



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. CAUSE NO. 186 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th July, 2020)

DR. FRED SIYOI.....PETITIONER

VERSUS

THE PHARMACY AND POISONS BOARD OF KENYA.....RESPONDENT

WAMBUA MAITHYA.....PROPOSED 2ND RESPONDENT

RULING

1. The Application before me is the Proposed 2nd Respondent's Notice of Motion dated 29/4/2020 which seeks the following orders:-

1. Spent.

2. THAT the Ruling of the Honourable Court delivered on 6/12/2019 be reviewed and/ or varied and/or set aside so as to meet the ends of justice.

3. THAT the Conservatory Orders issued on 9/10/2019 and later confirmed which have stayed the Ruling of the Court of Appeal and the High Court Judgment be stayed pending the hearing of the instant application.

4. THAT the Court do issue directions on exchange of affidavits, submissions and ruling date on the application to be extracted and served by the Applicant in view of the Covid-19 pandemic effect on the court's operations.

5. Such other Orders as that the Court may deem fit.

2. The application is premised on grounds that:-

1. The Applicant has new important/relevant critical evidence to the Applicant's application dated 18/10/2019 that was dismissed by the Court vide its Ruling dated 6/12/2019. The new critical evidence is the Ruling delivered by the Court of Appeal on 24/4/2020 in appeal 485 of 2019 between Pharmacy and Poisons Board (Respondent and Petitioner herein) v Wambua Maithya, which was not available at the hearing of the said application.

2. The said Ruling by the Court of Appeal concerned the annulment by the High Court of the appointment contract/letter of Dr. Fred Moin Siyoi dated 27/2/2019 which is the subject of this Petition and the attendant temporary conservatory orders.

3. The Honourable Judges of the Court of Appeal unanimously held that the Respondent vouched for Dr. Fred Moin Siyoi, the Petitioner herein, by urging the Court to resuscitate the annulled appointment contract/letter of the Petitioner.

4. The Court of Appeal further declined the prayer that the Respondent has no locus standi to vouch for Dr. Fred Moin Siyoi and that it further appreciated that the Petitioner was the person most affected by the High Court's annulment of his appointment contract/letter.

5. The holding of the Court of Appeal that the High Court at Machakos annulled the appointment contract/letter dated 27/2/2019 of the Petitioner is a confirmation that the substratum of these proceedings/Petition is the same as the substratum of the Judgment obtained by the Applicant from the High Court at Machakos.

6. This holding therefore confirms the collusions between the Respondent and the Petitioner in these proceedings for the Respondent was vouching for the Petitioner to resuscitate the annulled appointment which is the subject of these proceedings.

7. The Court is intent to deliver Judgment in default of the response of the Respondent just to frustrate the High Court's Judgment and the Court of Appeal's Ruling which is a travesty of justice as can be attested from the said proceedings.

8. The Ruling of this Court at paragraph 26 is a fundamental mistake and error apparent on the face of the record since the Applicant annexed the said Judgment on his application as Annexure WM-2.

9. Had the Court perused the said Judgment, it would have confirmed the Applicant's personal interest or stake in the matter and that he is now suffering for his non-joinder.

10. It was also a mistake and an error apparent on the face of the record for the Court to hold that the employment contract of the Petitioner as Chief Executive Officer of the Respondent has no bearing to the Judgment/ Orders that were obtained by the Applicant and which nullified his employment contract.

11. The Court at paragraph 3 (b) of the Ruling made a mistake and error on the record by stating that the Petitioner had declined service of the said orders and that it forced the Chairman of the Board of the Respondent to issue the Petitioner with a Notice of Intention to terminate employment in compliance with the Court Order.

12. That the above is a total departure of paragraph 4 of the grounds of the application which provides that the Petitioner was on 27/8/2019 served in person on behalf of the Respondent with the Judgment and attendant Orders.

13. Had the Court read the foregoing paragraph, it would have captured the correct events and or reaction of the Petitioner in the said paragraph and its conclusion would have been different that the Applicant had demonstrated his personal interest in the matter.

14. The Court made a mistake and error apparent on the face of the records in relying on the case of Francis Kariuki Muruatetu & Another v Republic & 4 Others [2018] Eklr as none of the three limbs set out by the Supreme Court provided that the Intended Party must demonstrate to the Court what remedies are being sought from the Applicant by the Petitioner.

3. The Application is supported by the supporting affidavit of Wambua Maithya, the Applicant, sworn on 29/4/2020 in which he reiterates the grounds set out in the application.

Responses to the Application

4. In response to the application, the Petitioner herein filed a Replying Affidavit sworn on 21/5/2020. He avers that the application is misconceived, an abuse of the Court process, scandalous, frivolous and vexatious in the circumstances.

