



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO**

**PETITION NO. 1 OF 2019**

**TOETT GEOFFREY.....1<sup>ST</sup> PETITIONER**

**GODWIL BETT.....2<sup>ND</sup> PETITIONER**

**-VERSUS-**

**PROF. THOMAS KIMELI CHERUIYOT.....1<sup>ST</sup> RESPONDENT**

**PROF OICE MARU.....2<sup>ND</sup> RESPONDENT**

**PROF JOSHUA KWONYIKE.....3<sup>RD</sup> RESPONDENT**

**BOMET UNIVERSITY COLLEGE.....4<sup>TH</sup> RESPONDENT**

**ETHICS & ANTI-CORRUPTION**

**COMMISSION.....5<sup>TH</sup> RESPONDENT**

**PROF ESTHER TIRIMA.....6<sup>TH</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**CABINET SECRETARY MINISTRY**

**OF EDUCATION.....2<sup>ND</sup> INTERESTED PARTY**

**ATTORNEY GENERAL.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. On 30.7. 2020, Mbaru J delivered a judgment in which she dismissed the petition herein with costs on ground that the court lacked jurisdiction. The petitioners were aggrieved by the said decision and brought the instant Notice of Motion dated 8.4.2021 seeking the following orders:

**a. THAT the Honourable Court be pleased to grant the applicants leave to apply for review of the judgment entered on 30.7.2020 and prayer b, c, d and e of the petition be allowed.**

**b. THAT pending the hearing and determination of this application, Conservatory order be issued to stay execution of the impugned judgment.**

2. The application is supported by the Affidavit sworn by the 1<sup>st</sup> Petitioner in which he deposed that the judgment was delivered in the absence of the petitioners; that the judgment has errors and oversight which have aggrieved the petitioners and the public; that the petition is on all fours with four other judicial precedents which have not been reversed; that the it is equitable and in the interest of justice for the review application to be allowed; that the court has the power to grant the review sought; that the delay in filing the application was due to

capacity building exercise by the 4th respondent and the 2nd interested party, a public complaint on 9-11.3.2021 and the bill of costs of Kshs1,474,322 by the respondent; and that the petitioners stands to suffer prejudice and the public interest defeated.

3. The 1<sup>st</sup> ,2<sup>nd</sup> ,3<sup>rd</sup> , and 6<sup>th</sup> respondents opposed the application vide the Replying Affidavit sworn on 23.6.2021 by the 1st respondent in which he deposed that the application is inept, frivolous, incompetent, ill-conceived, brought in bad faith and without merits; that the applicants have not annexed the impugned judgment or decree; that the application lacks particulars of the alleged errors in the impugned judgment that have aggrieved the petitioners and the public; that the judgment was delivered electronically on 30.7.2020 and as such the application has been brought after inordinate delay; that the delay of more than 10 months has not been explained by a valid reason; that there is no new and important evidence, matter or documents which could not be produced by the petitioners before the impugned judgment was passed; that all the issues raised by the application were canvassed in the petition before the judgment; that erroneous conclusion of law or evidence is not a good ground for review but may be good ground for appeal; that no valid basis has been laid upon which to exercise discretion; that the application is an abuse of court process; and that litigation must come to an end. Consequently, they prayed for the application ought to be dismissed with costs.

4. The 4<sup>th</sup> respondent opposed the application by the Grounds of Opposition filed on 23.6.2021. In brief, the 4th respondent contended that the application does not meet the legal threshold for review set out under Order 45 Rule 1 of the Civil Procedure Rules; the application is an afterthought meant to delay taxation of the bill of costs awarded by the court; the delay of 11 months before filing the application has not been explained; that the applicants have not demonstrated any mistake or error apparent on the face of the record, discovery of any new or important evidence, that the application intends to reopen the petition; and that the impugned judgment was proper and if the petitioners are aggrieved, they ought to appeal and not to re-litigate. Consequently, the 4th respondent prayed for application to be dismissed with costs.

#### **Issues for determination**

5. I have carefully considered the application, responses and the written submissions. The only issue for determination is whether leave should be granted to the petitioners to apply for review of the judgment delivered by my sister Mbaru J on 30.7.2020. The petitioners did not cite the provision of the law upon which the instant application is brought. The relevant law is Rule 33 of the ELRC Procedure Rules 2016 which provides that:

***“(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 an Appeal is Allowed, may with 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 same mistake or error apparent on the face of the record;***

***(c) If the judgment or ruling requires clarification; or***

***(d) For any other sufficient reasons.”***

6. The above provision is quite clear that the right to apply for review is automatic to an aggrieved party such that there is no requirement for the court to give leave before making the application. All what is required is that the applicant complies with the above conditions including promptness, and establishing any or all of the 4 grounds for review set out in (a) to (d) above. Consequently, the application as drawn lacks merits.

7. However the court appreciates that the petitioners are not represented by counsel and as such they may not have the relevant competence of drawing technical legal document. Consequently, I will treat the application as a substantive application for review of the said judgment. In reaching that view, I have considered the responses by the respondents and found that they have treated the petitioners’ application as a substantive motion for review as opposed to application for leave to apply.

8. Having reached the foregoing decision, the issues for determination are:

a) *Whether the application was made without unreasonable delay.*

b) *Whether the applicants have established any ground for review of the impugned judgment.*

***Unreasonable delay.***

9. The respondents contended that the application was made after 10 or 11 months after the impugned judgment and the delay has not been explained by any valid reason. However the petitioners contended that the delay was caused by capacity building exercise declared by the 4<sup>th</sup> respondent and the 2<sup>nd</sup> interested party; a public complaint on 9-11<sup>th</sup> March, 2021 that failed to resolve the matter; and the bill of costs of Kshs1,474,322 by the respondents.

10. It is a fact that the impugned judgment was delivered on 30.7.2020 and the instant application was made on 7.6.2021 equalling to ten months delay. The reasons advanced by the petitioners to justify the delay do not add up. The delay of ten months in making the application is unreasonable and I agree with the respondents that the application is an afterthought.

***Whether the application has merits***

11. The respondents contended that the applicants have not established any ground warranting review of the impugned judgment. They further contended that the applicants have not given the particulars of the alleged errors in the judgment which has aggrieved them and the public.

12. I have tried my best to decipher the grounds advanced by the applicants as the basis for the review but with due respect none falls within the provision of Rule 33 of the ELRC Procedure Rules 2016. Instead of endeavouring to establish which of the 4 grounds for review under Rule 33, the applicants have turned to accuse the respondents and interested parties of misleading the court with falsehood to defeat justice.

13. They further argued that the court went astray right from the preamble of the judgment by ignoring the supporting affidavit on the issue of *locus standi* and in finding that there court lacked jurisdiction yet on 31.1.2019, the court had granted conservatory orders. The foregoing arguments, faults the merits of the judgment by the trial court as opposed to error on the face of the record.

14. Having considered the material presented by the applicants, I regret to say that they have failed to establish any of the four grounds for review provided under rule 33 of the ELRC Procedure Rules 2016. Consequently, I find and hold that the application lacks merits.

15. In the end the application fails for the failure to meet the procedural requirements and for lack of merits. Consequently the order for review of the judgment delivered on 30.7.2020 is declined and as such the request to grant prayer b, c, and d in the petition is rejected. This being a public litigation case, I will not condemn the applicants to pay costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY NOVEMBER, 2021.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**