



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 32 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 10<sup>th</sup> June, 2019)**

**KENYA UNION OF EMPLOYEES OF**

**VOLUNTARY AND CHARITABLE**

**ORGANIZATIONS (KUEVOKA).....CLAIMANT**

**VERSUS**

**BOARD OF GOVERNORS PUMWANI**

**SECONDARY SCHOOL ..... RESPONDENT**

**RULING**

1. On 9<sup>th</sup> March 2016 this Honourable Court delivered its Judgment dismissing the entire claim. The Claimant then filed the present Notice of Motion on 16<sup>th</sup> February 2019 seeking the following Orders:-

1. ***THAT the application for review of the Judgment of this Honourable Court delivered on 9<sup>th</sup> March 2016 be allowed.***
2. ***THAT the Judgment of this Honourable Court delivered on 9<sup>th</sup> March 2016 be and is hereby vacated.***
3. ***THAT the Respondent be and is hereby ordered to pay Kshs. 279,913.65 being the Grievant's "net quantum merit demanded" with interest at 14% rate with effect from 1<sup>st</sup> January 2002 when his (the Grievant's) retirement became effective.***
4. ***THAT the Respondent be and is hereby ordered to issue the Grievant with the Staff Loan Clearance Certificate.***
5. ***THAT the Respondent be and is hereby ordered to issue the Grievant with Certificate of Service.***
6. ***THAT the Respondent be and is hereby ordered to pay costs of this suit to the Claimant/Applicant.***

2. The Application is based on the grounds that there is discovery of important matters/evidence that was not available for the Claimant/Applicant's knowledge when preparing the Statement of Claim dated 9<sup>th</sup> January 2013. There are mistakes and errors apparent on the face of the record and there are areas of the Judgment that require clarification.

3. In his Supporting Affidavit, Odin Boaz Otieno the Claimant's authorised representative, avers it was aggrieved by the Judgment of the Court delivered on 9<sup>th</sup> March 2016 necessitating the filing of this Application for review.

4. He avers that in accordance with the appointment letter, the grievant's terms of appointment was subject to the agreement between the Ministry of Education, Science and Technology and KUDHEIHA Workers therefore the Respondent was bound to pay the grievant his wages and the allowance due to him as prayed for in the Statement of Claim being Kshs. 279,913.65.

5. He avers that pursuant to Order 3 (1) and (4) of the Regulation of Wages (General) Order 1982 the wages paid to the Grievant were below the statutory wages entitled to his occupation from 1<sup>st</sup> May 2001 when he was due to retire and that the grievant was not compensated in any

form hence his claim for overtime in his Statement of Claim.

6. He further avers that the discovery of the entire Collective Bargaining Agreement is important evidence which was missing from the Statement of Claim to enable the Judge give a proper judicial opinion over the suit and the grievant's entitlement to 9 years leave travelling allowance at Kshs.158,400 and 9 years' service gratuity at Kshs. 26,963.80 that were arising from the relevant clauses of the Collective Bargaining Agreement for a retire employee of a public School Board of Governors.

7. He avers that the Court on 28<sup>th</sup> April 2015 stated that the issue of limitation of action had been determined by Justice Marete in the Preliminary Objection and no new application can be made therefore there was an error/mistake on the face of the record when this Court in its Judgment dismissed the claims without citing any order of this Court or of the Court of Appeal. Hence, this finding invalidated the Court's Ruling delivered by Justice Marete.

8. In response to the application, the Respondent filed a Replying Affidavit sworn by Richard Mugo Mwangi the Respondent's Principal. He avers that the Ruling on the Preliminary Objection was to the effect that the issue raised needed to be ascertained through the hearing of the suit and therefore the Court could not make a determination on whether or not the suit was time barred at that stage.

9. Accordingly, Justice Marete did not dispense with the issue of limitation of action thus this Court was justified in making a determination whether the suit was time barred as the issue had not been resolved in the Ruling.

10. He avers that should the Court have made an error on whether the suit was time barred, this was not a ground for review as it was not an error apparent on the face of the record rather it would be an error that needs to be established through a long process of reasoning.

11. He avers that the Claimant had annexed excerpts of the Collective Bargaining Agreement to his bundle of documents and it is therefore ironical that it now states that it disconcerted the entire agreement. He avers that the allegation of discovery does not warrant an order of review as the whereabouts of the entire agreement were within the Claimant's knowledge from the onset.

12. He further avers that there has been inordinate and inexcusable delay by the Claimant in filing the present application as he filed it 3 years after judgment was passed.

13. The parties made oral submissions to the applications on 24<sup>th</sup> April 2019 with the Claimant submitting that there are sufficient reasons to allow the application and that the application was filed within reasonable time.

14. The Respondent on its part submitted that the ground set out in the application in respect of the Ruling by Marete, J is a legal issue which ought to be a ground of appeal.

15. In the Court's judgement dated 9<sup>th</sup> March 2016, this Court dismissed the entire claim on the ground that the Claim was time barred.

16. The Applicant aver that the time of the Claim being time barred had been resolved by J. Marete vide his ruling of 5/12/2014 and therefore this Court could not delve into it at this point.

17. The ruling of J. Marete of 5/12/2014 did not go into the merits or otherwise of the Preliminary Objection raised on the issue of the Claim being time barred. The only finding by Hon. J. Marete was that the Preliminary Objection did not conform to the law as set out on precedent.

18. He also opined that the issue would require further scrutiny before a ruling in favour of the objection could be made. No further ruling was ever made on the issue of the suit being time barred.

19. I considered the merits of the suit and submissions made before me and concluded that the Claim was time barred. I therefore do not find any error on the record or any new information presented before me to warrant of any contrary finding or determination.

20. The Applicant wishes to have this Court review the Judgement as read but I find no reason to do so. I therefore find the Application for review not merited and I dismiss it accordingly.

**Dated and delivered in open Court this 10<sup>th</sup> day of June, 2019**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Odin Otieno for Claimant – Present

Miss Mbwire for Respondent – Present