5. He deposes that the Applicant has not met the required threshold to warrant the Court to exercise its residual jurisdiction to review its own decision. He avers that there is no new and important matter that could not be produced by the Applicant at the time the Ruling was delivered.

6. He avers that the Applicant's argument that the Court made an error apparent on the face of record based on the highlighted facts of the Petitioner's case in the Ruling cannot form the basis of a review since it would amount to asking this Court to sit on appeal against a Ruling of a Judge of a concurrent jurisdiction.

7. He avers that the Court in **Origo & Another v Mungala (2005) 2KLR** cited in **Jameny Mudaki Asav v Brown Otengo Asava & another [2015] eKLR** held that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal.

8. He avers that the Applicant has not elaborated any sufficient reasons to warrant review of the Court's ruling but has made baseless allegations of collusion and a repetition of what he alleged in his previous application for enjoinder, which was dismissed.

9. He avers that under Order 45 of the Civil Procedure Rules, which the Applicant relies on, he has to satisfy the condition that the application has been made without delay. He avers that the Ruling sought to be reviewed was delivered on 6/12/2019 while the application was made on 29/4/2020. Whereas close to 5 months' appears not to be unreasonable, failure to explain the delay may cause the delay to be considered as unreasonable.

10. He avers that the Supreme Court in Petition 15 & 16 of 2015 (Consolidated), held that a person seeking joinder must show the prejudice to be suffered to the satisfaction of the Court in case of non-joinder. He avers that reviewing the Court's Ruling and enjoining the Applicant will not only occasion prejudice upon him but the said prejudice would not be adequately compensated by way of costs.

11. He avers that he was never a party to the Machakos Petition No. 2 of 2019 and that he was neither heard nor given an opportunity to make representations as to the facts which were in issue in that Petition or Appeal. He further avers that that Petition did not arise out of the employment relationship or his intended termination as portrayed in the Respondent's letter dated 4/10/2019.

12. He avers that the allegations imputing collusion against a party are serious allegations which when pleaded, must be proved to a standard

above a balance of probabilities and that the Applicant has failed to meet the threshold to satisfy this Court of the existence of collusion between the Respondent and him.

13. He avers that the Conservatory Order he prayed for and was granted by the Court only seeks to stay the Respondent's letter dated 4/10/2019 and not any other Judgment or Ruling as alleged by the Applicant.

14. He avers that the allegations that the Appeal (Application) No. 485 of 2019 is a new and important matter is farfetched since the matters were well within the knowledge of both the Applicant and the Respondent, and Ruling by the Court of Appeal was before a different court of competent jurisdiction.

15. He avers that the issues raised in the instant application were canvassed in depth and the Court addressed itself on the issues and that the orders sought in the instant application are a replica to the orders sought in the previous application, which was dismissed.

16. He further avers that the Applicant is not a contracting party in respect of his employment with the Respondent and urges the Court to dismiss the application with costs to him.

17. In opposing the application, the Respondent filed a Replying Affidavit sworn by Kibet Kisorio, its Head of Legal services on 11/5/2020. He depones that the application does not meet the threshold for review, for reasons that the issues raised do not constitute discovery of any new and important evidence.

18. He avers that the Applicant has completely mischaracterised the Ruling delivered in Civil Appeal (Application) 485 of 2019 and presented it as if the Court made a finding on the Respondent's employment contract which is not the case.

19. He avers that the existence of the appeal and the proceedings is neither new or critical because the Court and the parties have always been aware of its existence and it in fact arose during the highlighting of submissions on the application for joinder.

20. He avers that the Ruling is a subsequent occurrence and not evidence available for a review application. He further avers that the application before the Court of Appeal was on the grant of stay of execution of a Judgement and the Appellate Court has not heard or determined the appeal.

21. He contends that the Applicant has set out to attack the Court's interpretation and decision on the place and purpose of a third party who seeks to be joined as a Respondent in a dispute between an employer and an employee.

22. He further contends that an application for review under Section 16 of the Employment and Labour Relations Court and Rule 32 of the Employment and Labour Relations Court Rules 2016 can only be allowed under the circumstances set out thereunder. He contends that should the Applicant be dissatisfied with the interpretation of statute, the remedy lies in an appeal and not an application for review.

23. He avers that the application for joinder raised the same issues that have been raised in support of this application for review.

