



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 3 OF 2015 [FORMERLY MISC. CIVIL CASE NO. 1278 OF 2004]

RUFUS NJUGUNA 1ST PLAINTIFF

RURIANI MICHENI 2ND PLAINTIFF

DANSON KIMAN 3RD PLAINTIFF

ALLAN MIKINDIA 4TH PLAINTIFF

(Suing on behalf of themselves and 63 other former employees of the Directorate of Civil Aviation, a department within the Ministry of Transport and Communications)

VERSUS

THE ATTORNEY GENERAL 1ST DEFENDANT

KENYA CIVIL AVIATION AUTHORITY 2ND DEFENDANT

C.A. KUTO 3RD DEFENDANT

RULING

Introduction

1. The application before me is the Notice of Motion by the plaintiffs dated 27.11.2017 seeking the following orders:

a) **THAT** the Honourable Lady Justice Linnet Ndolo be pleased to review her own judgment delivered on the 27th day of October 2017

b) **THAT** in reviewing her judgment she includes the following twenty-seven (27) persons as part of those entitled to receive their salary arrears for the period of 145 months since 2002 till 2014, that

is:-

Name.	ID Number.	Salary Termination.	at
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1 Peter . Ndwiga	Mwongela 14437883	17,971.00	
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2	Micheni G. Ruriani	9047399	24,627.00
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3	Martha Wanjiku	9241018	29,256.00
.	Kihaiga		
4	Joel W. Muhangani	0024591	27,826.00
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5	Lucyline Churi	13869903	14,561.00
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6	Alex Muli Ngindu	11402557	22,842.00
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7	Michael Ndeeri Murage	12867808	21,303.00
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8	David I. Lusigi	8479226	29,256.00
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9	James M. Mwaura	13673859	19,471.00
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1	Dishon T. Mwangi	3584679	30,725.00
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1	Steven Maina Gathiomi	4878288	31,603.00
1			
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1	David Mburu Kibe	11880145	23,471.00
2			
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1
3 Charles Gathui 1410195 31,603.00

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1
4 Joab Omondi Atudo 1810962 27,615.00

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5 Merengeni J. Munene 0024591 27,256.50

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6 Nelson Kipkurui Mutai 2483120 17,498.00

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7 Lorna A. Oswego 13532379 20,424.50

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1
8 Joseph T. Aywaya 13594683 19,032.00

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1
9 Hellen N. Okemwa 11112427 22,409.00

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2
0 Richard Mwangi Njuguna 9153356 27,256.00

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1 Pamela A. Owiti 8352507 31,603.00

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2
2 Carolyne B.A. Okello 13163818 19,521.00

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23. Nicholas Mutiso 201869219,256.00

24. Mathendu Kapita $\frac{1008911}{9}$ 21,842.00
25. Martin Ngesu Mwea 138469916,314.00
26. Henry G. Kirweya $\frac{0983731}{0}$ 22,842.00
27. Derek Olukaka $\frac{1120189}{3}$ 22,329.00

c) **THAT** the Honourable Lady Justice Linnet Ndolo in reviewing her judgment to include the House Allowance of Kshs.8,000/= (eight thousand shillings) per month of one of the plaintiffs/Applicants, David Nyapinda Onyango, to the salary arrears he was awarded by the Court, thus making the right figure after review to be as follows;

(i) 20,472/= (not inclusive of house allowance x 145 months (2002 – 2014) =Kshs.2,968,4400/=

(ii) 28,472/= inclusive of house allowance x 145 months (2002 -2014)

(iii) Making the new total and final figure to be Kshs.4,128,440/=

d) **THAT** the Honourable Lady Justice Linnet Ndolo in reviewing her judgment to include the House Allowance of Kshs.15,000/= (fifteen thousand shillings) per month of one of the Plaintiffs/Applicants, Peter Njoroge Kairu, to the salary arrears he was awarded by the Court, thus making the right figure after to be as follows;

(i) 32,919 (not inclusive of house allowance) x 145 months (2002 -2014) = Kshs.4,773,255/=

