Case Number:	Civil Appeal 271 of 2015
Date Delivered:	18 Oct 2018
Case Class:	Civil
Court:	Court of Appeal at Nakuru
Case Action:	Judgment
Judge:	Roselyn Naliaka Nambuye, Sankale ole Kantai, Fatuma sichale
Citation:	Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal Dismissed with costs to the Respondents.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

SITTING AT NAKURU

[CORAM: NAMBUYE, SICHALE & KANTAI, JJ.A]

CIVIL APPEAL NO. 271 OF 2015

BETWEEN

PETER WAMBUGU KARIUKI & 16 OTHERS.....APPELANTS

=VERSUS=

KENYA AGRICULTURAL RESEARCH INSTITUTE.....RESPONDENT

(Being an appeal from the Ruling and Order of the Employment and Labour Relations Court at Nakuru (Stephen Radido, J.) Dated 1st July 2011

in

Nakuru Industrial Court Petition No.2 of 2013)

****

JUDGMENT OF THE COURT

This is an appeal from the Ruling and orders of the Employment and Labour Relations Court (ELRC), the Hon. **Mr. Justice Stephen Radido, J.** dated the 31st day of October, 2014, in Nakuru Industrial Court Petition number 2 of 2013, (formerly Nakuru High Court petition number 30 of 2012), refusing to review and vary the Judgment of the **Hon. Mr. Justice Byram Ongaya, J.** dated the 3rd day of May, 2013.

The background to the appeal is that the appellants had variously been employed by the respondent as casuals for varying periods, at the conclusion of which periods, they continued working for the respondent and received wages for the work done. On or about the month of September, 2010, the respondent required them to sign contracts on casual terms which the appellants declined to accept, prompting the appellant's to unsuccessfully file Nairobi Industrial Court Case No. 1303 of 2010, on the 26th day of October, 2010, seeking redress.

Undeterred, the appellants filed petition number 30 of 2012 in the High Court at Nakuru subsequently transferred to the ELRC and registered as petition number 2 of 2013, seeking declarations that: the respondent violated their rights to fair Labour practices, fair remuneration and reasonable working conditions; that they were permanent employees of the respondent and that the termination of their employment was unfair and unlawful; that each of the appellants was entitled to terminal benefits, namely, ninety (90) days' notice for years served, accumulated leave pay for the years served, unpaid overtime, house allowance, compensation for loss of employment and pension for the years worked; and an order compelling the respondent to pay to the appellants terminal benefits in accordance with the provisions of the Employment Act 2007, together with an attendant order for costs of the petition and such other orders as the Court may deem fit to grant.

The petition was opposed by a replying affidavit of **Paul Marutegek** deposed and filed on the 18th day of July, 2012, contending *inter alia*, that, the appellants' petition was *res judicata* as the issues raised therein had been litigated and rejected by the Industrial Court in Nairobi cause number 1303 of 2010. In the alternative that the respondent hired the appellants on signed up casual workers contracts which they subsequently declined to sign when required to do so, hence their being locked out of the respondents premises.

The petition was canvased by way of oral submissions by learned Counsel for the parties, resulting in reliefs granted in favour of the appellants on the 3rd day of May, 2013 as follows:-

" (a) A declaration that the respondent violated the petitioner's rights to fair labour practices namely; reasonable working conditions including permanent terms and conditions of service as protected under Article 41 (1) of the Constitution and the provisions of the Employment Act, 2007.

(b) A declaration that the petitioners were permanent employees of the respondent and the termination of their employment was constructively unfair and unlawful.

(c) A declaration that each of the petitioners is entitled to terminal payment of wages for one month in lieu of terminal notice; and payment of six months gross salary at the rate of the salary at termination for unfair constrictive termination to be computed by the petitioners, filed in Court and served within fourteen (14) days from the date of Judgment and for recording in Court at a convenient date, and the respondent to pay interest thereon from the date of this Judgment till full payment,

(d) An order for the respondent to pay costs of the petition,

(e) The respondent to deliver to each of the petitioners a Certificate of Service within thirty days, from the date of this Judgment".

Thereafter, the appellants filed a Notice of Motion dated the 26th day of June, 2014, and filed on the 27th day of June, 2014, premised on section 16 of the Industrial Court Act No. 20 of 2014, Rule 32 (1) and (2) of the Industrial Court (Procedure) Rules 2010, order 45 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law, seeking an order for review of the Judgment and decree given on 3rd May, 2013 on account of some mistake or error apparent on the face of the record and also for any other sufficient reason; and that upon review, the petitioners be allowed to adduce viva voce evidence to prove their losses for purposes of assessment of terminal benefits and compensation they were entitled to from the respondent together with an attendant order for costs.

