



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 86 OF 2020

LILIAN W. MBOGO-OMOLLO.....PETITIONER/APPLICANT

VERSUS

CABINET SECRETARY MINISTRY OF PUBLIC SERVICE & GENDER1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. Before me is the Notice of Motion application dated 23rd November 2020. Mr. Omollo appeared for the Petitioner/Applicant while Miss Oyugi appeared for the Respondents. The motion seeks review of the decision by my brother Radido J. In brief, the decision is sought to be reviewed for the following reasons:-

a. Spent

b. Pending hearing and determination of this Application the Honourable Court be pleased to issue a conservatory order restraining the Respondents whether by themselves, their agents, servants or any other person acting under their instruction from victimising the Petitioner through removal from payroll or from implementing any adverse action against the Petitioner without affording the Petitioner due process conferred by Article 236 of the Constitution.

c. Pending hearing and determination of this Application the Honourable Court be pleased to direct the Respondents whether by themselves, their agents, servants or any person acting under their instruction to forthwith reinstate the Petitioner to the payroll and remit to the Petitioner all the withheld salary and benefits due to the Petitioner since June 2020.

d. The Honourable Court be pleased to review and vary the Judgment dated 21st July 2020 and the consequential decree emanating therefrom by setting aside the nominal compensation of Kshs. 1/- being damages for the violation of the Petitioner's right to due process by awarding adequate compensation for violation of the Petitioner's rights and contravening the Constitution in purported removal of the Petitioner from the payroll.

e. The Honourable Court be pleased to review and vary the Judgment dated 21st July 2020 together with the decree emanating therefrom by issuing a prohibitory order restraining the Respondents whether by themselves, their agents, servants or any other person acting under their instruction from victimising the Petitioner through removal from the payroll or from implementing any adverse action against the Petitioner without affording the Petitioner due process conferred by Article 236 of the Constitution.

f. Costs of this Application be in favour of the Petitioner/Applicant.

The motion was premised on the grounds appearing on the face of the Motion and supported by the affidavit of Lillian W. Mbogo-Omollo the Petitioner herein.

2. The Respondents were opposed and filed grounds of opposition and at the onset sought that the Review Application be placed before Radido J. for review. The grounds of opposition were as follows:-

1. That the present application does not disclose new and compelling evidence necessitating review of the Honourable Court's judgment.

2. That the Respondents believe that the Honourable Court had all the crucial evidence necessary for proper disposal of the matter.

3. That there is already an intended appeal by the Petitioner/Applicant evidenced by a Notice of Appeal dated 3rd November, 2020 and lodged on 4th November, 2020.

4. That the Petitioner/Applicant has not demonstrated any ground to justify review of the Court's decision.

5. That the orders sought ought not to issue as the Petitioner/Applicant's application is frivolous, vexatious and an abuse of the due process of this Honourable Court and should therefore be dismissed with costs.

3. On account of the Covid 19 pandemic, the motion was canvassed orally via Microsoft TEAMS, the online platform currently in use for hearing and disposing of cases/application and matters appearing in Court. The Petitioner/Applicant submitted through her Learned Counsel that the motion is for review of judgement of the Court delivered by Radido J. on 15th October 2020 together with the decree arising therefrom. Mr. Omollo submitted that the grounds for review are on the face of motion and specifically, he relied on the ground the judgment requires clarification and also the ground – sufficient reason. He argued that the Employment & Labour Relations Court (Procedure) Rules, 2016 grant the Court the authority to grant review. He submitted that the Rules provide 4 grounds for review and that under Rule 33(1), there is basis for review on discovery of new and important matter, for a mistake apparent on the face of the record and the ground the Petitioner relies on - clarification and sufficient reason. He referred the Court to the decision of Radido J. and in particular to paragraphs 53, 54, 55, 57, 58, 59, 60, 61 and 62 of the said decision. He submitted that the Court found the removal of the Petitioner was unconstitutional but however, at paragraph 63 when it was time to make its order, the Court took the view that it was not informed of whether the application at the Anti-Corruption Court by the Assets Recovery Agency had been appealed against. He submitted that in view of the remedies granted, the orders of protection under Article 236 of the Constitution and the declaration of the Court that the Petitioner was entitled to damages of a nominal Kshs. 1/= the Petitioner was seeking clarification. He submitted that indeed proceedings in the High Court involving the Anti-Corruption and Recovery Agency were appealed against in Civil Appeal No. 121 of 2020 and that the pleadings in relation to the appeal are annexed to the motion. He argued that in light of the position that there was an appeal filed, the Court on grounds of clarification under Rule 33(1)(c) can clarify the judgment in that regard. He submitted that the Petitioner/Applicant also relies also on other sufficient reason as it has been explained before in the case of **Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR** where Mativo J. clarified what 'sufficient reason' entails. He submitted that the Learned Judge had this to say:

Additionally, a court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Singh and Another* [15] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [16] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.[17]

He submitted that this is analogous to grounds for review and that the Petitioner is not relying on grounds of new evidence as argued by the Respondent. Neither is Petitioner relying on mistake apparent on face of record. He submitted that the Respondent will say there is an appeal preferred but he wished to submit in as much as a notice of appeal has been filed, a notice of appeal is merely a formal notification of intention to appeal. He submitted that there are certain requirements for lodging of an appeal and that the appeal itself is deemed to have lapsed once the time has lapsed. He relied on the case of **Chairman Board of Governors Highway Secondary School v William Mmosi Moi [2007] eKLR**. He argued that the Court's attention ought to be drawn to the deficiency of pleadings filed by Respondents who had only filed grounds of opposition. He submitted that grounds only state the legal arguments to be relied on and they do not controvert the facts in the affidavit of the Petitioner/Applicant. He argued that the Respondents have conceded the facts pleaded in her affidavit as no pleadings are filed controverting her affidavit. He submitted that the Court has the jurisdiction to clarify its judgement as the decision in ACC Misc. No. 58 of 2018 was in fact appealed against and in light of the clear variance in finding of the Court and the final orders for the Petitioner/Applicant, he submitted and prayed that the Application be allowed in terms of prayers on the Petitioner's/Applicant's motion and that grounds of opposition by the Respondents be dismissed with costs to Petitioner/Applicant. He also cited the case of **Daniel Kibet Mutai & 9 Others v Attorney General [2019] eKLR** and urged the grant of the orders sought by the Petitioner/Applicant.

4. In response, Miss Oyugi for the Respondents submitted that the application for review is based on sufficient reason and these are advanced in motion and relying affidavit. She submitted that the question to resolve is whether these reasons fall within the scope of Rule 33 of the Employment & Labour Relations Court (Procedure) Rules, 2016. She submitted that while considering what amounts to sufficient reason the Court in **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2015] eKLR** delivered on the case of clarification where Court held any other reason means anything analogous to the first two. She submitted that the Court held the expression used or Order 47(1) means a reason analogous to those specified in the Rule. She argued that any other attempt except to correct an appeal or would amount to an abuse of the liberty given to tribunal to review its judgment. She cited the decision of the Court in **Stephen Gathua Kimani** (supra) for her argument. She submitted that on the strength of the case, the reasons advanced are not analogous to those under Rule 33 of the Employment & Labour Relations Court (Procedure) Rules, 2016. She submitted that the Judge fully canvassed all matters in the Petition and made a decision on matters in controversy and exercised his discretion. She submitted that the judgment is self-explanatory and does not require clarification and for illustrative purposes submitted that the declaration was proper. She submitted that the instant application to review and reinstate is on account of the stated failure to give the Petitioner damages. She submitted that while granting order (a) in the Petition, the Court was very keen not to play any administrative role by making sure it did not order the Ministry to reinstate the Petitioner's salary. She urged Court to maintain these findings. She relied on the case of **Bitange Ndemo v Director of Public Prosecutions [2013] eKLR**. She submitted that a declaration is formal statement of Court as it declares what the legal position is and does not contain the orders as can be enforced. She submitted that Order (a) of the Court's judgement is not a coercive order as it only states a legal position as regards protections assured to public officers under Article 236. She submitted that the Petitioner/Applicant cannot demand her reinstatement to payroll. She submitted that the judgement is straightforward and does not need clarification and the Petitioner has not proved the right to review. She submitted that the Petitioner was satisfactorily granted her relief per her Petition where the Petitioner got nominal dues. Counsel submitted that the review to allow her to be on payroll would be to cause unjust enrichment through double restitution. She relied on the case of **Madhupaper International Ltd & Another v Kenya Commercial Bank Ltd & 2 Others [2003] KLR 31** on the arguments on unjust enrichment. She submitted that to reinstate the Petitioner to payroll and to remit the dues to her is against public policy. She submitted that the Petitioner also sought prayers in the alternative and that the Court gave orders in relief and gave reasons. She argued that the prayer

sought now has an alternative relief which the Court declined to grant. She submitted that the orders sought should not be granted and on totality of the reasons the Petitioner has failed to demonstrate that she has satisfied grounds for grant for review. She submitted that it is the best interest of justice to uphold decision of 20th October 2020 as this motion is an abuse of Court process and ought to be dismissed with costs to the Respondent.

