



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 3 OF 2018

(Before Hon. Justice Mathews N. Nduma)

VINCENT MARITA OMAO.....PETITIONER/RESPONDENT

-VERSUS-

THE CHIEF EXECUTIVE OFFICER

NATIONAL GOVERNMENT AFFIRMATIVE ACTION FUND.....1ST RESPONDENT

HON. JERUSA MOMANYI,

WOMEN REPRESENTATIVE, NYAMIRA COUNTY.....2ND RESPONDENT

THE DIRECTOR GENERAL, KENYA SCHOOL OF GOVERNMENT.....3RD RESPONDENT

RULING

1. The intended interested party/applicant filed application dated 30th September 2019 on 7th October 2019.

2. The substantive petition was heard and determined on 1st July 2019 before the application was filed.

3. The applicant prays for order in the following terms: -

(i) That the Honorable Court to set aside wholly the Judgment dated 11/7/2019 and subsequent decree and or orders.

4. The application is premised on grounds set out in the Notice of Motion that may be summarized as follows: -

(i) That the applicant is the current County coordinator, Nyamira County effective 6/9/2018 and has never been served with any Court document related to this matter.

(ii) That the applicant was necessary party to this suit but the respondent despite knowledge of this appointment did not serve the applicant with court papers during the hearing of the suit and before Judgment was delivered in the matter.

(iii) That the respondent has commenced contempt proceedings against the 1st respondent which in effect means that applicant will be replaced from employment without having been heard.

(iv) That the application be granted.

5. The respondent filed a notice of preliminary objection to the application dated 14th October 2019 stating that the court lacks jurisdiction by dint of Civil Procedure Rules 2010, under Order 9 that the intended interested party is a stranger in the petition.

6. That the application is misconceived and an abuse of the Court process. That the applicant is trying to pursue an appeal through the Notice of Motion. That the matter is *res judicata*.

7. The intended interested party and the petitioner/respondent filed written submissions.

Determination

8. The issue for determination is whether the Court having heard the suit and delivered a Judgment in the petition has jurisdiction to entertain the application post Judgment.

9. The proceedings in the Employment and Labour Relations Court are governed by the ELRC Court (Procedure) Rules 2016 and not the Civil Procedure Rules.

10. Under the said Court rules the Court may revisit a matter post Judgment only in terms of rule 33(1) (a) to (d) in terms of which 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.

11. It is quite clear that ‘‘ A person who is aggrieved’’ is not necessarily a party to the suit. An aggrieved person who was not a party before Judgment was delivered may apply under rule 33(1) to be joined or be an interested party for the Limited Purpose for review and/or setting aside a Judgment of the Court for reasons provided under paragraph (a) to (d) of Rule 33(1) and for no other purpose whatsoever.

12. An aggrieved person who was not a party to the suit may also file an appeal to the court of Appeal in terms of the appellate Court procedure rules.

13. The present application was not brought in terms of Rule 33(1) of the ELRC (procedure) Rule 2016. Furthermore, no grounds for review provided under Rule 33(1) (a) to (d) were relied upon by the applicant in this application.

14. The application is an attempt by an aggrieved person who has a right of appeal but has not filed an appeal and who has not filed an application for review or setting aside the Judgment of the Court on grounds permissible under rule 33(1) (a) to (d) to get the Court to hear an appeal on its own Judgment.

15. The respondent was served with interim orders made by the court on 13th March 2018, prohibiting the employer from filling up the position in dispute pending the hearing and determination of this suit.

16. The employer had despite service of the court order and in blatant disobedience of the order proceeded to fill the position.

17. Contempt proceedings were initiated before court by the respondent on 30th July 2019. The present applicant is a fruit of the forbidden seed of contempt by the employer and lack confides therefore to initiate this application post Judgment.

18. The application is dismissed with costs to be borne by the intended interested party.

Ruling Dated, Signed and Delivered at Nairobi this 25th day of June 2020.

Mathew N. Nduma

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 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances: -

Mr. Gichuba & Co. Advocated for the intended interested Party/Applicant

Mr. Achok for petitioner/Respondent.

Chrispo: Court Clerk