



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 204 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 5th December, 2018)

KENNETH KIPKEMBOI SETTIM.....1ST CLAIMANT

JOSSY M. KIOKO.....2ND CLAIMANT

VERSUS

NATIONAL SOCIAL SECURITY FUND

THE BOARD OF TRUSTEESRESPONDENT

RULING

1. The Claimant/Applicant filed an Application dated 11th July, 2018 seeking for Review Orders to the Judgement of this Honourable Court delivered on the 30th May, 2018. The said Application has been brought under the provisions of Section 16 of the Employment & Labour Relations Court Act and Rule 33(1) of the Employment & Labour Relations Court (Procedure) Rules, 2016.

2. The prayers sought under the said application are as follows:-

1) That the Court be pleased to certify the matter as urgent and hear it exparte in the first instance.

2) That this Honourable Court do review its judgement delivered on 30th May, 2018 dismissing the Claimants claim and vacate, set aside the orders of that date.

3) That this Honourable Court do substitute its orders dismissing the Claimants claim with orders allowing it as prayed in the memorandum of Claim.

4) That the Respondent be directed to compute and pay each claimant their half salaries withheld immediately and full allowances with effect from the day of 9th July, 2003 to the conclusion of the pending Anti-Corruption Criminal Case on such amounts to be worked out by the Respondent having regard to the respective claimants appointment latest pay-slip, promotion, rank etc.

5) That costs of this application be borne by the Respondent in any event.

3. The Judgement of the Court dated 30th May, 2018 the subject of review under paragraphs 20, 21, 22 and 23 provides as follows:-

20. "In this respect, assuming that this claim was falling under contract under the repealed Employment Act Cap.224, then this claim was to be filed within 6 years from the time the Claimants were dismissed which was February, 2009.

21. The Claim was however filed on 16.2.2011. In this respect it is my finding that this claim is not only improperly before court for not having gone through the conciliation process but is also time barred.

22. It would not be necessary in the circumstances for the Court to interrogate any other aspects of this claim including arbitrariness or otherwise of the Respondents actions or the prayers sought.

23. I therefore dismiss the claim in its entirety with no orders as to costs".

4. The Applicant submitted that the application is merited as the matter is not time barred, this position having been made in a ruling made by J Wa Makau on 9th July 2014. They therefore submit that the position is res judicata and cannot be revisited by this Court.

5. The Respondent opposed the Claimant's Notice of Motion Application dated 11th July, 2018 on the grounds that the said Application is frivolous and vexatious and an abuse of Court process on the following grounds:-

1. "Application offends the provisions of Rule 33(1) of the Employment and Labour Relations Court (Procedures) Rules 2016.

The Application does not meet the threshold for Review and the same is an abuse of Court process. Rule 33(1) of this Court's (ELRC) Rules, 2016 provide the criteria for an application of review as set out under indicate that;

"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 on the face of the record;

c) if the judgement or ruling requires clarification;

d) for any other sufficient reason.

2. The Application for review does not disclose any 'discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the Claimant or could not be produced at the time when the decree was passed or the order made".

6. The Respondent also submitted that the Notice of Motion application does not disclose any new discovery at all that was not within their knowledge at the time of the hearing.

7. The Claimants' contention is that the Court failed to consider that parties were referred to conciliation on 26th March, 2012 by Justice Mukunya which was 9 years after the termination of the Claimants' employment in February, 2003. These submissions however do not address the issue of limitation of time which is provided for under Section 90 of the Employment Act, 2007 and Section 4 of the Limitation of Actions Act of filing a claim within 6 years of the cause of action and the Trade Disputes Act (repealed) which provided for filing of a trade dispute within a year of the cause of action.

8. They also submitted that the Application does not disclose any mistake or error on the face of the record or need for clarification on any issue. They aver that the Claimant has not made any submission of error or mistake on the face of the record such as the date of the cause of action requiring a review on the finding of the Court that the Claim has been barred by limitation and hence the Court has no jurisdiction. The Orders for review sought by the Claimants are therefore untenable and not fitting for a review application. They submit that the Claimants are literally persuading the Court to appeal its own decision by reconsidering its decision and award.

9. The Respondents also submit that there is nothing requiring clarification - Nothing in the Claimant's Application is seeking for clarification of any part of the Judgement so as to justify the prayers of review. In view of the above, they submit that the Claimants' application does not meet the threshold for a Review Application and should be dismissed with costs for want of form and abuse of Court process.

10. The Respondents aver that this case is barred by limitation and hence the Court lacks jurisdiction. The Respondent relies on the Court of Appeal ruling in the Court of Appeal Civil Application No. Nai. 100 Of 2015 (Ur 81/2014) between **Mr. & Mrs. Justice E.Torgbor -vs- Ladislaus Odongo Ojuok** (Coram: G.B.M Kariuki, J. Mohammed & Otieno-Odek JJ.A), where the Court of Appeal pronounced;

"In our part, we reaffirm the dicta that jurisdiction is everything and whenever a jurisdictional issue is raised, it is important for the court to pause and determine the issue before proceeding with the case. The Supreme Court of Kenya in the cases of the Matter of the Interim Independent Electoral Commission S.C Constitutional Application No. 2 of 2011; [2011] eKLR and in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others S.C. Application No. 2 of 2012; [2012] eKLR, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent. It stated:-

"A Court's jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity".

11. I have considered the averments and submissions of both parties. The Claimants have drawn the Court's attention to the Ruling of this Court by Hon. Justice Nzioki wa Makau dismissing the Preliminary Objection filed on the jurisdiction of the Court. From the ruling of J. Nzioki Wa Makau the P.O was dismissed not on merit but on grounds that the Preliminary Objection was in the Court's view **'not on a pure**

point of law in so far as I have to ascertain the facts from evidence to be adduced'. The effect of the judge's ruling in my view was that he could not resolve the P.O at that time as there were factual issues to be determined and ascertain whether the matter was time barred or not. Having been seized of this case, I heard the facts and ascertained that the matter was time barred.

12. Other than the issue of time, I also determined that the case had not gone through conciliation process as provided under the provisions of the Trade Disputes Act (now repealed) i.e. to report a dispute to the Minister.

13. I have considered all the issues raised and I do not find anything needing review. The Applicants seem to be asking this Court to sit on appeal on its own judgement. This I cannot do. I do not find the application merited and I therefore dismiss it accordingly.

Dated and delivered in open Court this **5th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Chege holding brief for Mr. Arusei for 1st and 2nd Claimant – Present

Miss Okeyo holding brief for Miss Kanyiri for the Respondent