5. In a brief reply, Mr. Omollo submitted that the grounds of review are said to be not analogous to grounds for review. He submitted that the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers** (*supra*) on the suitability of the review was based on Civil Procedure Rules. He submitted that case quoted the Indian Civil Procedure Rules and the grounds pronounced in Civil Procedure are only two-fold, based on discovery or new facts and error apparent on the face of the record. He submitted that the Petitioner's Motion is on the Employment & Labour Relations Court (Procedure) Rules, 2016 which holds additional grounds. He submitted that the judgement requires clarification and that a very loose meaning is that clarification is to make something clearer. He submitted that to ensure the Court gets to the bottom of the matter the Court should note the Petitioner was unconstitutionally removed and this was unlawful *ab initio* then proceeded to issue the order. He submitted that should be clarified now that there is knowledge there is appeal and that the question is whether the orders remain the same. He submitted that the Petitioner is going empty handed despite the Court having found there is breach of the duty. He urged the Court decision be reviewed on terms set out. He submitted that the contention of unjust enrichment by payment of her salary is unfounded as half of her salary was withheld until her case before the Anti-Corruption Court was concluded. He submitted that is a legal provision supported by Section 62 ACECA. He submitted that for the Court to hold she is only entitled to Kshs. 1/= for breach of her rights needs to be clarified and does not amount to unjust amendment. He submitted that the Court has wide powers to grant an array of reliefs under Section 12 of the Employment and Labour Relations Court Act and prayed that the Court exercises the power in favour of the Petitioner. He submitted that these are not the only grounds for review before Employment and Labour Relations Court. He submitted the grounds advanced which are analogous to the clarification or sufficient grounds proposed are analogous to sufficient reasons. He invited the Court to find for Petitioner and not drive her from the seat of justice empty handed and submitted that the Respondent will not suffer any prejudice in any case.

6. The motion before me is for review. Under Rule 33(1) and (2) of the Employment & Labour Relations Court (Procedure) Rules, 2016 provides

33(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.

2. An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.

7. In terms of Rule 33(2), the Judge who passed the Judgment left the Court Station and is presently presiding over another Station of this Court. In the premises, the decision can be reviewed by any other Judge at the Nairobi Station. In line with this Rule I have carefully considered the decision of the Learned Judge and have accordingly come to a determination as I shall shortly deliver.

8. The Petitioner has a grouse with the decision made by the Learned Judge in awarding nominal damages. It is the Petitioner's position there is basis for review for clarification and sufficient reason. The Petitioner holds the view that the Court found the removal of the Petitioner was unconstitutional but however, at the point it was time to make its order, the Learned Judge took the view that it was not informed of whether the application at the Anti-Corruption Court by the Assets Recovery Agency had been appealed against. The Petitioner holds that in view of the remedies granted through the protection afforded under Article 236 of the Constitution and the declaration of the Court that the Petitioner was entitled to damages of a nominal Kshs. 1/- the Petitioner thus sought clarification of the decision. The Respondents are of a contrary view and asserts that in seeking clarification as is sought herein, the Court is bound to consider the matter and ascertain whether the grounds advanced are analogous to the first two grounds propounded in Rule 33. The Respondents assert there is no basis for review.

9. The decision by Radido J. was succinct. He stated thus in the penultimate paragraphs of the decision dated 21st July 2020:-

63. The Petitioner was found by the High Court to be the beneficiary of proceeds of crime. The Court was not informed whether the decision has been appealed against.

64. In lieu of the remedies sought by the Petitioner, the Court orders

(a) THAT a declaration is hereby issued that a Principal Secretary is entitled to the protections assured public officers by Article 236 of the Constitution.

(b) The Petitioner is awarded a nominal Kshs 1/- (Kshs ONE) for the violation of her right to due process.

65. Each party to bear its own costs.

10. Having carefully read the decision by my brother Radido J. it is inevitable that I come to the conclusion that the decision does not require clarification. It is in very unambiguous language as the Court considered the protection assured of a Public Officer per Article 236 of the Constitution and proceeded to render a verdict. The Court found that given the finding by the High Court that the Petitioner was a beneficiary of proceeds of crime, the Court proceeded to award a nominal Kshs. 1/- as damages. Rather than being compensatory, damages may instead be nominal which are very small damages awarded to show that the loss or harm suffered was technical rather than actual. In view of the considered decision by Radido J. there is no basis for my interference with the decision as no ground under Rule 33 has been invoked to warrant the review sought. I therefore decline to review the decision and dismiss the Petitioner's notice of motion with costs to the Respondents.

It is so ordered.

Dated and delivered at Nairobi this 17th day of December 2020

Nzioki wa Makau

JUDGE