



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 93 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLES 22, 23, 27 AND 28 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 3, 10, 20, 27, 28, 29, 30, 36, 41 AND 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

HUMPHREY NYAGA THOMAS AND 25 OTHERS.....PETITIONERS

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

RULING

Before me, for determination is the Petitioners/Applicants Notice of Motion Application dated 11th June 2019. It seeks the following orders:

1. That the Court be pleased to review its Order issued on 10th June, 2019 and Order the Respondent do pay the Applicants their salaries for the months of July, August, September, October, November, December, 2018.
2. That costs of this Application be provided for.

This Application is premised on the grounds that:

1. At the time of filing the Application, the Muster Roll for the period July, August, September, October, November and December 2018 could not be produced as the same had been locked by the Respondent and only became available on 23rd May, 2019 after the Court had delivered its Ruling.
2. The Court be pleased to review the Order to ameliorate further suffering by the Applicants who are working without pay.

The Application is supported by the Affidavit of **HUMPHREY NYAGA THOMAS** sworn on 11th June 2019 in which he reiterates the grounds set out on the face of the Notice of Motion Application.

The Application is filed under Order 45 Rule 1, 2 and 3 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

The Respondent opposed the Application and filed a Replying Affidavit deponed by **FATUMA CHEGE**, the Deputy Vice Chancellor – Administration of the Respondent on 24th June, 2019 in which she contends that the instant Application ought to be dismissed for being incurably defective and incompetent as it fails to comply with the strict and mandatory provisions of Order 45 of the Civil Procedure Rules, 2010. She further contends that the Application is based on a misapprehension of the law and that the same has been filed after an unreasonable delay.

The Respondent contends that the instant Application is intended to delay the hearing of the main Petition and is an attempt by the petitioners

to avoid confronting the issues raised in the Petition on merit. She further avers that the Applicants are seeking a new cause of action which was not in the initial Amended Notice of Motion which cannot be permitted in an Application for Review.

The Respondent further contends that the allegation that it had locked the Muster Roll for the duration of the Amended Notice of Motion is baseless, unfounded and made in bad faith. The Respondent contends that the said Roll is available in the relevant office as it has to be signed by numerous people on a daily basis. That the Applicants in fact made a request for the same on 23rd May 2019 after the Court delivered its Ruling to the Amended Notice of Motion Application on 20th May 2019.

The Respondent further avers that the Muster Roll cannot be used as evidence to show that the Applicants' have been working without pay and that such an issue can only be determined at the hearing of the main Petition.

The Respondent insisted that granting of the Orders sought in the instant Application will cause it great prejudice. It urged the Court to dismiss the application with costs to the Respondent.

Parties disposed of the application by way of written submissions.

Submissions by the Parties

It is submitted on behalf of the Applicant that the instant Application ought to be allowed as prayed as it has met the threshold for granting of the order of Review as laid down in Order 45 Rule 1(b) of the Civil procedure Rules, 2010. To buttress their argument the Applicants cited and relied on the Authority of *Khalif Sheikh Adan Vs Attorney General (2019) eKLR*.

The Applicants further submitted that the Amended Notice of Motion Application dated 28th September, 2018 had sought for the payment of salaries for the months of July, August, September 2018 and any other subsequent months worked while the instant application does not seek for additional months that were not prayed for. The Applicants relied on prayer 6 of the Amended Notice of Motion Application that mentioned "subsequent" which means other months after September.

In conclusion, the Applicants urged the Court to allow the instant Application as prayed.

Respondent's Submissions

The Respondent on the other hand submitted that the Application for review has no merit and that the same ought to be dismissed with costs to the Respondent.

The Respondent further submitted that the Applicants have placed reliance on Order 45 yet the correct provision of the law that this Application ought to have been brought under is Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

The Respondent contends that even if the new evidence of the Muster Roll was to be admitted it would not prove that the Applicants have worked without being paid. The Respondent further contends that this issue can only be resolved at the hearing of the main Petition.

The Respondent further submitted that the granting of the Orders sought would cause it extreme prejudice as it would be forced to litigate on the same issue twice.

In conclusion, the Respondent urged the Court to dismiss the instant Application with costs. The Respondent relied on a total of 11 Authorities as cited on Page 8 of its submissions filed herein.

Analysis and Determination

I have considered the application, the Affidavits on record and the submissions of the parties in this matter and agree with the respondent that this court is clothed with powers to review its judgments as provided under Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. This is however a procedural technicality that does not affect the validity of the application.

The circumstances under which this court may exercise the discretion to review its decisions as set out under Rule 33 are as follows –

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. ...

3. A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.

4. The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.

5. Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.

6. An order made for a review of a decree or order shall not be subject to further review.

The instant Application is pegged on ground (a) which is in respect of discovery of the Muster Roll from which the Applicants are seeking Review of the Orders of the Court made on 10th June, 2019. The Review is to order the Respondent to pay the Applicants their salaries for the months of July, August, September, October, November and December 2018.

The Applicants seem to be on a fishing expedition as they had initially sought for payment for the months of July, August and September 2018 in their Amended Notice of Motion Application dated 28th September 2018 which was dismissed. They now seek for payments of an additional three months not initially pleaded in the Amended Notice of Motion Application.

No evidence has been availed by the Applicants to support the assertion that the said Muster Roll was not within their reach at the time of filing the Amended Notice of Motion Application.

It is further my view that the issue of payment of salaries for work allegedly done is an issue that can only be determined at the hearing of the Petition after taking evidence from both sides. This was also my view in the ruling delivered on 20th May 2019. Further the muster roll does not address all the issues cited in the said ruling for which the application dated 28th September 2018 was dismissed. Its production cannot therefore justify the review of the orders therein.

In the circumstances, I find no merit in the instant Application with the result that the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE