It is the Claimant/Applicants further case and submission that the claim (original) was premised as follows;

3. *The Claimants cause is contained in the Statement of Claim dated 23rd July, 2018, whereby they approached this Honourable Court seeking for the following orders:-*

a) Immediate payment of all the dues/gratuity payable to each of the Claimants as tabulated in paragraph 8 of the Statement of Claim.

b) Interest on (a) above from the date of the Claimants' release from employment.

c) Costs of the suit with interest.

The further trend of the matter come out thus;

4. Upon service of the Claimants' pleading, the Respondent filed a defence to the statement of claim which was accompanied by among other things, a notice of preliminary objection dated 27th August, 2018. The preliminary objection raised the following two grounds;

a) That the Claimants, appointees of the Governor, like Cabinet Secretaries appointed by the president in exercise of their respective powers as Chief Executive of the National and County Governments, are status employees in a pure presidential system of Government and it is only the High Court which has jurisdiction to entertain disputes touching them and their appointing authorities.

b) As held in Owners of the Motor Vessel Lilian S v Caltex Oil Kenya Ltd (1989) KLR 1, where a court lacks jurisdiction, it must down its tools.

5. Before handling the substantive Cause, the court dealt with the Respondent's PRELIMINARY OBJECTION WHEREBY IT DELIVERED A Ruling dated 6th October, 2020 upholding the preliminary objection and proceeded to strike out the Claimants' cause. In the impugned Ruling, the court struck out the claimants cause under the erroneous grounds that, "it does not have jurisdiction to hear a case where members of the county Executive Committee are challenging their removal from office by the Governor,"

The Claimants/Applicants further submission is that there is an error on the face of the record occasioned by an omission of court that is amendable by review. There is also a deserving case for such review.

The Claimant/applicant urges the court to bear in mind that the claim is on service gratuity due to themselves from the respondent and not a challenge of removal from office, as they suspect was the erroneous belief of the court in so noting.

The claimants submit a defence to the ground of *functus officio* raised by the respondent thus;

16. The Court of appeal in Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M.Kyavi & James Kimani v Kenya Power & Lighting Company Ltd (2018) eKLR, held as follows regarding the functus officio rule:-

"17).On the principle of functus officio, we are guided by the case of Raila Odinga & 2 others v Independent Electoral &Boundaries Commission & 3 others (supra) where the Supreme Court of Kenya rendered itself thus:

"(18)…Daniel Malan Pretorius, in "The origins of the functus officio Doctrine, with specific Reference to is Application in Administrative law," (2005) 122 SALJ 832, has thus explicated this concept:

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.

According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter… The (principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive, such a decision cannot be revoked or varied by the decision-maker."

(19) This principle has been aptly summarized further in Jersey Evening Post Limited v Al Thani 92002) JLR 542 at 550:

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available"

(18).Similarly, in Menginya Slim Murgani v Kenya Revenue Authority (2014) eKLR the Supreme Court of Kenya held 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 a judicial power over the same matter, save as provided by law."

(19). Applying the laid down principles to the circumstances of this case, the learned Judge made a correct finding that the court was not functus officio and had the jurisdiction to entertain the application as a review under the Industrial court Act and the Industrial Court (procedure) Rules made there under."

It follows that, a court can only be said to be *functus officio* once it has performed all its duties to finality in a particular case. As pointed out by the Court of Appeal in **Peterson Ndung'u, Stephen Gichanga Gituro, N.Ojwang, Peter Kariuki, Joseph M.Kyavi & James Kimani v Kenya Power & Lighting Company Ltd** (cited above), the doctrine of *functus officio* does not bar the court from hearing an application for review.

They submit that the ruling of 6th October, 2020 is not a bar to an application for review. It is not final and can be remedied through a review.

Additionally, they seek to rely on the authority of **Peterson Ndung'u, Stephen Gichanga Gituro, N.Ojwang, Peter Kariuki, Joseph M.Kyavi & James Kimani v Kenya Power & Lighting Company Ltd** *(cited above) where the Court of Appeal observed thus;*

"The doctrine of functus officio does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties."

So, is this court empowered by law to review its ruling? The response to this question is set out under Rule 33(1) of the Employment and Labour Relations Court Rules which provides that;-

33. Review

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 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.

The Claimants/Applicants rebuff the Respondent's ground on fatality of the application for lack of amendment of the said ruling. This

comes out thus;

> 22. *It is our humble submissions that, by applying the principles set out in the above cases and the provisions of Rule 33(1) of the Employment and Labour Relations Court Rules, this Honourable Court has the jurisdiction to hear and determine the Claimants' application for review dated 10th November 2020.*
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> 3.2. Whether the Claimants' application dated 10th November 2020 is fatally defective for want of annexing a copy of the order sought to be reviewed as mandated by Rule 33(30 of the Employment and Labour Relations Court (Procedure) Rules?
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> 28. *It is our humble submissions that the word "or" is applied disjunctively under Rule 33(3) of the Employment & Labour Relations Court (Procedure) Rules. We urge the Honourable court to be bound by the findings of the Supreme Court of Kenya in Raila Amolo Odinga & Another v Independent Electoral and Boundaries & 2 others (2017) eKLR as cited by the court under paragraph 39 in Republic v Kenya School of Law (2019) eKLR (above)*
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> 29. *It follows that, since the word "or" is applied disjunctively under Rule 33(3), the claimants were not bound to attach both Ruling and Order. The implication of the word "or" under Rule 33(3) when applied to this case, it means that an applicant can attach either the Ruling or order to be reviewed.*
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> 30. *It is our humble submissions that the Claimants' application is proper in law and fully complied with the provisions of Rule 33(3) of the Employment & Labour Relations Court (procedure) Rules. Under the Affidavit in support of the Claimants' application, the deponent has annexed and marked a copy of the impugned Ruling as "MBG 3"*
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> *31. We urge the Honourable court to disregard the authorities cited by the Respondent under Ground 4 of the Respondent's grounds of opposition since those cases are irrelevant and inapplicable to the issues in this case. The decisions in those cases are made in light of the provisions of the Civil Procedure Rules, which are inapplicable to this case.*

To use this as a ground for failing the application would, to me, be an affront against Article 159 (2) (d) - the rule against undue application of technicalities.

The Claimants/Applicants in the penultimate submit that they have established a sufficient case for review in the circumstances.

> *35. When making its Ruling, the court failed to appreciate the nature of the Claimants' cause. Under the main cause, the Claimants are seeking for the orders for,* "the immediate payment of all the dues/gratuity payable to each of the Claimants by the Respondent."
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> *36. At page 6 of the Ruling dated 6th October 2020; the court struck out the claimants cause on the grounds that they were challenging their removal from office. This finding is erroneous on the face of the record, in its finding the court held as follows, "in my considered view, in as much as this court has the jurisdiction to entertain employment disputes, there is nothing for it to entertain from the claimants as County Executive Committee Members, cannot validly challenge the decision of the Governor to remove them under Section 31(a) of the County Governments Act 2012 as the Governor retains the prerogative to appoint or remove CEC Members…."*

On this, they seek to rely on the authority of **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR**, where the court observed thus;

> "*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 or omission must be self-evident and should not require an elaborate argument to be established."*

They further submit that upon allowing the Claimants' application for review, we urge the court to exercise its powers as set out under Rule 33(5) of the Employment and Labour Relations Court Rules by quashing the findings in the Ruling dated 6th October, 2020 and thereby reinstate and re-admit the Claimants' cause and set it for a substantive hearing and determination on merits.

The Respondent submits that the application, being supported by an undated affidavit, does not offer evidential supporting the application.

The Respondent further submits that it is mandatory that a copy of the order to be reviewed is enjoined to the application per rule 33 (3) of the Employment (Procedure) Rules, 2016. In the absence of this, a case for dismissal of the application ensues. This is as follows;

> *9.The Respondent submits that this Honourable court having delivered its ruling on 6th October, 2020, it lacks jurisdiction to hear the said application as it is now functus officio. It can, therefore, not be asked to re litigate on the same issues competently determined by it. With respect, this Honourable court has no power to overturn the decision of a court of equal standing. The Claimants are invoking an unknown jurisprudence i.e. a court setting aside or reviewing the decision of a brother/sister Judge. We urge this Honourable Court to disallow the said application with costs.*
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> *11. As held by the Court of Appeal in Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former Employees of Telkom Kenya Limited) (2014) eKLR, where there is finality as to the proceedings, merits and decision in a matter, a court becomes functus officio so that any issues of grievance can only be dealt with by escalation to another Court on appeal. In that case, the Court of Appeal stated the law as follows:-*
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> *The Supreme Court in RAILA ODINGA V IEBC cites with approval an excerpt from an article by Daniel Malan Pretorius entitled,*

"The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in which the learned author stated;

…"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter… The (principle) is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional reengagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in JERSEY EVENING POST LTD V A1 THANI (2002) JLR 542 at 550, also cited and applied by the Supreme Court;

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

The Respondents further submit that it is also a doctrine of law that litigation must come to an end. As stated above, the judgment sought to be set aside has been perfected. No appeal was preferred against this Honourable Court's decision delivered on 6th October, 2020. The doctrine of finality of litigation has been discussed by a five judge bench in **Court of Appeal, Civil Application No.307 of 2003, Rai v Rai** in which Justice Bosire stated the law as follows;

This application appears to challenge the doctrine of finality. This is a doctrine which enables the court to say litigation must end at a certain point regardless of what parties think of the decision which has been handed down. It is a doctrine of principle based on public interest. … The principle of finality requires that litigation should come to an end.

Again, as held by the Court of Appeal in **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR**, 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; in it, the law was stated as follows;

The error or omission must be self-evident and should not require an elaborate argument to be established. 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 stature or other provision of law cannot be a ground for review.

In the instant case 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.

The parties have made elaborate presentations of their respective cases. I wish to thank them heartedly.

However, the Claimants case overwhelms that of the Respondent. This is because the circumstances and facts of the case bring out a case of review per rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. It is a deserved case.

I am therefore inclined to allow the application with orders that each party bears their costs of the application.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2021.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr.Munyori instructed by Kamau Kuria & Company Advocates for the Respondent.

2. Mr.Kariuki instructed by Mithega & Company Advocates for the Claimant/Respondent.