The application was based on the grounds on its body and a supporting affidavit of **Peter Wambugu Kariuki**, contending *inter alia*, that, upon ruling that the appellants were not casual workers but permanent employees of the respondent, the trial Court ought to have proceeded to conduct an inquiry into their entitlements as permanent employees; that despite the Court holding that the appellants' Constitutional rights had been violated, it did not frame and grant appropriate reliefs to enforce the right or fundamental freedom violated and also that the Court misapprehended and erroneously failed to award compensatory reliefs on the basis that there was no material evidence on the record to support the same.

The Notice of Motion was opposed by a replying affidavit deposed by **Ephraim Mukisira** on the 23rd day of July, 2014, and filed on the 4th day of August, 2014, contending *inter alia*, that, the matters raised by the appellants for review were suitable for determination through an appellate process; that the trial court rendered itself according to the pleadings, reliefs sought and evidence placed before it by the appellants; that the Court had no basis in law to conduct an inquiry into the appellants' entitlements. Neither was it bound to frame any reliefs and litigate for the appellants. There was therefore no justification for the Court to take into consideration in admissible evidence and grant blanket reliefs; that in circumstances where the appellants as the party that had alleged violation of their Constitutional rights, it is them who should have framed reliefs for the Court's consideration. They failed to discharge that obligation and could not therefore be heard to blame the trial Judge for the alleged failure to grant those reliefs.

It was also the respondent's contention that the review Judge fell in no error when he declined the appellants' request for review and variation of the trial courts' Judgment as the appellants were in essence seeking to reopen a concluded matter and introduce new evidence which they had an opportunity to adduce through viva voce evidence but elected to proceed by way of a constitutional petition and submissions; that the trial Court cannot therefore in the circumstances be faulted for confining itself to the record as laid before it. Upon evaluating the record in the light of the rival submissions before him, the review Judge, declined to uphold the appellants request for review for the reasons that the trial court had considered and rejected the claims which the appellants were now trying to resuscitate and reagitate through review; that the appellants had decided to approach the Court through its constitutional jurisdiction where ordinarily issues are determined on the basis of affidavit evidence, documentation and submissions, as opposed to the normal route of filing either a Memorandum or a Statement of Claim on the basis of which *viva voce* evidence could have been adduced; that the issues raised on review by the appellants especially those touching on compensatory

reliefs were suitable for litigation through the ordinary civil claim process where both parties are accorded an opportunity to call for *viva voce* evidence and exercise their right of cross-examination of the opposite parties witnesses; that the trial Court made a determination of the appellants' case based on the material they had placed before it. Further, that the appellants had also failed to demonstrate that there were sufficient reasons to warrant the review of the trial courts Judgment.

Turning to the issue of delay in presenting the application for review, the review Judge faulted the appellants for their failure to explain why it took them more than a year before they sought review.

The appellants filed this appeal against the above decision, proffering three (3) grounds of appeal. It is the appellants' complaints that:

(1) The learned Judge of the Superior Court erred in law by finding that there was no error apparent on the face of the record to warrant review of the Judgment delivered on 3rd May, 2013,

(2) The learned Judge of the Superior Court erred in law by finding that there was no sufficient reasons to warrant a review of the Judgment delivered on 3rd May, 2013,

(3) The learned Judge of the Superior Court erred in law by finding that there had been inordinate delay in bringing the application for review.

In support of ground one (1) and two (2) of the appeal, the appellants submitted that their request for review was properly premised on section 16 of the Employment and Labour Relations Court Act, 2011, which donates to the Court the jurisdiction to review its own orders, and Rule 32 (1) (b) & (e) of the Industrial Court (Procedure) rules 2010. They reiterated the content of the grounds advanced in support of the application for review already summarized above and on that account contended that they had met the threshold for an order for review based on the prerequisites on establishment of existence of a mistake and or error apparent on the face of the record as well as on account of any other sufficient reason.

To buttress the above reiteration, the appellants cited **Nyamogo & Nyamogo Advocates versus Kogo [2000] KLR 2017,** on the threshold for the power of the Court to exercise its mandate of review based on the prerequisite of a mistake or error apparent on the face of the record; and **Wangechi Kimita versus Wakibiru [1982-88] 1KAR 317,** for the threshold on any other sufficient reason. Also relied upon is the case of **Flanney versus Halifax Estate Agencies [2000] 1 All ER 373** for the proposition that, it is the duty of a trial Court to give reasons for its decision for the parties not only to know the reason (s) as to why they had either worn or lost at the trial, but also for them to determine the next cause of action upon the making of such a decision.

With regard to the alleged failure to award any reliefs under Article **23** of the Kenya Constitution 2010, the appellants relied on the High Court decision of **Ericsson Kenya Limited versus Attorney General & 3 others [2014] eKLR** for the holding *inter alia*, that, a Court of law has a duty after finding in favour of a party under Article **23** of the Kenya constitution 2010, to frame appropriate reliefs to vindicate the petitioner's rights, and which reliefs are not limited to the specific reliefs outlined in Article 23 (3) (a) to (e).**Gitobu Imanyara & 2 others versus Attorney General [2016] eKLR** for the proposition that the primary purpose of a constitutional remedy is not compensatory or punitive, but it is for purposes of vindicating the rights violated and to prevent or to deter any future infringements.

Turning to proposed comparable awards which the trial court ought to have considered and awarded to the appellants under Article **23** of the Constitution upon finding in their favour that their constitutional rights had been violated, they cited **Joseph Makau Munyao & 4 others versus Kenya Ports Authority [2016] eKLR,** where Kshs 800,000/= was awarded to each claimant; and **James Ang'awa Atanda & 10 others versus Judicial Service Commission [2017] eKLR,** where Kshs 750,000/= was awarded to each claimant both instances, the awards were compensation for unfair Labour Practices/breaches of the contract of employment. **Multiple Hauliers East Africa Limited versus Attorney general & 10 others [2013] eKLR,** in which Kshs 2,000,000/= was awarded for violation of the petitioner's right to fair administrative action; and lastly, **Robert Njeru Nyaga versus Attorney General [2014] eKLR,** on the principles that guide the Court in the assessment of an appropriate remedy for violation of a Constitutional right. On the basis of the above comparables, the appellants suggested an award of Kshs 2,000,000/= for each of them as an appropriate compensation for the trial courts findings that there was a violation of their Constitutional rights.

Turning to the issue of specific compensatory reliefs, the appellants relied on Regulation 5 (1) and 6(1) (b) of the Regulations of

wages (General) Order, on the one hand, and Sections 31 (1), (35) (5) and (6) and 74(1) (i) in support of their submissions that the review Judge should have faulted the trial Judge for his failure to invoke those provisions, call for records pertaining to the appellants compensatory claims, assess them and award appropriate reliefs with regard thereto, upon finding in their favour that they were permanent employees of the respondent.

To buttress the above submissions, the appellants cited the case of **Elijah Kiptarus Tonui versus Ngara Opticians t/a Bright Eyes Limited [2014] eKLR;** The **Board of Management, Ngara Girls Secondary School versus Kudheiha Workers Union, Civil Appeal No. 36 of 2016;** and **William Karani & 47 others versus Michael Wamalwa Kijana & 2 others, Nakuru C.A. 43 and 153 of 1986** all on vindication of employees' rights where appropriate.

As for the alleged inordinate delay in seeking review, the appellants relied on section 16 of the Employment and Labour Relations Act, 2011, and Rule 32 of the Industrial Court (Procedure) Rules 2010, in support of their submissions that these Rules do not prescribe any timelines within which to bring an application for review; section **58** of the interpretation and General provisions Act Cap 2 of the Laws of Kenya, in support of their submissions that where no time line is prescribed or allowed within which any action in law is to be undertaken, such an action shall be undertaken without unreasonable delay in support of their contention that they sought review of the trial court's judgment within a reasonable time; Article **159(2) (d)** of the Kenya Constitution 2010, for the principle that Justice shall be administered without undue regard to procedural technicalities; and a High Court decision of **Mwangi S. Kimenyi versus Attorney General & another [2014] eKLR,** for the proposition inter alia that there is no precise measure of what amounts to inordinate delay, save that it will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay with the only caveat being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore inexcusable.

In the light of the above factors, the appellants submitted that they were not guilty of any in ordinate delay in seeking review as, the Judgment was delivered on the 3rd day of May, 2013; the computation of the amounts payable to the appellants as per the Judgment was settled on the 21st day of June, 2013; the decree was issued on the 31st day of July, 2013, while the application for review was filed on the 27th day of June, 2014. That it also took time to get instructions from the appellants who reside in various parts of the country; which factors in the appellants view, are sufficient to fault the review Judges finding that there was inordinate delay in bringing the application for review.