(ii) 47,919/= inclusive of house allowance) x 145 months (2002 – 2014)

(iii) Making the new total and final figure to be Kshs.6,948,255/=

e) **THAT** the Honourable Judge in reviewing her judgment to given due consideration to the possible annual salary increments that would have accrued to all the Plaintiffs/Applicants as per the ***“Kenya Civil Aviation Authority Realigned Salary Structure and Grades of July 2016” as well as the increments done on the 2nd of November 2011 as per the Internal Memo dated 3rd November 2011 titled “KCAA SALARY SCALES AND PROGRESSION”*** and therefore include the salary increments while tabulating the salary arrears of each of the plaintiffs/applicants.

f) **THAT** the Honourable Judge in reviewing her judgment to give due consideration to the Allowances and benefits that would have been accorded to all the Plaintiffs/Applicants as per the document titled ***“Kenya Civil Aviation***

Authority: Realigned Salary Structure and Grades of July 2006” and therefor include the same while tabulating the salary arrears.

g) **THAT** the Honourable Judge while placing reliance on the Salary increments as well as the allowance and benefits sought for above review the salary arrears of all the Plaintiffs/Applicants following their individual tabulation as annexed in their previously filed affidavits.

h) Costs and interest thereof.

2. The application is premised on the grounds set in the body of the motion and the Affidavits sworn by the plaintiff counsel, Dr. Khaminwa on 22.11.2017, 15.12.2017 and 4.4.2018. The gist of the application is that there is a discovery of new evidence that was there before the impugned judgment was passed and, that there is a mistake apparent on the face of the Judgment.

3. The second Respondent has opposed the application by filing Grounds of Opposition dated 21.3.2018. The gist of the objection is that

new evidence could have been produced before the impugned judgment with the exercise of due diligence, that there is no mistake or error on the face of the record and that the application is replete with falsehoods and misstatements not supported by evidence.

Background

4. The plaintiffs were employed by the second defendant on diverse dates and in diverse positions until 8.4.2002 when they were dismissed for gross misconduct. Thereafter, they brought this said suit by way of an originating summons alleging that their constitutional rights had been violated and sought a variety of reliefs. After the hearing Justice Emukule entered Judgment in their favour and granted various reliefs including a declaration that the dismissal of the plaintiffs was null and void, and ordered that they be paid their arrears of salary and other benefits dating back to 18.4.2002. He further directed the Registrar of the Court to assess the exact amounts payable taking into consideration the applicable terms of service.

5. The defendants were aggrieved and appealed to the Court of Appeal which affirmed the said judgment on 4.4.2014 save for the direction that the arrears payable be assessed by the Registrar of the Court. Instead, the appellate Court directed the plaintiffs to file a schedule of arrears payable to each and every one of them, to form the basis for assessment of arrears of salary and other benefits before any other High Court Judge. Due to jurisdictional question under the 2010 constitution the suit was transferred to this court as an employment dispute.

6. On 19.8.2016, Ndolo J. directed the plaintiffs to file documentary evidence to support their respective tabulations. That was more than 2 years after the said court of Appeal judgment but only 40 plaintiffs complied according to the impugned judgment and in whose favour the judgment was entered. The plaintiffs who were excluded from the said judgment have now brought this application. The issues for determination in the application are:

- (a) Whether the applicants have meet the threshold for the grant of review orders.
- (b) Which orders should be made in the circumstances.

The application was argued on 12.6.2018 between Dr. Khaminwa for the Applicants and Mr. Wafula for the 2nd Respondent.

Applicant's Case

7. Dr. Khaminwa relied on the supporting affidavits and the affidavits of the applicants annexed thereto in prosecuting the application. He urged that the matters herein relate to employment which fall under the Bill of Rights in the constitution which require substantive justice from the Court. He therefore urged the court not to be fettered by legal technicalities. He further urged the court to carefully go through the bundle of annexures to the affidavits and proceed to review the impugned judgment of Ndolo J. because it is inadequate in many respects going by the affidavits and the documents attached. He opined that grave injustice will be visited on the applicants if the judgment is not reviewed. He contended that the supporting documents of 25 applicants came into their possession after close of the impugned proceedings while the documents for the other 2 applicants were on record before the impugned judgment was passed but the court still omitted them from the judgment.

Respondents' Case

8. Mr. Wafula opposed the application citing the grounds of opposition filed on 23.3.2018. He contended that the application does not meet the threshold set out under order 45 rule 1 of the Civil procedure Rules (CPRs) and the Employment and Labour Relations Court Rules (ELRCRs). He submitted that the alleged new evidence (Affidavits) was indeed on record and after consideration, the Ndolo J rejected the same and only accepted payslips. He submitted further that the payslips being produced now belong to other people and are the same ones which were used to obtain the impugned judgment.

9. He denied there being an error on the face of the record which calls for corrections. He further denied there being any other just cause that warrants the review of the impugned judgment and contended that the applicants are merely appealing against the said judgment through the back door.

Analysis and Determination

10. After careful consideration of the material placed before me, the following issues arose for determination:

- (a) Whether the applicants have met the threshold for grant review orders.
- (b) Whether the orders sought should issue.

Threshold for Review of Judgment

11. Rule 33 of ELRCRs provides that a review of a judgment can be sought within reasonable time:

“(1) (a) if there is discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person at the time when the decree was passed or 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 reasons.”

12. The grounds cited by the applicants in this application are discovery of new evidence and mistake or error apparent on the face of the record. Under Rule 33(2) of the ELRCRs, if the judge who passed the impugned judgment is no longer attached to the Court station any other judge can entertain the application for review. In this case, Ndolo J. who passed the impugned judgment has since left the station and as such, the application is properly before me. In addition, the application has been made within a reasonable time because it was filed one month after the impugned judgment.

New Matter or evidence

13. The 1st to 13th, and 15th to 26th applicants have contended they were not able to produce their payslips as at the time the impugned judgment was passed because they were not in their possession. That on 30.10.2017, the said 25 applicants wrote to the Permanent Secretary, Ministry of Transport requesting for copies of their last payslips because they had lost the same. It appears from the record that the request was granted after only one day because they were all certified on 1.11.2017. Contrary to the submissions by the defence counsel, the said evidence (certified copies of payslips) is new and was not placed before Ndolo J. before passing the impugned judgment on 27.10.2017.

14. In view of the said letter to the P.S Ministry of Transport and the affidavit sworn by the 16th Applicant Mr. Nelson Kipkurui Mutai sworn on 9.5.2016 explaining that the applicants had lost their payslips and their effort to locate them was futile due to the “metamorphosis” they had undergone since their termination, the court returns that the new evidence now produced could not, even with due diligence, have been produced to Court before the impugned judgment was passed.

Mistake or error apparent on the face of the record

15. The 14th and 27th applicants have contended that they had produced their payslips before the impugned judgment was passed but they were omitted from the judgment. They considered that to be an error on the face of the record and prayed for the review of the judgment. In addition, two of the 40 plaintiffs who got their salary arrears in the impugned judgments, Mr. David Nyapinda Onyango and Peter Njoroge Kairu have contended that their respective house allowance was not considered by the Judge while computing their dues. The former alleged that had his house Allowance of Kshs.8,000 been considered his dues would have been Kshs.4,128,440 as opposed to Kshs.2,968,440. Likewise, the latter alleged that had his house Allowance of kshs.15,000 been considered, his dues would have been Kshs.6,948,255 as opposed to the Kshs.4,773,255.

16. The respondent never contested the alleged mistake or error on the face of the record by affidavit. However, the defence counsel contended that the judge considered all the material presented before her on the merits and rejected them and as such, he viewed the application as an attempt to appeal against that judgment through the back door. After careful perusal of the record, I have confirmed that, indeed Joab Omondi Atudo and Olukaka Derek Okola filed Affidavits and payslips before the impugned judgment was passed but they were omitted from the judgment. I have also perused the judgment and I did not see anywhere that the Judge considered the merits the payslips for Mr. Atudo and Mr. Olukaka and dismissed their claims. I therefore find and hold that the omission of the said applicants from the judgment was an error apparent on the face of the record.

