REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 36 OF 2018

(*Formerly Judicial Review No. 141 of 2017*)

Before Hon. Lady Justice Maureen Onyango

IN THE MATTER OF AN APPLICATION BY THE REGISTERED TRUSTEE OF TELEPOSTA PENSION SCHEME FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF *CERTIORARI* AND PROHIBITION IN RESPECT OF THE DECISION OF THE RETIREMENT BENEFIT APPEAL TRIBUNAL MADE IN CIVIL APPEAL NO. 7 OF 2011 ON 13™ FEBRUARY 2017

AND

IN THE MATTER OF ARTICLES 22, 25, 48, 50 (1) AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLE 165(6) AND (7) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF ARTICLE 159, 2(d) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 OF LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT NO. 4 OF 2015

AND

IN THE MATTER OF SECTION 49 AND 52 OF RETIREMENT BENEFITS ACT NO. 3 OF 1997 AND RULE 10 OF THE RETIREMENT BENEFITS (TRIBUNAL RULES 2000)

IN THE MATTER OF:

REPUBLIC...APPLICANT

AND

THE RETIREMENTS BENEFITS APPEAL TRIBUNAL..............1ST RESPONDENT

THE ATTORNEY GENERAL..2ND RESPONDENT

AND

RETIREMENT BENEFITS AUTHORITY..........................1ST INTERESTED PARTY

BONIFACE MARIGA AND 948 OTHERS.........................2ND INTERESTED PARTY

GIDEON MBURU NG'ANG'A AND 176 OTHER.............3RD INTERESTED PARTY

BEN OULO AND 135 OTHERS...4TH INTERESTED PARTY

AND

THE BOARD OF TRUSTEES

TELEPOSTA PENSION SCHEME..EXPARTE APPLICANT

RULING

The 4th Interested Party/Applicants, Ben Oulo and 135 Others, filed a Notice of Motion Application dated 25th June 2018, brought under Order 45 and Order 53 Rule 3(2) of the Civil Procedure Rules, Section 80 and 3A of the Civil Procedure Act, Article 50(1), 159 and 23 of the Constitution and seeking review and setting aside of orders issued on 7th May 2018, to be enjoined in this suit and for the court to admit

the Notice of Change filed on 14th July 2017.

The Application is founded on the grounds that: majority of the Applicants herein are retired, old, poor, sickly and with life threatening diseases achieved compounded or contracted because their pension is held due to the above case and that they have no money to move about let alone pay costs to their former advocates representing the 2nd Interested Party as ordered by this Court. That there is an annexed revised list of Telkom retirees identified by their Personal Numbers who were previously represented by Koceyo and Company Advocates with whom they fell out after disagreements over fees. That this Court should thus by discretion allow them to be retained in the suit with a different representation which is their constitutional right and that the Applicants will be greatly compromised and grossly prejudiced if they are not represented. That they were part of the 2nd Interested Party in the Tribunal suit and just as the 2nd Interested Party's interests are represented, they should also be included. That since the court did not see or hear parties in court, this court should be pleased to grant the orders they seek in this application.

The Application is supported by the Affidavit of Ben Otieno Oulo a former Telposta Pension Scheme retiree who annexes a copy of the list of names marked BOO1 of those on whose behalf the application has been filed. That their former advocate gave them blank forms to sign which made them apprehensive and led to them appointing another advocate and that when they requested the Exparte Applicant and the 2nd Interested Party for statement of interest, they both declined. That they supplied their personal numbers, with all the details required for verification and that the Exparte Applicant and the 2nd Interested Party are frustrating them. That this court should reconsider the orders of Aburili J. to the effect that all Interested Parties should come aboard as a matter of compliance and that the court should order each party to bear their costs.

When the matter came up for hearing on 20th February 2019, the Ex parte Applicant's advocate argued that they had not been told which application was coming up for hearing and secondly, that there is a pending application in the Court of Appeal seeking a stay of any further proceedings in this matter as well as a stay of the judgment of Nyamweya J of 6th December 2018. That the stay is also sought pending an intended appeal which seeks to challenge the jurisdiction of this court in this case and that they request this court to suspend the hearing of the instant application and the entire suit pending the hearing of the application in the Court of Appeal.

The 2nd Interested Party's advocate opposed the application stating that it was a technique to delay the matter further while the 1st Interested Party's advocate stated that they would not be actively participating in this application.

The Applicant's advocate argued that the hearing notice was properly served on the Respondents on 20th July 2018 as proved by the filed affidavit of service and that the Respondents are aware this was the only application the 4th Interested Party has filed on record. That this court should not entertain the application to delay the hearing as nothing had been placed before this court to prove that there was an intended appeal.

The court overruled the objections and the application was heard by way of oral submissions.

Oral Submissions

The Applicants' advocate submitted that there is an error on the record as the learned Judge was of the belief that the Interested Parties were only on board for the purpose of JR 141/2017. That this court should note that the Applicants were all along in the proceedings in this case but were dropped off after they disagreed with the 2nd Interested Party's Advocate. That the Exparte Applicant who has been enjoying a stay from February 2017 and abusing the court process, will not be prejudiced if the orders sought in this application are granted but that it is the 4th Interested Party who will suffer loss and damage. They relied on the case of ***Martha Wambui –v- Registered Trustees Marter Hospital*** and the case of ***SMK –v- MWN & Another [2015]***.

