



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**MISC.APPLICATION NO.82 OF 2016**

**JIMNA MWANGI GICHANGA ..... APPLICANT**

**VERSUS**

**HON. ATTORNEY GENERAL ..... RESPONDENT**

**RULING**

Background

1. This case has a long background and going back to proceedings filed with the High Court in **HCCC No.1907 of 1999**. Pleadings with regard to this matter are not on this file.
2. On record is **HCCC Civil Application No.43 of 2016** and the records herein start at 12<sup>th</sup> February, 2016 where the Applicant filed his application under Certificate of Urgency and Notice of Motion dated 8<sup>th</sup> february, 2016. On 30<sup>th</sup> March, 2016 the Applicant was given leave to amend the Notice of Motion. On 4<sup>th</sup> July, 2016 the High Court directed the matter be transferred to this court as it related to questions of employment of the Applicant.
3. The matter transferred to this court is HCCC Civil Application No.43 of 2016 and registered under Misc. Appl. No.82 of 2016.
4. The records of the earlier matter in HCCC No.1907 of 1999 are not part of proceedings herein.

Application dated 8<sup>th</sup> february, 2016

5. In this application, the Applicant, Jimna Mwangi Gichinga is seeking for orders that;
  1. *This application be certified urgent and service be dispensed within [with] the first instance, following letter.REF NO.MDP/DPSM/HRM/208 of 7<sup>TH</sup> DEC 2015*
  - The matter should be accepted by the court under certificate of urgency*
  2. *The Ruling of 18.7.2007 setting aside 1<sup>st</sup> Oct 2003 judgement in favour of the Applicant be set aside.*
  3. *The costs for this application are in the cause.*
6. On 8<sup>th</sup> April, 2016 the Applicant filed another application and seeking for orders that;

1. *The Ruling of 18.7.2007 setting aside 1<sup>st</sup> Oct 2003 judgement be set aside*

2. *The Applicant of 18.7.2007 Ruling Secretary TSC pays Respondent Applicant No.43 of 2006 costs of this application*

3. *The costs of this application are in the Cause.*

7. The Applicant also cited the above application as the *Amended Submission*.

8. On 20<sup>th</sup> April 2016, the Respondent filed Grounds of Opposition to the application and Notice of Motion of 8<sup>th</sup> february 2016. A List of Documents.

9. The Applicant has since filed several sets of written submissions and affidavits;

Submissions of 28<sup>th</sup> July, 2016;

Affidavit of 8<sup>th</sup> Augst, 2016;

Further submissions of 26<sup>th</sup> August, 2016;

Further submissions of 4<sup>th</sup> November, 2016;

Documentary evidence of 15<sup>th</sup> eceember, 2016; and

Submissions of 26<sup>th</sup> January, 2017.

10. In totality, in the application of 24<sup>th</sup> May, 2016 that came after the Applicant was directed to amend his Notice of Motion, the same is not supported by a suit/claim/plaint or statement of the final orders sought with the Notice of Motion as the foundation. Even though the Applicant has moved the Court on a *MISCELLENIOUS APPLICATION* the option to file Notice of Motion must have a basis in the main claim/plaint/statement upon which it is anchored on. The Court of Appeal in **Adala v Anjere [1988] eKLR held that;**

*There is no procedure whereby a claim of any sort can be commenced by Chamber Summons. Applications are for interlocutory matters in the suit. Any claim has to be commenced by a plaint or where the rule provides, by an originating summons. The defendant has to file a defence or an affidavit in answer to that claim. It is only then that Order 35 can apply for summary judgement where the defendant has entered appearance but has not filed a defence. The application for summary judgement has to be served on the defendant who can chose to attend at the hearing to show cause why judgement should not be entered as he may have a defence to the claim. These are the steps the respondent should have taken rather than applying wrong procedure as he did. We feel that the High Court was wrong, while trying to sympathise with the respondent accepted the wrong procedure for entering judgement upon which execution could follow.*

11. The applicant's application is also made on the grounds that the Applicant was dissatisfied with the ruling of the court with regard to a Chamber Summons dated 30<sup>th</sup> November, 2004 on the basis that when the matter came up in court on 1<sup>st</sup> october, 2003 an acting counsel for the Respondent asked to be given a hearing date as the responsible advocate/counsel was in another court. That the Applicant had dully served the Respondent with hearing notice and had nothing to do with the reason as to why the respondent's counsel was not in court as scheduled.

12. The Applicant also avers that the chamber summons before court on 1<sup>st</sup> October, 2003 was defective.

13. Other grounds in support of the application are that on 14<sup>th</sup> September, 2007 the Respondent filed

preliminary objections stating that the suit filed by the Applicant on 30<sup>th</sup> September, 1999 offended mandatory provisions of Cap 39 section 3(2) counting 3 years from 5<sup>th</sup> July, 1999.

14. Other grounds are that on 6<sup>th</sup> June, 2008 the court allowed the Applicant to amend his plaint to show when the provisions of Cap 39 section 3(2) took effect and this was when the Minister for Education under Legal Notice No.534 established principal teacher grade 'R' under TSC scheme of service and thus the correct counting of dates for the 3 years rule should be with effect from 14<sup>th</sup> November 2000 and by which date, the filing of the suit was within time and thus not time barred. When the Applicant wrote to the minister there was a reply on 6<sup>th</sup> June, 2006 and by establishing the scheme of service on 1<sup>st</sup> July, 2006, the count for 3 years would be from 1<sup>st</sup> July, 2009 and by which date the amended suit had been filed on 10<sup>th</sup> June, 2008. The application of Cap 39 under section 3(2) was therefore erroneous.

15. That the judgement in Appeal Case No.8 of 22<sup>nd</sup> June, 2012 and the dismissal of review application on 23<sup>rd</sup> January, 2015 were wrong in asserting that the Amended Plaint of 10<sup>th</sup> August, 2008 was time barred under the provisions of section 3(2) of Cap 39.

16. As noted above, this is a file with a long history. The matter commenced before the **High Court in HCCC No.1907 of 1999**. By ruling of 18<sup>th</sup> July, 2007 the court allowed application and Chamber Summons of 30<sup>th</sup> November, 2004 and seeking to set aside the judgement of 1<sup>st</sup> October, 2003 and allowed the Respondent to file defence for the parties to set down the matter for hearing.

17. The Applicant appealed against the Ruling of the **Court in Civil Appeal No.8 of 2011**.

18. The suit was heard and judgement by the High Court delivered on 29<sup>th</sup> October, 2009. The court dismissed the suit on the grounds that;

*In the result I find the plaintiff's suit against the defendant has no basis. The same is hereby dismissed in its entirety. I direct that each party shall bear its own costs.*

19. The Applicant, being dissatisfied with this judgement moved the Court of Appeal to challenge the same and filed Civil Appeal No.8 of 2011. Before the Court of Appeal, and while dismissing the Applicant's case on 22<sup>nd</sup> June, 2012 held;

*9. In conclusion, I must point out that this appeal was defective to the extent that, although separate notices of appeal were filed in relation to the judgement of 29<sup>th</sup> October, 2009 and the ruling of 30<sup>th</sup> September, 2010 one memorandum of appeal was lodged by the appellant [Applicant herein] on 17<sup>th</sup> January, 2011. The ruling and judgement having been delivered at different times each ought to have been subject of a different appeal, so that the appeals are treated individually.*

20. The Applicant was not satisfied with the orders of the Court of Appeal on 2<sup>nd</sup> June, 2012. He applied for a review of the same. On 23<sup>rd</sup> January, 2015 the Court of Appeal dismissed the application for review and held;

*11. ... the Applicant has not satisfied this court that his application for review falls within this purview. The Applicant has also not adduced any new and important matter or evidence in support of his application for review we therefore, find that there exists no exceptional circumstances to warrant this court's review of its judgement dated 22<sup>nd</sup> June, 2012. In the circumstances, this application is devoid of merit and is dismissed with no orders to costs.*

21. On this background, the High Court rendered judgement and the Applicant moved the Court of Appeal to challenge the same. The Court of Appeal has rendered judgement and father considered an application for review of the same and did dismiss the same.

22. For the Applicant to now move this court and seeking for orders that **The Ruling of 18.7.2007 setting aside 1<sup>st</sup> Oct 2003 judgement in favour of the Applicant be set aside** this being a court of equal status with the High Court and matters herein having been addressed in their fullness by the Court of Appeal, this court is both *factus officio* and without jurisdiction to reopen the same and deal as set out.

23. When the Applicant got judgements in the High Court on 29<sup>th</sup> October, 2009 he had the choice of seeking a review where he felt the court had omitted an important matter that was within his knowledge or to file an appeal where he felt the court erred on a matter or matters of law. The Applicant took the option of filing an Appeal to the Court of Appeal. The High Court and the Court of Appeal have rendered themselves in this matter. There can be no case of reopening any aspects that were before the High Court as at 29<sup>th</sup> October, 2009 or before the Court of Appeal at any given time with this court. To do so would be to lose the essence of the principle that litigation must come to an end.

**This court has nothing by device, design, authority in law or constitution the mandate or jurisdiction to re-open the matter herein and proceed on any front as sought by the Applicant. Noting the concessions given to the Applicant through the years by various courts not to award costs against him despite dismissal of various matters and applications, I am persuaded to award costs to the Respondent, but there is no jurisdiction to proceed in the matter in the first instance. This resolves the matter on its own.**

**Application is hereby dismissed.**

**Dated and delivered in open court this 30<sup>th</sup> day of March, 2017**

**M. MBARU**

**JUDGE**

In the presence of:

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