17. As regards failure to take into account the House Allowance while computing the dues for Mr. David Nyapinda Onyango and Peter Njoroge, I find that was an error of judgment which can only be challenged by an appeal. The Judge relied on the payslip presented her to come up with the sums awarded to the two applicants and such if any error was made, the same does not constitute a mistake or error apparent on the face of the record in the judgment.

18. In view of the finding herein above that there is discovery of new evidence, which could not, with due diligence be produced before impugned judgment was passed, and also that there is a mistake or error apparent on the face of the record, I find and hold that the application has met the threshold for grant of review orders under Rule 33(1) (a) and (b) of the ELRCRs.

It is ordered

19. Under the judgment by Emukule J. dated 7.11.2005, the plaintiffs were awarded salary arrears and other benefits backdated to 18.4.2002. In my view the award by Emukule J. was for salary arrears for the period between 18.4.2002 and 7.11.2005 and not upto 2014 as assessed by Ndolo J in the impugned judgment. Consequently the impugned judgment is reviewed and varied by adding thereto assessment of salary arrears for the successful 27 applicants as follows, based on the aforesaid payslips produced:

Name.	ID Number.	Salary at Termination.	Salary April 2002 – Oct 2005 (42 months)	Arrears
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1	Peter Mwangela Ndwiga	14437883	17,971.00	754,782.00
2	Micheni G. Ruriani	9047399	24,627.00	1,034,334.00
3	Martha Wanjiku Kihaiga	9241018	29,256.00	1,228,752.00
4	Joel W. Muhangani	0024591	19,292.00	810,264.00
5	Lucyline Churi	13869903	14,561.00	623,364.00
6	Alex Muli Ngindu	11402557	22,842.00	959,364.00
7	Michael Ndeeri Murage	12867808	21,303.00	894,726.00
8	David I. Lusigi	8479226	29,256.00	1,228,752.00
9	James M. Mwaura	13673859	19,471.00	817,782.00
10	Dishon T. Mwangi	3584679	30,725.00	1,290,450.00
11	Steven Maina Gathiomi	4878288	31,603.00	1,327,326.00
12	David Mburu Kibe	11880145	23,471.00	985,782.00

1	3	Charles Gathui	1410195	31,603.00	1,327,326.00
	.				
1	4	Joab Omondi Atudo	1810962	27,615.00	1,159,830.00
	.				
1	5	Merengeni J. Munene	0024591	27,256.50	1,144,773.00
	.				
1	6	Nelson Kipkurui Mutai	2483120	17,498.00	734,916.00
	.				
1	7	Lorna A. Oswego	13532379	20,424.50	857,829.00
	.				
1	8	Joseph T. Aywaya	13594683	19,032.00	799,344.00
	.				
1	9	Hellen N. Okemwa	11112427	22,409.00	941,178.00
	.				
2	0	Richard Mwangi Njuguna	9153356	27,256.00	1,144,752.00
	.				
2	1	Pamela A. Owiti	8352507	31,603.00	1,327,326.00
	.				
2	2	Carolyn B.A. Okello	13163818	19,521.00	819,882.00
	.				
2	3	Nicholas Mutiso Muia	20186927	19,256.00	808,752.00

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4 Mathendu Kapita 10089119 21,842.00 917,364.00

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5 Martin Ngesu Mwea 1384699 16,314.00 685,188.00

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6 Henry G. Kirweya 09837310 22,842.00 959,364.00

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7 Derek Olukaka 11201893 22,329.00 937,818.00

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20. The rest of the orders sought are decline because they were never prosecuted before the impugned judgment was passed or they were considered and declined on the merits by the Judge and as such I lack the jurisdiction to determine them again.

Conclusion and Disposition

21. In view of all the matters, reason and findings herein above, I review and vary the judgment by Ndolo J. dated 27.10.2017 by awarding the 27 applicants herein the sums tabulated herein above plus costs and interest from dated hereof. The said award shall be subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018

ONESMUS N. MAKAU

JUDGE