



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATION COURT AT NAIROBI

PETITION 31 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 13th October, 2020)

KENYA MEDICAL RESEARCH INSTITUTE.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

INDUSTRIAL COURT OF KENYA.....2ND RESPONDENT

AGNES MUTHONI & 34 OTHERS.....1ST INTERESTED PARTIES

UNION OF NATIONAL RESEARCH AND

ALLIED INSTITUTES OF STAFF IN KENYA.....2ND INTERESTED PARTY

RULING

1. Before this Court is the 1st Interested Parties' Notice of Motion Application dated 7/7/2020 seeking the following prayer:-

a. THAT this application herein this matter be certified as urgent. (Spent).

b. THAT its service be dispensed with at the 1st Instance. (Spent).

c. THAT this Honourable Court be pleased to review its decision that it is functus officio made through the judgment delivered on 18th October 2019.

d. THAT this Honourable Court be pleased to order the sum of Kshs. 50,569,000.00 plus the accrued interest comprising of the Claimant's basic pay from 17th December 2009 to 17th July 2015 deposited (sic) Account No. [...] held at Sidian Bank Limited pursuant to an order of this Court as a condition of stay pending Appeal in Court of Appeal No. 220 of 2013 be and is hereby released to the Claimants.

e. THAT the cost of the application be in the course.

2. The Application is supported by the grounds set out therein and the Supporting Affidavit of Gerald Biko Livondo sworn on 7/7/2020. The Petitioner has opposed the Application vide the Replying Affidavit of Prof. Yeri Kombe sworn on 14/9/2020.

The Applicant's Case

3. The Applicants aver that there is sufficient reason to review the judgment delivered by the Honourable Justice Abuodha on 18/10/2018 because there was error apparent on the face of record as the Court made a wrong finding that it was *functus officio*. It is their position that there is no pending appeal in the Court of Appeal as regards the judgment delivered on 16/7/2015.

4. The Applicants aver that had the letter of 9/2//2018 which the Court relied on to arrive at its decision been brought to the attention of the parties, then they would have explained to the Court that the matter had been concluded in the Court of Appeal and referred back to this Court. They clarified that there was no pending appeal in the Court of Appeal regarding this suit hence the Court made a wrong decision.

5. The Applicants aver that a portion of the Claimant's entitlements have been secured on account of the orders of stay pending appeal which have been spent and/or lapsed. However, there is no order currently securing the amount which ought to be in their possession.

6. Further, the order for stay issued on 9/9/2016 was on the condition that the Respondent was to deposit the basic salaries of 35 Claimants from 17/12/2010 to 15/7/2015, in court or a joint interest earning account within 30 days from the day of the ruling failure to which, the orders would lapse. The Respondent deposited the sum of Kshs. 50,569,000.00 on 19/10/2016, 10 days after the expiry of 30 days and without seeking the leave of this Court.

7. The Applicants aver that it has been 9 years since judgment was entered in their favour yet the Petitioner herein is enjoying stay orders which has hindered the enjoyment of the fruits of their judgment. They urged that it was in the interest of justice that the application be allowed.

The Petitioner's Case

8. The Petitioner conceded that there was an error on the face of record in the judgment in so far as the Court declared itself *functus officio* which warrants a review. As regards the Judgment delivered on 18/10/2018 the Petitioner avers that the decision by the three-judge bench delivered on 16/7/2015 was set aside by the Court of Appeal through the compromise of the Petitioner's appeal; **Civil Appeal 220 of 2016; Kenya Medical Research Institute vs. The Honourable Attorney General & 3 Others** where the appeal was allowed.

9. It is their position that the doctrine of *functus officio* operates to bar a merit-based decisional re-engagement with a case, once a final judgment has been entered. According to the Petitioner, since the 1st ELRC judgment was set aside in its entirety, there was no final judgment for the Court to declare itself *functus officio*.

10. The Petitioner is of the view that the review order should not extend to releasing the monies deposited the interest earning account. They contend that it is a fact that a conditional stay was granted through the Ruling delivered by the Honourable Justice Nderi Nduma on 9/9/2016 and the sum was deposited in an interest earning account.

11. According to the Petitioner, the effect of the Court of Appeal decision to set aside the first ELRC Judgment was that the monies deposited in the interest earning joint account were to remain in that account until the Petition is heard afresh. As such, the monies should be released only after the Petition is heard afresh and determined in the Applicant's favour.

12. The Petitioner is of the view that the joint interest earning account guarantees the safety of the monies. Further, that they are apprehensive that if the monies are released to the Applicants the Petitioner will not be able to recover the same and will be subjected to a strenuous litigation process to recover the same.

13. Finally, the Petitioner urged the Court to review the judgment only to the extent that the Court declared itself *functus officio* in the matter.

14. The Application was disposed by way of written submissions with only the Petitioner filing theirs. Though the 1st Interested Parties informed this Court that they had filed their submissions, there were no submissions in the Court file of the e-filing portal.

The Petitioner's

15. The Petitioner's submission was largely a reiteration of the averments made in the Replying Affidavit. They submit that the second ELRC judgment ought to be reviewed only to the extent that the Court declared itself *functus officio* in the matter as it is not a merit-based decisional re-engagement.

16. They relied on the cases of **Nyamogo & Nyamogo vs. Kogo [2001] EA 173** and **National Bank of Kenya Limited vs. Ndungu Njau [1997] eKLR** where it was observed that the error must be apparent and should not require an elaborate argument to be established.

17. The Petitioner also relied on the case of **Raila Odinga & 2 Others vs. Independent Electoral Boundaries Commission & 3 Others [2013] eKLR** where Court observed that the *functus officio doctrine* was one of the mechanisms by which the law gives expression to the principle of finality and that the Court was *functus officio* where it has performed all its duties in a particular case.

18. The Petitioner further relied on the case of **Telkom Kenya Limited vs. John Ochanda (Suing on his own Behalf and on behalf of 996 Former Employees of Telkom Kenya Limited [2014] eKLR** where the Court opined that *functus officio* was an enduring principle that prevented the merit-based re-opening of a matter before a Court that had rendered the final decision thereon.

19. The Petitioner submitted that should this Court find that the decision of the Court to declare itself *functus officio* is not an error apparent on the face of record, then the judgment still ought to be reviewed by dint of rule 33 (1) (d) of the Employment and Labour Relations (Procedure) Rules 2016 for any other sufficient reason being that the Judge was bound by the Order of the Court of Appeal of 19/6/2017, to hear the matter afresh, which was not done.

20. As regards the monies deposited in a joint interest earning account, the Petitioner submits that the orders of stay pending appeal have not lapsed. It is their position that unless the Petition is heard afresh as ordered by the Court of Appeal, the monies cannot be refunded.

21. The Petitioner also submitted that the orders for stay were made by the first ELRC Court in the Ruling of 9/9/2016 hence any orders regarding the release of the monies should relate to that Ruling. Since no prayer was made to that effect, then the same should not be awarded.

22. The Petitioner further submits that the issue of depositing the monies outside the 30 days granted by the Court is a novel issue which was never raised during the hearing of the Petition hence should be disregarded. It is also submitted that the delay in depositing the monies does not satisfy the requirements set out in rule 33. Lastly, it is the Petitioner's submissions that the ruling of 9/9/2016 has not been varied, set aside or repealed hence remains binding.

23. The Petitioner concluded by urging this Court to limit the review to this Court's finding that it was *functus officio* in the matter and that each party should bear their own costs.

24. I have examined the averments of the Parties herein. From the averments herein, the Claim No. 379 (N) of 2010 was concluded. The Petitioner herein moved to the Court of Appeal over the said award.

25. The Interested Parties raised a Preliminary Objection dated 2/2/2012 to the effect that the Court of Appeal lacked jurisdiction to entertain the Appeal. The Court of Appeal upheld the said Preliminary Objection and struck out the Appeal as being incompetent. Upon dismissal of the Appeal, the Petitioner filed this Petition on 6/8/2013.

26. In the Petition, the Petitioner sought certain orders. The Court, delivered its judgement on 18/10/2019 indicating that it is *functus officio*. It is on this judgement that the Petitioner seeks a review in terms of the issue that this Court is not *functus officio*.

27. Indeed the Court of Appeal did not determine the Appeal on merit but through a technicality indicating that it had no jurisdiction to handle the Appeal. The Appeal was actually struck out.

28. The prudent thing the Petitioner should then have done was to file an appeal before the Court with jurisdiction. The Petitioner instead sought to file the Petition for which the Court found was res judicata.

29. For this Court to review its order, the law is clear under rule 33 of the ELRC (Employment & Labour Relations Court (Procedure) Rule 2016 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 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".

30. In the current application, the Applicants seek a review on the ground that there is an error on the face of the record. Indeed when judgement was delivered in this case, the Court made a finding that it was *functus officio* having handled the initial Case No. 31(N) of 2010 to conclusion.

31. The judgement of the Court was never overturned. The Petitioner however filed the case notwithstanding and the Petition was not an Appeal to the judgement in Cause No. 37(N) of 2010. The judgement in this Cause stands.

32. The Court having given order of stay in this case pending hearing of the Appeal which Appeal is now non-existent, it follows that Court cannot fold its hands and do nothing about order and condition of stay in place.

33. In this regard, the Court is not *functus officio* in respect of directions on how the amounts deposited in Court ought to be dispensed with to that extent. I review the earlier order of Court finding the Court to be *functus officio* and state that the Court is not *functus officio* in respect of directing on issue of moneys deposited in Court following stay orders granted.

34. In the same vein, this Court directs that the sum of Kshs.50,569,000/= plus accrued interest deposited in Account No.[...] held at Sidean Bank Limited pursuant to an order of this Court as a condition of stay pending Appeal in Court of Appeal No. 220 of 2013 should be released to the Interested Parties herein there being no Appeal pending in any Court since then.

35. Costs in the cause.

Dated and delivered in Chambers via zoom this 13th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Enonda for 1st Interested Parties – Present

Mutie for 1st Respondent – Present

Muigai for Petitioner – Present

Respondents – Absent