24. He also avers that the Court assessed all the grounds and in its Ruling analysed the effect of Machakos Petition 2 of 2019 on the application for joinder and was convinced that the decision of the High Court at Machakos has no bearing on the application for joinder. Further, the Court dealt with the question for disclosure of material information in the matter and the Court was convinced that the decision arising from the Machakos Petition was already delivered thus there is no material information to be disclosed as alleged by the Applicant.

25. He contends that key findings in the Court's Ruling are unchallenged, which include the character of the dispute of one arising from a private contract and the Applicant is a necessary party and his presence is not necessary to enable the Court effectively adjudicate upon and settle all questions in the suit.

26. He avers that the Applicant's allegation that the parties are in collusion arises because the parties allegedly did not disclose the case in Machakos. However, this position is inaccurate for reasons that the Machakos decision featured prominently in the pleadings and submissions presented by both parties and that as observed by the Court, the decision in Machakos is in the public domain.

27. He avers that the Applicant is cleverly trying to put the two Courts of concurrent jurisdiction on a collision course by filing documents in the two Courts to suggest that they are contradicting each other.

28. He avers that the application is without merit and should be dismissed with costs.

Applicant's reply

29. The Applicant filed a Supplementary Affidavit sworn on 28/5/2019 in response to the Respondent's Replying Affidavit. He avers that the Court on 16/1/2020 confirmed the conservatory orders on request by the Petitioner without affording or seeking No Objection from the Respondents' counsel who was also present in Court.

30. He avers that the collusion and concealment between the Petitioner and the Respondent is no longer obscure and that the Respondent is yet to oppose the Petition despite being given 7 days to respond to the Petition.

31. He contends that the Respondent and Petitioner are facing contempt proceedings in the High Court at Machakos and have exhibited as defence, conservatory orders of these proceedings. He avers that this Court's conservatory orders will be frowned upon by any other judicial

officer and that this court's legal avenue to address any grievance to the High Court's decision was to seek joinder to Appeal No. 485 of 2019.

32. The Applicant filed a Further Affidavit sworn on 9/6/2020 in which he avers that it is critical for this Court to stay the conservatory order, which were thought to be issued in an honest error on account of collusion and concealment of material facts.

33. The application proceeded by way of written submissions and only the Applicant and Petitioner's submissions were on record.

Applicant's submissions

34. The Applicant submitted that there was no inordinate delay in filing the application as it was filed within 6 days of obtaining the ruling of the Court of Appeal and the impact of Covid-19 that precipitated shut down of the Court.

35. He submitted that the Ruling of the Court of Appeal dated 24/4/2020 was not within his knowledge at the time the order was granted. He relied on the case of **Kithure M'Mwendwa Nyaga v Teacher Service Commission [2019] eKLR** where it was held that Rule 33 of the Employment and Labour Relations Court (Procedure) Rules contemplates the discovery of a new and important matter or evidence that was not within the knowledge of the Applicant.

36. He relied on the cases of **Associated Insurances Brokers v Kenindia Assurance Co. Ltd [2018] eKLR** and **Nyamogo and Nyamogo Advocates v Kogo [2001] E.A. 173** and submitted that the Court's finding that the Applicant did not provide a copy of the Judgment in Machakos matter is an error on the face of the record.

37. He further submitted that the joinder of parties in this Court is governed by Order 1 Rule 10 of the Civil Procedure Rules and not section 23 of the Supreme Court Act as read with Rule 25 of the Supreme Court Rules. He submitted that the Francis Muruatetu case which this Court relied upon, only interpreted the provisions of the Supreme Court Rules.

38. He submitted that there are sufficient grounds to warrant grant of the order for review as the Respondent is yet to file a response to the Petition and the Court granted the interim conservatory without hearing the Petitioner's formal application for conservatory orders and enquiring from the Respondent's Counsel.

39. In conclusion, he submitted that he has satisfied the three limbs for grant of review and oxygen principles of sections 1A, 1B and 3A of the Civil Procedure Act.

40. In his Supplementary submissions, he submitted that both the Petitioner and the Respondent have not in their pleadings controverted or even made a specific mention or reference to the errors he stated as being apparent.

Petitioner's submissions

41. The Petitioner submitted that the application fails to meet the threshold provided under the Civil Procedure Act and the Civil Procedure Rules. He relied on Section 16 of the Employment and Labour Relations Court Act and Rule 33 (1) of the Employment and Labour Relations Court (Procedure) Rules and submitted that there is no new and important matter that could not be produced by the applicant at the time the Ruling was made.

42. He submitted that the Ruling of the Court of Appeal cannot be inferred or considered as a new ground as set out by the Applicant. He further submitted that the Ruling cannot be used as a ground for termination or staying the conservatory orders of this Court. He relied on the Court of Appeal decisions in **Francis Origo & Another v Jacob Kumali Mungala and Samuel Ogodu Waga v Fish Processors (2000) Ltd [2014] eKLR** where the Court set out the conditions that an Applicant must satisfy in seeking an order for review.

43. He submitted that what is before the Court of Appeal is an issue pertaining to an advertisement for the position of Chief Executive Officer of the Pharmacy and Poisons Board and not his termination.

44. He submitted that the grounds advanced by the Applicant for review are best suited for an appeal because they challenge the merits of the decision, which requires a long process of reappraising the evidence. He relied on the case of **Christine Sigowa Wadulo v Solimpex Africa Limited [2016] eKLR** where the Court held that an error on the face of the record should be an error capable of being seen and it cannot be an error that the decision was not arrived at on merit. He further relied on the case of **Origo & Another v Mungala (2005) 2KLR and Nyamogo & Nyamogo v Kogo (2001) EA 70.**

45. He submitted that the Applicant has not elaborated any sufficient reason to warrant a review of the Court's ruling. He relied on the case of **Sadar Mohammed v Charan Singh & Another** where the Court held that any other sufficient reason for the purposes of review refers to grounds analogous to the error apparent on the record and discovery of a new matter.

46. He reiterated that the delay of close to 5 month prior to the filing of the application for review required an explanation. He submitted that the Applicant having failed to meet the threshold for review, cannot seek an order for setting aside the conservatory orders since he has not met the threshold for setting aside of the conservatory orders and has not invoked the Court's jurisdiction on the said subject.

47. He submitted that the application for review is intended to vex the parties or convolute the proceedings with unnecessary new matters. In conclusion, he submitted that he stands to be prejudiced by the fact that he does not have any other source of employment. In addition, the application has not satisfied the threshold for review and setting aside.

48. I have considered the averments and submissions of the Parties herein.

49. Vide this Court's ruling dated 6/12/2019 this Court declined to allow the application for joinder of one Wambua Maithya to this Petition.

50. Earlier on vide an application dated 9/10/2019, on 11/10/2019, this Court issued conservatory orders staying the Respondent's decision contained in a letter dated 4/10/2019 expressing the intention to terminate the Applicant's contract of service and appointing an Acting Registrar/Chief Executive Officer of the Pharmacy and Poisons Board.

51. It is in respect of the above orders that the Applicant seeks review on the ground that there is new important and relevant information available, which was not before Court at the time the Court issued the above orders.

52. The Applicants aver that the new and important evidence available is the ruling of the Court of Appeal delivered on 24/4/2020 in Appeal No. 485/2019 between the Petitioner, the Respondent herein and one Wambua Maithya, which was not available at the time the Court made the orders in question.

53. The Applicants avers that in the Court of Appeal ruling it was confirmed that there was collusion between the Petitioner and Respondent by the Respondent vouching for the reinstatement of the Petitioner. The Applicant also avers that it annexed the judgement of the High Court in Machakos to the application as Annexure WM2.

54. From the Pleadings before Court, when the Applicant made the application before Court, they were contending about another matter before the High Court (Odunga J) for which the nexus between that case and the current Petition was not demonstrated to Court.

55. In the current application, the Applicant has now annexed a ruling of the Court of Appeal in relation to the ruling of the High Court of Kenya at Machakos (Odunga J) delivered on 26th September, 2019 which ruling was delivered on 24/4/2020 in which the Court of Appeal dismissed 2 applications for stay against the orders of the High Court (J Odunga) in which Odunga J had ruled that the process of recruitment of the Chief Executive Officer of the Pharmacy and Poisons Board failed to meet the constitutional and statutory requirements and granted orders of certiorari as sought.

56. I note that the orders of the Court of Appeal relate to the recruitment of the Chief Executive Officer of the Pharmacy and Poisons Board, as is the current Petition. The Court of Appeal having confirmed that position in CA No. 485/2019, this Court has no business staying the recruitment process of the Chief Executive Officer of the Pharmacy and Poisons Board as ordered in Court's ruling of 9/10/2019.

57. I find that, that is a good reason to review my ruling of 9/10/2019 and I therefore review my ruling and lift the injunction granted stopping recruitment of the Chief Executive Officer of the Pharmacy and Poisons Board.

58. As for joinder of the Applicant, his interest having been addressed in Court of Appeal No. 485/2019, his joinder in this Petition will not add any value to the Petition this being purely an employment relationship between the Petitioner and his employer. I therefore decline to enjoin the Applicant accordingly.

59. Costs in the Petition.

Dated and delivered in Chambers via zoom this 28th day of July, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Otieno for Petitioner – Present

Respondent – Absent