The 2nd Interested Party's advocate while opposing the application submitted that the Applicants were unknown to them and that when Nyamweya J dismissed the application, she asked the aggrieved parties to appeal or apply for review. They urged the court to dismiss the application based on the four principles of review set out under Order 45 of the Civil Procedure Rules. The counsel submitted that an application for review can only be allowed upon an applicant producing significant documentation that would reopen an application. That none has been produced in this matter and that the grounds in support of the application are for appeal and not review. They pray that the application be dismissed with costs.

The Exparte Applicant's advocate submitted that this court is being asked to review an application that has not even been annexed and that the court should revise its record and note that this information of the 4th Interested Party being part of the 2nd Interested Party is being brought up now for the first time. That the grounds relied upon by the Applicants do not meet the threshold of Order 45 and so the application does not meet the prerequisites of merit. Further, that it is doubtful whether an application can be made before a Judge other than the Judge who made that decision and that they are also disputing jurisdiction of this court to hear a dispute between Trustees and members

of a Scheme under Section 17 of the ELRC Act. That the nature of the dispute is that there was an erroneous computation of pension and that while the Applicants have raised the issue of prejudice, accepting this argument would add Kshs.8 billion to its liability. That the 4th Interested Party should have appealed instead.

In a rejoinder the Applicants' advocate submitted that there are letters on record from the applicants seeking information which can be verified. That the Exparte Applicant and the 2nd Interested Party have not identified the 948 persons. That the 4th Interested Party/Applicants have also not been verified to ascertain that they are not in that list. That if they are going to be locked out then there is need to confirm they are not in the list of 948. That there is also no document to show that there is a stay in the Court of Appeal. They pray that this court grants the application and reviews the decision of Nyamweya J. as prayed.

Determination

The issue for determination is whether the 4th Interested Party's Application for review and enjoinment is merited.

Rule 33(1) of Employment and Labour Relations Court (Procedure) Rules, 2016 provides that an aggrieved person can make an application for review of an order from which an appeal is or is not allowed under the following circumstances –

(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 knowledeof 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.

Rule 33(2) states that an application for review may be heard by the Judge who made the decision or nay other Judge if the Judge who made the decision is no longer in the court station.

Sub Rule 3 provides that a copy of the judgment or decree or ruling or order to be reviewed shall be filed with the application for review the applicants allege that there was an error on the record.

In the case of ***Martha Wambui v Irene Wanjiru Mwangi & another [2017] eKLR***, the court observed that:

> "*In the case of **Antony Gachara Ayub Vs. Francis Mahinda Thinwa (2014) eKLR** which quoted with approval the decision of the court in the case of **Draft and Develop Engineers Ltd Vs National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011,** it was held;*
>
> > "*An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be left to be determined judicially on the facts of the case".*
>
> *There is a real distinction between mere erroneous decision, and an error apparent on the face of the record. Where an error on a substantial point of law stares on in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by the long drawn process of reasoning or on the points here there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be, for appeal."*

The arguments by the applicants are that first, Judge Nyamweya did not hear the arguments by the parties and only came in to write the judgment after Aburili J. heard the parties. That Judge Aburili had directed the Ex Parte Applicant to advertise in the daily newspaper for Interested Parties to apply to be enjoined.

The second argument is that the Judge was of the belief that the Interested Parties were only coming on board for purposes of the Judicial Review Application No. 141 of 2017, yet the 4th Interested Parties had all along been part of the proceedings in Retirement Benefits Authority Tribunal (RBAT) No. 7 of 2011 but disagreed with their advocate over fees.

The third argument is that the Judge condemned the applicants to pay costs, yet they are elderly, sickly; have life threatening diseases, some deceased and the rest poverty ridden. That they were not supposed to be condemned to pay fees because they were not the applicants in JR 141 of 2017, and the decision to slap them with the fees was unfair.

The fourth ground is that the Ex Parte Applicant will not suffer any prejudice by their joinder, that the applicants have a right to their joinder and to be presented by counsel of their choice hence the prayer that the Notice of Change of Advocates filed by Celine Odembo and Associates dated 14th July 2017 and filed on the same date be admitted on record.

All these grounds do not fall within the grounds for review under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules.

They do not constitute an error on the record as explained in the case of ***Martha Wambui –V- Irene Mwangi and Another*** (supra): they do not constitute fresh evidence that was not available at the time of hearing of JR No. 141 of 2017; they do not seek clarification of the decision; and in my opinion, they do not constitute "*any other sufficient reason*" for review.

There are thus several reasons why this application must fail. The first is that there is an appeal that has been filed against the decision of Nyamweya J. which is the subject of the instant application for review. A review can only be sought where no appeal has been preferred.

Secondly, the order or ruling sought to be reviewed has not been attached. It is a requirement under Rule 33(3) that a review can only be in respect of a decree or an order whose copy has been attached to the notice of motion.

The final ground is that the applicants have not established the threshold for review as provided in Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 which are the discovery of new evidence, mistake or error on the face of the record, clarification of judgment or ruling or other sufficient ground.

It is my opinion that all the grounds of review in the application are matters that can be adequately dealt with in the appeal.

The application is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2019
MAUREEN ONYANGO
JUDGE