

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

MERU ELRC CAUSE NO. 75 OF 2018

(FORMERLY NYERI ELRC CAUSE NO. 513 OF 2017)

JUDE RIZIKI KARIUKI.....CLAIMANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

THARAKA NITHI PUBLIC SERVICE BOARD.....2ND RESPONDENT

RULING

1. The Claimant/Applicant's notice of motion application dated 27th February 2019 seeks a review of the judgment of this court given on 24th January 2019. The application is premised on Sections 3(1), 3(3) and 12(3) of the Employment and Labour Relations Act and all enabling provisions of the law. The Claimant seeks orders that the honourable court be pleased to review and/or issue further orders pursuant to the judgment delivered on 24th January 2019. The Claimant also seeks the costs of the application. The application is based on grounds that the *ratio decidendi* for dismissing the suit was that the Claimant's suit offended section 77 of the County Governments Act, 2012 yet this Court in Meru ELRC case No. 21 of 2017, Callen Gatune Francis v Tharaka Nithi County Government and Tharaka Nithi Public Service Board, had a different opinion. The Claimant argues that this matter is in relation to the dismissal/termination from employment and not a dispute in regards to appointment of the Claimant to a public office hence this court has jurisdiction to hear and determine the same and that in regards to dismissal, suspension and/or removal from office of an employee and based on the pronouncement in the Meru case above, the Employment and Labour Court is the proper and natural forum in line with Article 41 of the Constitution and the Employment Act. The Claimant asserts that behoves this court to review the decision to dismiss the suit as the same relates to unfair dismissal of the Claimant and not appointment and recruitment.

2. The Respondents filed grounds of opposition and assert that the court having delivered a judgment in 24th January 2019 is *functus officio* and lacks jurisdiction to hear the said application. The Respondents further stated that the purported affidavit sworn by the Claimant's counsel is invalid since the counsel has not authority to depone to controversial matters involving his client and another party as the affidavit contravenes Order 19 Rule 3 of the Civil Procedure Rules. The Respondents asserted that the application is an abuse of the court process since the Claimant has not availed herself of the right to appeal to the Public Service Commission against the termination.

3. Mr. Warutere the advocate for the Applicant argued an advocate can depone to matters which he can of his knowledge prove and also stated that the deposition is on matters of law and not the matters in contention. He further argued that there are sufficient reasons for review and the court can be moved under rule 32(d) Rules of the court so as to pronounce itself as the court of record and to ensure that there is certainty.

4. On his part, Mr. Ndungu for the Respondents argued that the court was *functus officio* and could not entertain the application by the Claimant after pronouncing the judgment on 24th January 2019 as where there is finality of proceedings, merit and decision a court becomes *functus officio* and any grievance can only be escalated on appeal. He submitted that the application was not supported by any evidence as the advocate for the party had sworn the affidavit in support on contentious issues thus offending the principles of Order 19 Rule 3 of the Civil Procedure Rules and the decision in **Copana Limited v Panafrica Insurance Co. Ltd. [2015] eKLR**. He stated that the affidavit sworn by an advocate on contentious matters in a suit is inadmissible and by parity of reasoning there was no affidavit in support of the motion. He urged the dismissal of the application by the Claimant/Applicant with costs to the Respondent.

5. The court in handling a review application cannot be said to be *functus officio* since there is reposed jurisdiction to deal with matters such as stay of execution and incidental matters related to the finalisation of the suit including an application for review or for committal of the judgment debtor etc. The Respondents' arguments on this score therefore fail. In seeking the review, the Claimant asserts that the court had a different view in the case of **Callen Gatune Francis v Tharaka Nithi County Government & Another [2019] eKLR** where the court did not dismiss the Claimant's case as was done in this case. The two cases are not on all fours and therefore the attempt to equate the two is insufficient to warrant a review. The arguments advanced by the Claimant are grounds for preferring an appeal and not a review. As held in the Court of Appeal decision in **Nyamogo and Nyamogo Advocates v Kogo [2001] EA 173** "We have carefully considered the submissions made to us by the advocates of the parties to this appeal. 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 each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of an error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where 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 a review although it may be for an appeal." I am in total agreement with the

decision of the Court of Appeal. The application is not merited as the grievance raised is a ground for appeal and not for review. The application is dismissed with costs to the Respondents.

It is so ordered.

Dated and delivered at Nyeri this 3rd day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar