REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 550 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JAMES NYANGIYE AND OTHERS….CLAIMANTS/APPLICANTS

VERSUS

THE HON. ATTORNEY GENERAL…….....RESPONDENT

RULING

The applications before me for determination are dated 14th July and 24th July 2017 respectively. The application dated 14th July 2017 is filed by Mirugi Kariuki and Company Advocates and seeks the following orders –

a. That the court be pleased to review its judgment on quantum dated and delivered on the 26th day of May 2017 by including the name of the claimants in Nakuru HCCC No. 395 of 2001 PETER BAIYE GICHUHI AND OTHERS –V- THE HON. ATTORNEY GENERAL as per the list attached herein.

b. That upon prayer (a) above being granted, the court be pleased to order the respondent herein to compute the specific amounts payable to the claimants/applicants as per paragraph 7 of the judgment of 4th February 2015.

I will refer to this as the first application.

The second application dated 24th July 2017 is filed by Gordon Ogola, Kipkoech and Company Advocates and seeks the following orders –

a. That the application be certified urgent and service of the same be dispensed with in the first instance.

b. That the court be pleased to stay the execution of the order in the judgment on quantum delivered on the 2nd June 2017 pending the hearing and determination of this application.

c. That the court be pleased to review the orders made in a judgment delivered on the 2nd June 2017.

d. That the names of the applicants inadvertently omitted from the judgment on quantum be added.

e. That the court be pleased to make all such further orders and/or directions as it may deem fit.

f. That the cost of the application be provided for.

Both applications are premised on the grounds that there was an error on the face of the record as some claimants were omitted dint eh tabulation of the quantum contained in the judgment delivered on 2nd June 2017.

The respondent opposes the application.

Parties disposed of the application by way of written submissions.

Applicant's Submissions

It was submitted by the applicants that they were parties to the suit and participated in the proceedings from the beginning. It is submitted that Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules provide for review, that this position is backed by Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. It is submitted the Order 45, Rule 2 permits another Judge to hear the application for review where the Judge who passed the decree or made the order is no longer attached to the court and that Order 45(3)(2) provides for the orders that the court may grant upon review. It is submitted that the omission of the names of the applicants from the judgment on quantum is an error on the face of the record that the court is clothed with powers to rectify.

The applicants relied on the case of KWAME KARIUKI AND ANOTHER -V- MOHAMMED HASSAN ALI AND 4 OTHERS as quoted in ABDULLAHI MOHAMUD -V- MOHAMUEL KAHIYE where the court observed that "*it is evident that the relief for review is only available where appeal has not been preferred against an order.*" The applicants further referred to the case of **MWIHOKO HOUSING COMPANY LIMITED -V- EQUITY BUILDING SOCIETY** where the court observed that a review could be granted whenever the court considered it was necessary to correct an error or omission on its part.

The applicant further relied on the case of **MUYODI -V- INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER** as quoted in **WANJIRU GIKONYO AND 2 OTHERS –V- NATIONAL ASSEMBLY OF KENYA AND 4 OTHERS** in which the Court of Appeal describe what constituted an error on the face of the record.

The applicants further submitted that in the case of **MUYODI -VS- INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER (2006) IEA 243** the court held thus -

> "For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay."

That the Court of Appeal in **NATIONAL BANK OF KENYA LIMITED VS NJAU ri 9961 LLR 469 TCAK1** delivered itself thus:

> "A review may be granted wherever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law."

That in the case of **MICHAEL MUNQAI VS FORD KENYA ELECTIONS AND OTHERS (2013) eKLR,** the court held that **"***for one to succeed in having an order of the court reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is for the whole world to see."*

That in the case of **CHANDRAKHANT JOSHIBHAI PATEL -VS- R [2004] TLR, 218** as relied upon in the case of **WANJIRU GIKONYO AND 2 OTHERS -VS- NATIONAL ASSEMBLY OF KENYA & 4 OTHERS [2016] eKLR** it had been held that an error stated to be apparent on the face of the record:

> "...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."

That the Court has inherent powers pursuant to Section 3A of the Civil Procedure Act to make orders necessary for the ends of justice.

That in the case of **NUH NASSIR ABDI -VS- ALI WARIO AND 2 OTHERS (2013) eKLR**, the Court held that a decision whether or not to vary, set aside or review earlier orders is an exercise of judicial discretion and the Court ought only to exercise such discretions if to do so would serve a useful purpose.

Respondent's Submissions

For the respondents it is submitted that there is no error apparent on the face of the record in the judgment delivered on 2 nd June 2017 as all claimants and their counsels were involved in compiling the list of claimants for purposes of computing the quantum payable, that it is that list that was used by the court and the court did not omit any names.

It is further submitted that the applicants were not party to the suit, that had they wished to be enjoyed they would have applied to be enjoined before the judgment was delivered, that the court is *functus officio* as was stated by the Court of Appeal in **DICKSON MURICHO MURIUKI –V- TIMOTHY KAGONDU MURIUKI AND 6 OTHERS**, that litigation must come to an end and that the principle of finality must be applied as was stated in **KENYA COMMERCIAL BANK LIMITED –V- BENJOH AMALGATED LIMITED** and **REPUBLIC –V- DIRECTOR OF PUBLIC PROSECUTIONS AND** ANOTHER EX PARTE RAMESH CHANDRA GVINO GORASIA. It is submitted that equity aided the vigilant; that the suit was filed in 2013 and it is too late in the day for applicants to be seeking to be enjoined in 2017 after judgment on quantum was delivered.

The respondent relied on the case of **HEDWIG - HRT MITTERLERLEHNER ULRICH V JEMDROCI SPIN [2016] eKLR** where the court stated –

> "The equitable doctrine of equity does not aid the indolent but the vigilant finds relevance here. The applicant has waited for 10 years to lay claim of what he is entitled which he claims is unpaid. He does this after the suit is filed to short circuit the plaintiff

suit ... / *find he has been indolent and therefore should be ready to go through the full hearing. This will give all the parties an opportunity to present their claims* **...** in the result, l find the notice of motion dated 26th April 2015 lacking in merit and dismiss it with costs to the plaintiff/respondent.**"**

The respondent further relied on the case of **TEACHERS SERVICE COMMISSION –V- SIMON P. KAMAU AND 19 OTHERS** in which the Supreme Court –

> "But if we were to assume that the data in question here was relevant, we would still find the three-year delay to be unreasonable, for a litigant seeking Justice, it is well known that equity comes in aid of the vigilant, and not the indolent. We cannot fail to take into account the pain of the successful respondents waiting for the fruits of the judgment for as long as three years, only to be confronted with a fresh cycle of litigation. We would restate the wisdom of the old principle of the common law that litigation must come to an end ….. the three year period that elapsed is, in the circumstances, to be regarded as unreasonable delay, which inconsistent with a quest for justice before this court."

Determination

I have considered the applications dated 14th July 2017 and 25th July 2017. 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 20016. The circumstances under which the court may exercise the discretion to review as set out under Rule 33 are as follows –

33. Review

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. An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.

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.

In the instant applications, the applicants aver that their names were omitted in the computation of quantum even though they were parties to the suits from the beginning.

In the judgment delivered on 4th February 2016, the court set out at paragraph 4 that the parties agreed as follows –

i. That the assessment of remedial/Quantum was based on paragraphs 4, 6,12,16 and 17 of the Judgment of Nambuye J. at page 44 and 45 thereof,

ii. Claimants to call two witnesses to lead evidence on money that ought to have been paid to each claimant in respect or the budget allocation for the Training and transport of the claimants with a view to have the court apportion a share to each of the claimants.

iii. Evidence be led on the amount of Quantum that ought to have been paid, it being common cause that all claimants were paid Kshs.40,000.00 each on a Golden Handshake.

iv. Evidence led on the claim for aggravated damage based on the unlawful and unfair treatment of the claimants by the Respondent.

v. The parties to file a full list/matrix of the claimants indicating the particulars of employment of each claimant and the exit package already paid to them.

This means that all parties involved jointly prepared a full list/matrix of the claimants. It is that list jointly prepared by the parties that the court adopted.

In the judgment the court awarded the following –

1. Four (4) months' salary in lieu of notice to all claimants

2. Four (4) months' salary being exemplary damages to all claimants

3. Conversion from probationary to permanent status to ail claimants who had served 2 years but had erroneously not been given confirmation letters and payment of lump sum pension and monthly pension with effect from the date of retrenchment for life and 5 years to the dependents upon death.

4. (1) above is payable with interest at court rates from date of retrenchment till payment in full.

5. (2) above is payable with interest at court rates from the date of this assessment till payment in full and

6. (3) above is payable with interest at court rates from the date of attaining 2 years till payment of the full lump sum and arrears of monthly payment

7. The specific amounts payable to each Claimant be computed and filed with the Court within sixty (60) days from to date by the Respondent

The parties presented to the court computation, which the court adopted.

The two applications have attached a list of more than 5,000 additional names alleged to have been omitted from the computation presented by the parties to the court. This is not possible as the numbers alleged to have been omitted are more than the numbers in the suit. If this were so, whose names are in the list of over 5,000 names presented to the court by the parties for purposes of computation of quantum?

There was no error on the part of the court or apparent on the face of the record as the court only adopted what was presented to it jointly by the parties. The court was thus in actual fact adopting a consent by the parties arrived at on the basis of the judgment delivered on 4th February 2015.

This means that for the court to set aside the judgment the applicants must fit within the threshold for setting aside consent orders as held in **KENYA COMMERCIAL BANK LIMITED -V- SPECIALISED ENGINEERING COMPANY LIMITED [1982] KLR 485**, Harris J thus –

"A consent order entered into by counsel is binding on all parties in the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement."

There is another reason why this application must fail. Rule 33 of the Employment and Labour Relations Court (Procedure) Rules contemplates that only a person who is a party to the suit and is capable of filing an appeal against the decree or order but has opted not to, can apply for review. The applicants are seeking joinder. They are not parties to the suit and therefore cannot seek a review of the suit. Similarly, a party cannot be enjoined to a suit by way of a review. A person who is not already a party to a suit can also not seek to be enjoined so as to benefit from the judgment or decree of a court in a suit that has already been concluded.

The foregoing notwithstanding, the applicants have not proved that they were party to Nakuru HCCC 395 of 2001 as consolidated with Nairobi HCC No. 1649 of 2001 which were transferred to this court for determination of quantum. This court does not have the benefit of pleadings in the said suits to enable it confirm the same, they can only be included in the computation if they can prove they were parties.

Conclusion

In conclusion I find no merit in the applications and dismiss the same. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2018

MAUREEN ONYANGO

JUDGE