



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

MISC APPLICATION NO. E002 OF 2021

DUNCAN N. NDERITU & 55 OTHERS.....APPLICANTS

VERSUS

TELKOM KENYA LIMITED.....RESPONDENT

RULING

1. This ruling is in respect of the applicants' application dated 25th January, 2021 filed under certificate of urgency on 5th February, 2021 via the firm of Prof. Tom Ojienda and advocates pursuant to Article 50 and 159 of the Constitution of Kenya 2010, section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Order 51 Rule 1 & 4 of the Civil procedure Rules 2010, seeking the following orders;

- 1) THAT this application be certified urgent and service thereof be dispensed with and the same be heard ex-parte in the first instance.**
- 2) That the applicants be granted leave to file their respective claims out of time.**
- 3) That the costs of this application be provided for.**
- 4) Any other further relief which this Honourable Court deems fit and just to grant.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 25th January, 2021 by **Prof. Tom Ojienda**, the advocate ceased of this matter and based on the following grounds: -

- (a) That, at all material times before their termination, the applicants were employees of the Respondent but were deployed to work with Gilgil Industries Limited, a subsidiary of the Respondent before the Respondent was restructured.
- (b) That during the course of employment the Respondent increased its employee's house allowance by 60% by its circular number 2B OF 2001 however the house allowance was not effected upon the employees on the lower cadres of employment.
- (c) That on 10th February, 2003, the Respondent increased salaries of all unionisable employees by 7.5% and later following a strike on 5th August, 2004 increased the said salary by another 10%.
- (d) As a result of the selective implementation of salary increment the applicant herein together

with other employees jointly instituted **Nakuru high Court civil suit number 165 of 2006; Duncan Nderitu & 55 others –v- Telkom Kenya Limited** which suit was a test suit for 300 other suits filed together in Nakuru.

(e) That judgment was delivered in this case on 13th July, 2011 in favour of the Applicants herein, to be paid salary arrears as per improved terms of service till 15th June, 2006 when they were terminated together with costs of this suit.

(f) That the Respondent appealed against the decision of the trial Court in **Civil Appeal Number 147 of 2013** and **Appeal number 137 of 2013** which was later consolidated.

(g) That judgment in Court of Appeal was delivered on 4th November, 2016 which affirmed the decision of the Trial court to the extent that the applicants herein were entitled to benefits under the revised terms of service however the Appellate court differed with the trial court in the manner of calculating the arrears and indicated that the arrears ought to have been specifically pleaded and proved.

(h) That the applicants are desirous of giving effect to the Court of Appeal decision by specifically pleading the arrears and specifically proving the same but are time barred.

(i) That the lengthy nature of litigation from the high Court to the Court of Appeal delayed the filing of the claim of each of the applicants.

(j) That the applicants now seek leave from this Court to file out of time, the various individual claims to give effects to the judgment of the Court of Appeal issued on 4th November, 2016 and 6th November, 2020.

3. In opposing the application, the Respondent, through it legal counsel, **Nelson M. Mogaka**, filed a replying affidavit sworn on the 5th March, 2021 and filed in Court on 9th March, 2021 on the following grounds;

a) That the applicants since the delivery of the Court of Appeal judgment on 4th November, 2016 have filed several applications premised on the up-held declaratory Orders which were all dismissed.

b) He stated that the court has in the past rendered itself on a similar application in **ELRC cause number 477 of 2016, Duncan N Nderitu and 55 others –v- Telkom Kenya limited** and another related application in **ELRC MISC Application number 9 of 2017 Joseph Kibii siele –v- Telkom Kenya Ltd** which was equally dismissed.

c) That the Order annexed in the application herein is fictitious as the Order Delivered by the 3 judge bench is one of 4th November, 2020 while the one of 6th November, 2020 was by one judge, Lady Justice W. Karanja. Further that no order was issued on 4th November, 2020.

d) That the application cannot stand in light of the grounds of opposition dated 5th March, 2021.

4. On the 9th March, 2021 the Respondent in addition to the Replying affidavit filed grounds of opposition based on the following grounds.

a) The Order of Court of Appeal forming the foundation of the Employment and Labour relations Court at Nakuru, Misc. Application number 2 of 2021 is fictitious and fundamentally defective on its face, as it does not correspond to the judgment of Court of Appeal dated 4th November, 2016 and the Ruling of the Court (Lady Justice W. Karanja) dated 6th November, 2020.

b) There is in situ a Notice of Motion dated 3rd March, 2021 and lodged in the Court of Appeal on even date, seeking correction or rectification of the impugned Order to correspond to the judgment of the Court of Appeal dated 4th November, 2016 and the ruling of the Court (Lady Justice W. Karanja) dated 6th November, 2020.

c) This Court is *functus officio* and cannot be seized of the issue raised in Misc. Application no. 2 of 2021.

d) The Court has no jurisdiction to grant Orders to re-hear, and re-open matters which are otherwise *res judicata*.

e) The sustained Declaratory order is not enforceable *vide* suits, for “accrued salaries and house allowance arrears” instituted out of time.

f) ELRC Misc. Application No. 2 of 2021, has been brought in violation of the principles of finality in determination of suits.

g) ELRC MISC Application No.2 of 2021 is monstrous, abuse of the process of the Court.

5. The parties herein disposed of the application by way of written submissions with the applicant filing on 24th May, 2021 and the Respondent’s Skeleton submissions filed on 4th May, 2021.

Applicant submissions

6. The applicant’s Advocate submitted that the Applicants herein, decree holders are entitled to enjoy their fruits of judgment and cited the case of **Samvir Trustee Limited –v- Gurdian Bank Limited Milimani HCCC 795 OF 1997**.

7. It was submitted that the issue on whether the Applicants were merited to seek compensation was conclusively determined however the issue as to how much each of the Applicant is entitled was and has never been litigated in any fora therefore he argued that the current application is sought for the purposes of enlarging time within which the claimant may institute fresh suits and particularize what each applicant is owed and give effect to the judgment of the Court of Appeal of 4th November, 2016.

8. It was submitted that this Court has jurisdiction under Article 162 (2)(a) of the Constitution to hear and determine this matter.

9. On whether the current application is *res judicata*, it was submitted that the current application simply seeks for this Court’s leave to institute suits out of time to give effect to the judgment of the Court of 4th November, 2016 and ruling of 6th November, 2020 as such the application does not seek to re-open or re-hear the suit as alleged. He cited the case of **The Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 others Nairobi CA Civil Appeal no. 106 of 2017 eklr** and submitted that the doctrine of *Res judicata* has been prematurely pleaded and has no basis in the Application.

10. He argued further that the issue pleaded in Nakuru Civil case number 165 of 2006 are distinctively different from the issue the Applicants are seeking in the draft suits annexed herein as such the doctrine of res judicata is not applicable.

11. It was submitted further that the applicants have a decree which went in their favour which only lacked particularity of amounts which each of the applicants ought to be paid. He argued that to decline the current application would amount to denying the Applicants their right to hearing which will leave them which a judgment in their favour which cannot be executed as such rendering the entire proceedings herein an academic exercise.

12. Counsel submitted that this Court has jurisdiction under Articles 159(2) of the Constitution and Sections 1A and 1B of the Civil Procedure Act, to grant leave to them to filed their suits out of time. Further that as much as they recognize the need to plead all issue to save on the Courts resources, even as such, failure to plead is a mistake made by Counsel that ought not be visited upon an innocent client.

13. He thus urged this Court in the interest of justice to allow the application so as the issue of specific amounts owed to each party is brought to light and the matter determined once and for all.

Respondent's submissions.

14. The Respondent on the other hand submitted that the Order attached in the Application allegedly issued on 6th November, 2020 by a single Judge Lady Justice W. Karanja does not correspondent to the judgment of the 3 Judge Bench delivered on 4th November, 2016 an issue that the Respondent has already challenge by its Notice of Motion lodge in the Court of Appeal on 3rd March, 2021.

15. It was submitted that this Court is functus officio having litigated on the said issue and subjected the same to Court of Appeal who equaled decided on the matter. Further that the Applicants have earlier filed similar matters being ELRC CAUSE No. 477 of 2016 and ELRC MISC. Application Number. 9 of 2017 intended to realize the declaratory Orders of Court of Appeal in respect of accrued salaries and allowance arrears which were both dismissed.

16. He argued that the Applicants are calling upon this Court to re-open and re-hear a matter that has been adjudicated upon by the High Court and a decision arrived at and even appealed upon when this Court lacks jurisdiction to open such a matter, he thus argued that this Court cannot arrogate itself powers when from the circumstances it is functus officio.

17. It is the respondent's submissions that the Orders of Court of Appeal were to effect that it set aside the Orders on the calculations of the arrears but did not remit the file to high court for rehearing or for further orders therefore this Court lacks any authority to grant the orders sought as doing so would ingeniously be re-opening the judgment of the Court of Appeal.

18. I have considered the averments of the parties herein. Section 90 of the Employment Act 2007 provides as follows;

Limitations

Notwithstanding the provisions of [section 4\(1\)](#) of the Limitation of Actions Act ([Cap. 22](#)), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

19. My understanding of this provision is that a matter can only be filed before court if the cause of action occurred in the proceeding 3 years unless it is of a nature of a continuing injury or damage.

20. The law is also drafted in mandatory terms leaving no room for filing any claim after 3 years.

21. This matter having occurred way back in 2016, I find the application by applicants not merited.

22. I proceed to disallow this application accordingly.

Ruling delivered virtually this 22ND day of JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

No appearance for parties

Court Assistants – Fred and Wanyoike