**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 31 OF 2018**

**JOSECK MUTHURI MWARANIA.....CLAIMANT/APPLICANT**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....RESPONDENT**

**RULING**

1. The Claimant/Applicant herein seeks through the Originating Notice of Motion Application dated 28th March 2019 for orders that

> 1. The Respondent be ordered to pay the Claimant full salary from 17/12/03 being the date of dismissal to 17/1/19 being the date of judgment herein in the sum of Kshs. 6,125,434 as prayed in prayer (iii) of the plaint dated 22/11/04.
>
> 2. The Respondent be ordered to pay the Claimant the balance of half salaries retained by the Claimant between 24/3/03 and 17/12/03 in the sum of Kshs. 142,821/- as prayed for in prayer (iii) of the plaint dated 22/11/04.
>
> 3. The Respondent be ordered to compute and pay all terminal/retirement benefits due to the Claimant from the date of appointment till the date of judgment being 17/1/19.
>
> 4. Costs be provided for.

The originating notice of motion was supported by the grounds on the face of it and the annexed affidavit of Joseck Muthuri Mwarania the Claimant herein. His grounds were that the Claimant's dismissal was declared unfair and the Respondent had refused to pay salaries and all other dues to the Claimant claiming that they were not ordered to pay. He asserts that the orders sought will render the judgment executable.

2. The Respondent is opposed and filed grounds in opposition asserting that the application before the Court was *res judicata* granted the provisions of Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya. The Respondent states that having rendered its judgment on the substantive matter on 17th January 2019 the honourable court is *functus officio* and lacks jurisdiction to hear and determine prayers that were heard and dismissed in the substantive suit.

3. The Claimant filed submissions in support of his motion and stated that the natural and logical implication of the declaration of the Claimant's removal unfair fir reasons expressed in the judgment, had the Respondent applied the law and facts and hand fairly, they ought not have removed (dismissed) the Claimant. The Claimant submits that the only danger of removal was that the Claimant was de-registered as a teacher and could not seek employment as a teacher in a private school. The Claimant submitted that it is trite law that Courts do not give orders in vain and that the declaration has to be operationalized by reinstating the Claimant to the position he ought to have been but for the unfair action of the Respondent. The Claimant submits that this can only be done by his being paid all the salary allowances and pension he was entitled to had he not been unfairly terminated. He asserts he not only lost income for the period he was out of work but also lost over 20 years of service for which he was entitled to a substantial amount of money by way of pension to be computed from the date of employment to the date of judgment herein. The Claimant asserts that looking at the grounds of opposition it does not seem like the Respondent disputes the amounts claimed by the Claimant as the sums are based on the payslip. The Claimant submits that the Respondent instead seems to advance technical reasons why the Claimant's application should not be allowed and he calls into aid the provisions of Article 159(2)(d) of the Constitution which provides that justice is required to be administered without any undue regard to procedural technicalities. The Claimant submits that the honourable court enjoys both review and inherent powers and both can be invoked in determining this kind of application. He states that no new issues are being raised in the application and therefore the issue of *res judicata* does not arise. The Claimant submits that similarly, the Respondent does not state what section of the then Employment Act, cap 226 prohibits any of the prayers sought and the authorities cited by the Respondent are stated to be inapplicable in the current case. The Claimant urges the dismissal of the grounds of opposition and proceed to allow the application dated 28/3/19 with costs.

4. The Respondent in its submissions asserts that the application lacks merit and is bad in law, fatally defective and ought to be dismissed

with costs to the Respondent. It submitted that the originating notice of motion application was unknown to law, incurably and fatally defective and ought to be dismissed. The Respondent submits that the application and prayers sought therein are not a review neither is it an appeal making it impossible to discern the clear provision of the law that has been used to invoke the Court's jurisdiction. The Respondent submits that *res judicata* applies as the matters raised were fully determined in the decision of the court contained the in the Judgment of the court dated 17th January 2019. The Respondent cited the case of **John Florence Maritime Services Limited & Another *v* Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** and submitted further that the Court was *functus officio* having rendered its decision. The Respondent cited the cases of **Telkom Kenya Limited *v* John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR** where the Court of Appeal pronounced itself thus:

> *Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century.*

The Respondent submitted that the Court lacked the jurisdiction to hear and determine issues which were neither pleaded nor canvased in the main suit a position underscored in the case of **Independent Electoral and Boundaries Commission & Another *v* Stephen Mutinda Mule & 3 Others [2014] eKLR**. The Respondent submitted that the prayers by the Claimant were not pleaded in the plaint. The Respondent submitted that the prayers set out in the originating notice of motion application amount to an appeal against the judgment of the court and does not fall within the ambit of Section 3A of the Civil Procedure Act and Order 50 Rule 1 f the Civil Procedure Rules. The case of **Alex Toya Indasio *v* Mini Bakeries (Nrb) Ltd [2014] eKLR** which cited the case of **Eastern and Southern African Development Bank *v* Green Fields Limited and Others [2002] 2 E.A. 371**. The Respondents submit that the application is frivolous, vexatious and amounts to an abuse of the court process, the Respondent cited the case of **Kivanga Estates Limited *v* National Bank of Kenya Limited [2017] eKLR** where the Court of Appeal held that a pleading or action is frivolous when it lacks *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense. The Respondent submitted that the prayers sought are unknown to law as the law in place at the time did not have any provisions for the prayers sought.

5. The court has considered the originating notice of motion, the arguments of learned counsels for the parties Mr. Mwarania and Mr. Anyuor. In coming to the decision all the authorities cited and legal arguments advanced have been considered even where they are not expressly mentioned in my Ruling. The application before the court is an Originating Notice of Motion. This is a creature known in law as one of the means by which a court action can be commenced. In the former Constitution, The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (known as the Gicheru Rules) the law provided as follows in Rule 2 thereof

> *2. Unless a matter is specifically provided for under section 67 or section 84 of the Constitution or any other law, a party who wishes to invoke the jurisdiction of the High Court under section 65 of the Constitution, shall do so by way of Originating Notice of Motion (hereinafter referred to as "the Motion")*

The law therefore recognizes this as a way of moving the court. In the case before me this was employed to articulate the grievance of the Claimant. In the motion the Claimant seeks various relief reproduced hereabove. The Respondent opposes the motion and advances the grounds that the matters raised are *res judicata* as well as untenable in law as they amount to an appeal against my decision. Prayer (iii) of the Plaint sought an order setting aside all the proceedings culminating in the removal of the plaintiff from the defendant's register and an order compelling the defendant to reinstate the plaintiff in the defendant's register and pay him all entitlement from the date of removal. From the reading of the motion, there was dissatisfaction with the determination of the court in the decision rendered on 17th January 2019. The Claimant seeks the relief set out in his originating notice of motion, in his words, to render the judgment of the court executable. In the case of **Alex Toya Indasio *v* Mini Bakeries (Nrb) Ltd** *(supra)* Radido J. held that

> *….where a party feels aggrieved on the basis that the Court did not consider a statutory provision which was implicated, it should be challenged on appeal.*
>
> *In my view, what the Claimant is alleging is an alleged misapprehension of the law by the Court. I say so because essentially the Claimant is contending that the Court failed to consider an issue arising out of the pleadings without giving reasons.*
>
> *In the case of Eastern and Southern African Development Bank v African Green Fields Ltd. and others (2002) 2 E.A. 371 it was held that*
>
> *An order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the laws or that he exercised his discretion wrongly in the case…..The proper way to correct a Judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error is apparent on the face of the record and therefore requires no elaborate argument to expose.* (underline mine)

6. The way I understood the originating notice of motion is that the Claimant feels dissatisfied that the Court did not grant the prayers in prayer (iii) of his plaint. He seeks the grant of the prayers which he argues crystalized on the rendering of the judgment. He argues that there can be no right without a remedy. He accordingly asserts that he is entitled to relief as sought in his originating notice of motion. In my view, having taken that view, the Claimant could not seek relief from this court as it would seem there was either a misapprehension of the law on the part of the Court or the failure to grant a relief that was sought in the claim. In my considered view, the position taken by Mr. Anyuor is correct. I am *functus officio* as far as my determination on 17th January 2019 and the only remedy for an aggrieved party is to seek the interposition of the Court of Appeal which would consider the matter and if in agreement with the Appellant come to a different conclusion or remit the matter back to the Employment Court for hearing afresh or consideration as the Court of Appeal may direct. Having taken that view the motion is devoid of merit and is accordingly dismissed. I will make no order as to costs.

It is so ordered.

**Dated and delivered at Meru this 4th day of October 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true

Copy of the original

**Deputy Registrar**