The appellants also contended that the respondent stood to suffer no prejudice were the review order to issue in their favour.

To buttress the above submissions, they appellants relied on the same case of **Mwangi S. Kimanyi versus Attorney General** (supra), for the observation *inter alia* that, in determining as to whether the delay is prolonged and in excusable, the Court has to consider not only the interests of both parties to the litigation but also those of the Court as well; and also whether either one or both parties will suffer prejudice if the matter were to be reopened.

As for the explanation for the delay, the appellants relied on the same **Mwangi S. Kimenyi** case (supra), in support of their contention that they had satisfied the threshold for the prerequisite of giving not only a reasonable but also an excusable explanation for the delay in seeking review promptly.

Lastly on costs, the appellants agree that an award of costs usually follows the event. They therefore urged us to allow the appeal and grant them costs both on appeal and on the review application.

In opposition to the appeal, the respondent adopted fully its submissions before the review Court and reiterated that a party is bound by its own pleadings; that the appellant's petition only had four (4) prayers which were considered on merit by the trial Court and findings made thereon; that the application for review was therefore an attempt by the appellants to reopen and re-litigate their petition through the backdoor as no genuine grounds were adduced for review. Neither was the alleged mistake or error apparent on the face of the record demonstrated to exist.

It was also the respondent's submissions that since details of what the appellants compensatory claims ought to have comprised was always within the knowledge of the appellants, they ought to have included them in their petition and then call *viva voce* evidence in support thereof instead of electing to proceed by way of submissions. They were therefore bound by that mode of procedure; that the principles for review now crystalized by case law do not make provision for a request for *viva voce* evidence; that as there was no error apparent on the face of the record; and lastly that the appellants' remedy for redressing the trial court's refusal to allow them relief on the compensatory claims they sought from the trial court lay in an appellate process and not in an application for

review.

As for the delay in seeking the courts intervention, the respondent submitted that there was in ordinate delay in seeking the courts intervention. The appellants were therefore guilty of laches. The review Judge was therefore in the circumstances entitled to decline the exercise of his discretion in their favour on that account.

There was no reply to the respondent's submissions.

As this is a first appeal, it is our duty to re-analyze and re-assess the evidence on the record and arrive at our own conclusions on the matter. (See **Selle –versus Associated Motor Boat Company [1968] E.A.123; Jabane –versus Olenja, [1986] KLR 661, 664; Ephantus Mwangi –versus Duncan Mwangi Wambugu [1982-88] 1 KAR 278** and **Mwanasokoni versus Kenya Bus Services [1982-88] 1 KAR 870.)**

We have accordingly considered the record in the light of the rival submissions and principles of law relied upon by the parties in support of their opposing positions. In our view, only one issue falls for our determination, namely, whether the review Judge exercised his discretion judiciously when he declined to grant review and variation of the trial court's Judgment in favour of the appellants.

The principles that guide the Court in the exercise of its mandate to interfere or otherwise with the exercise of a trial courts' discretion have now been crystalized by case law. In **Mbogo & Another versus Shah [1968] E.A. 93,** it was held at page 96 that:-

"An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice"

See also **Maina Vs. Mugiria [1983] KLR 78,** for the holding *inter alia,* that:

the Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo Vs. Shah [1968] EA 93."

Both section **16** of the Industrial Court Act, 2011 and Rule 32 (1) of the Industrial Court (Procedure) Rules 2010 under which the appellants premised their application for review confer wide jurisdiction on the Court to review and vary or set aside its Judgment. Both provisions do not however stipulate timelines within which to seek such relief. Section 16 of the Act provides as follows:

"The Court shall have power to review its Judgment, awards, orders or decrees in accordance with the Rules".

Rule 32(1) of the (Procedure) Rules, on the other hand provide as follows:

"(1) a person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling:-

(a) if there is a 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; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) on account of the award, judgment or ruling being in breach of any written law; or

(d) if the award the judgment or ruling requires clarification; or

(e) for any other sufficient reasons."

In **National Bank of Kenya Limited versus Ndungu Njau [1997] eKLR,** the Court of Appeal held *inter alia* as follows:-

"A review may be granted whenever 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 for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review"

The appellants relied on prerequisite (b) and (e) of Rule **32** of the Industrial court (procedure) rules. These are the sub rules that donate the right to seek review on account of existence of a mistake or error apparent on the face of the record and on the ground of existence of some other sufficient reason.

In **Nyamogo & Nyamogo Advocates versus Kogo** (supra), observation was made *inter alia* that:-

"An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record."

In **Kimita versus Wakibiru [1985] KLR 317**, observation was made on what does or does not amount to any other sufficient reason, at page 312 as follows:-

"The words "for any other sufficient reason" have therefore to be construed *ejusdem geris* ***with the ground of discovery…...are hence confined to a reason which would be regarded as a kin to those specified immediately previously in the order, and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the order"***

The High Court in **Sarder Mohammed versus Charan Singh Nand Sing and Another [1959] EA 793**, held *inter alia*, that, the prerequisite "*for any sufficient reasons"* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the section was deliberate. In **Wangechi Kimita & Another versus Charan Singh [C.A. No. 80 of 1985]** (unreported) the Court held *inter alia*, that:-

"any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous*"*.

We have considered the above threshold in the light of the rival submissions set out above as well as the review Judges' reasoning when rejecting the appellants request for review based on the prerequisites. It is our finding that the review Judge correctly concluded that in law parties are bound by their pleadings, and the evidence placed before a court of law as a basis for the reliefs sought. See the case of **Odd Jobs versus Mubia** [1970] EA 476, for the holding *inter alia* that, a court may only base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue had been left to the Court for a decision.

In the light of the above principle, it is our finding that among the reliefs the appellants sought from the trial court was a declaration that they were permanent employees, a position upheld by the trial Judge. There was however no attendant prayer sought that, upon upholding their contention that they were permanent employees, the trial court should go further and conduct an inquiry into the terms and conditions of that permanent employment as well as the appellants entitlement under those terms. In the light of the above finding, the review Judge was entitled in those circumstances to hold as he did and correctly so in our view, that the manner in which prayer 3 of the review application was framed, it was nothing but, a move on the part of the appellants to reopen a matter that had long been concluded, relitigate it afresh and then fill up any gaps in their case as previously laid before the trial Judge. Second, that there was no provision in law for a review court to grant such a relief, more so, when the provision of law under which the appellants sought the courts intervention for review cited above make no provision for such an intervention.

Turning to the issue of the compensatory reliefs allegedly erroneously declined by the trial Judge, the review Judge correctly

appreciated the record and arrived at the correct conclusion thereon that the appellants had sought this relief from the trial court, but the same was rejected by the trial Judge in the following terms:-

"The court finds that there was no material evidence on record to support the others compensation relief in the prayers made in the petition and the same were therefore not tenable. A claim for gratuity or service pay is not satisfied because the material on record show that the petitioners were members of the National Social Security Fund and the relevant remission was made by the respondent."

The appellants do not dispute the existence of the above findings by the trial Judge. Their contention is that the trial Judge misapprehended both the law and the facts when he arrived at the above conclusion. They have on that account, urged us to fault the review Judge for his failure to fault the trial Judge for the trial Judge's failure to appreciate that section **10(7)** of the Employment Act 2007, placed a burden onto the respondent to disprove the appellants assertions and which burden the trial court found as a fact that the respondent had failed to discharge. Also for the trial Judge's failure to invoke and apply the provisions of Regulations 5(1) and 6(1) of the Regulations of wages (General) order, sections **31(1) 35(5)** & **(6)** and **74 (1) (1)** of the Labour Relations Act, 2007, tabulate the appellants entitlements and then award the resulting figures to the appellants respectively. The review Judge's response to the above argument and correctly so in our view, was that, such an exercise would have only been feasible if the appellants had approached the Court by way of either a memorandum or a statement of claim on the basis of which the appellants could have adduced *viva voce* evidence to prove those claims; that since the appellants elected to proceed by way of a constitutional petition open to disposal by way of affidavit evidence and submissions only, there was no provision under which the review court could have reopened the matter for them to adduce viva voce evidence to prove those claims. We agree with the review Judge's view that proof of compensatory damages in the manner framed and claimed by the appellants called for their proof by way of *viva voce* evidence.

The review Judge cannot therefore be faulted for holding that the trial Judge was entitled to reject that claim on account of insufficient evidence. Second, a part from complaining that both the review and trial Judges failed to invoke and apply the above provisions, they have not provided any guidelines on how those provisions could have been imported into and applied in the constitutional petition where those had not been cited as access provision.

Turning to the issue of the trial Judge's failure to frame and accord the appellants appropriate reliefs under Article 23 of the constitution, we reiterate our findings made above that the appellants were bound by their pleadings and the material placed before the trial Judge as proof of their petition. The appellants sought vindication for violation of their constitutional rights pertaining to fair administrative action and fair labour practices, a position upheld by the trial Judge together with attendant appropriate relief as already highlighted above. There was no prayer for an award of any relief under Article 23 of the constitution. Neither was it cited as an access provision. What the appellants cited was Article 23 of the universal declaration of Human rights. The above being the position, we do not see how the review Judge could be faulted for his failure to fault the trial Judge for his failure to award a relief under a provision of law not cited as an access provision. We also note from the record of the proceedings that no submission was made with regard thereto before the trial Judge. The trial Judge was therefore entitled to confine his appraisal of the record, limited to the provisions of law cited and the material on the basis of which the appellants' intended him to intervene on their behalf, of which Article **23** of the Kenya constitution 2010 was not one of them.

With regard to inordinate delay,the appellants relied on section **16** of the Employment and Labour relations Court, and Rule 32 (1) of the Industrial Court (Procedure) Rules, 2010 and submitted that those provisions so do not prescribe any timelines for an application for review. They also relied on section 58 of the interpretation and General Provisions laws of Kenya (supra) as well as Article 159 (2) (d) of the Constitution.

The review Court had this to say on the issue of delay:

"Further, the petitioners did not explain why it took more than one year from the date of delivery of Judgment to file the application for review. In the view of the Court, the delay was inordinate in the circumstances of the case."

In **Smith versus Clay [1967], Eng R 55, [1767] 3 Bro CC 646, (1767) s29 ER 743,** Lord Camden LC had this to say on the doctrine of *lache*:-

"A- Court of Equity has always refused its aid to stale demands where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith and reasonable diligence; where these

are wanting, the Court is passive, and does nothing. Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the legal right had been barred, the equitable right to the same thing was also barred: "*Expedit reipublicae ut sit finis litium"* ***is a maxim that has prevailed in this Court at all times, without the help of parliament"***

Our appraisal of the record leaves no doubt in our mind that the reasons the appellants have now advanced before us for the first time on appeal in mitigation of the review Judge's holding that there was in ordinate delay in seeking the courts intervention for review were not advanced either in the grounds and affidavit in support for the application for review. Neither were they advanced as part of the oral submissions before the review Judge. The review Judge cannot therefore in the circumstances be faulted for his failure to consider them. Rule **104** of the rules of the Court, limits our role to reviewing the conclusions reached by the review Judge on the issues raised before him and determine whether the conclusions reached thereon by him are well founded in law or not. It provides *inter alia* as follows:

(a) No party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 93 or rule 94.

In the light of what we have highlighted above that the reasons appellants are currently advancing on appeal were never placed before the trial Judge, there is no way the review Judge can be faulted for reaching the conclusion reached that no explanation was given for the delay. Also not advanced and interrogated by the review Judge was the issue as to whether the respondent stood to suffer any prejudice were review orders to issue in favour of the appellants'. Though raised before us, we find no jurisdiction to interrogate this prerequiste for the same reason advanced above. The appellants having failed to advance any reason for the delay before the review Judge, the review Judge cannot be faulted for the conclusion reached.

The appellants further urged us to invoke Article **159 (2) (d)** of the constitution as a curative provision. The threshhod for the application of the above provision has now been delianated by case law. In **Raila Odinga and 5 Others versus IEBC & 3 Others [2013] eKLR** the Supreme Court stated that the essence of **Article 159** of the Constitution is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case. In **Lemanken Arata versus Harum Meita Mei Lempaka & 2 Others eKLR** it was stated that the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice. Lastly in **Patricia Cherotich Sawe versus IEBC & 4 Others [2015] eKLR** it was stated that **Article 159(2) (d)** of the Constitution is not a panacea for all procedural short fall as not all procedural deficiencies can be remedied by it.**all procedural deficiencies can**

In the light of the above enunciations on the construction of Article **159 (2) (d**) of the Kenya Constitution, 2010, we find no trace in the said Article that can cure the appellants failure to advance reasons for the delay as a precondition for the relief of review then sought from the review court. The correct positions in law pertaining to issues of delay in seeking the courts' intervention as distilled from the case law assessed above, is that delay *perse* is not a ground for disentitling a party to relief. It is simply that, where there has been delay, an explanation is called for, and where such explanation given and found in excusable, no remedy will issue, but where it is satisfactorily or excusable, a relief will issue.

In the result, it is our finding that the review Judge, **Radido Stephen J**, was not wrong in dismissing the application for review. We find no merit in the appeal. We accordingly dismiss it with costs to the respondent.

Dated and delivered at Nakuru this 18th Day of October, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR