



Kenya Union of Commercial, Food & Allied Workers v Swastik Aluminium & Joinery Limited (Cause 103 of 2020) [2025] KEELRC 2945 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEELRC 2945 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 103 OF 2020
B ONGAYA, J
OCTOBER 30, 2025**

BETWEEN
**KENYA UNION OF COMMERCIAL, FOOD & ALLIED
WORKERS CLAIMANT**
AND
SWASTIK ALUMINIUM & JOINERY LIMITED RESPONDENT

RULING

1. The respondent/applicant filed a notice of motion dated 04.06.2025 under Sections 1A, 1B and 3A and 80 of the *Civil Procedure Act*, Order 42, 45 and rule 1(a) of the Civil Procedure Rules, Section 16 of the *Employment and Labour Relations Court Act*, and other enabling provisions, through Kabugu & Co. Advocates. It sought the following orders:
 - i. Spent.
 - ii. That there be a stay of execution of the judgment delivered on 19.12.2024 pending hearing and determination of this application.
 - iii. That this Honourable Court be pleased to review, vary and/or set aside the judgment dated 19.12.2024 ordering the respondents to pay the claimants their final dues and compensation for unfair termination per exhibit 8 of the claimant bundle of documents dated 19.02.2020.
 - iv. That the claimant and the union to provide full disclosure and sworn affidavits verifying the true employment status of all claimants at all material times, and to produce any records or documents supporting this status.
 - v. That the cost for this application and the suit be granted to the applicant.
2. The application is based on the grounds set out therein and supported by the affidavit of Kurji Kalyan Kerai sworn on 04.06.2025. The applicant urged as follows:



- a. Exhibit 8 is a table outlining payment particulars for the eight grievants, contingent on the court's finding of redundancy.
- b. The employment records from the respondent/applicant confirm that the eight grievants were in continuous, active employment with the respondent for the period spanning from 2020 up to and including the time of judgment in December 2024. The records also display the grievants' respective gross salaries.
- c. From 2020 to 2024, the respondent/applicant's Human Resource Department was subjected to restructuring and the transition of employee records between several electronic and manual systems. Additionally, the COVID-19 pandemic affected the regular updating, reconciliation and centralized management of employment data.
- d. Whereas the claimant union assumed responsibility for the correct and accurate presentation of the grievants' details, it was only after a detailed post-judgment audit undertaken in compliance with the court's orders that the full and true employment histories of the grievants for the years 2020 to 2024 were confirmed.
- e. The continued and uninterrupted employment of all grievants demonstrates that there was actually no redundancy, unfair termination, or other cognizable cause of action at the time of the institution of these proceedings and up to the date of the judgment.
- f. Unfortunately, the above-stated information was not within the respondent/applicant's knowledge at the time of the hearing and judgment because the human resource department was in the process of system migration to digital databases, which caused delayed and fragmented access to complete employee registers. With the ongoing digitalization, the respondent/applicant could only reconcile the grievants' full employment status against the records.
- g. As the representative of the grievants, the claimant union was better placed to ascertain and disclose to the court and parties that these individuals remained the company's employees and continued to enjoy the benefits of active employment. The union's failure to do so therefore resulted in the court issuing orders based on facts that did not reflect the true position of the grievants' employee status. If the said information had been accessible at the time of the hearing, the respondent/applicant would have placed it before the Honourable Court in rebuttal of the claimant's case, and the Court would not have ordered payment of dues and compensation to individuals who had neither been terminated from employment nor declared redundant.
- h. Consequently, the claim for final dues and compensation for redundancy or unfair termination does not lawfully or equitably accrue to such employees who remained actively in employment, continuing to earn a salary and benefits, and it would be manifestly unjust to allow them to enrich themselves unjustly.
- i. There is, therefore, an error apparent on the face of the record, and the newly discovered evidence is material and relevant to the just determination of the matter. Unless the judgment is reviewed and execution stayed pending review, the respondent/applicant will suffer grave prejudice as it will be forced to pay termination and redundancy benefits to individuals who are and remain in its employ.
- j. It is in the interest of justice that the orders sought be granted to prevent an abuse of the court process.



3. The claimant/respondent's replying affidavit, sworn on 03.10.2025 by Rebecca Muthoki, was filed in person. They opposed the respondent's application dated 04.06.2025 on the following grounds:
- a. Apart from the Judgment and Decree that are attached to the instant application, there is neither other attachment of any letter withdrawing the termination letters earlier issued to the grievants, nor any letter reinstating the grievants' services.
 - b. The respondent has failed to state in its application that upon issuing the termination letters, the grievants were either: re-hired on continuous service on the same terms and conditions of service, or re-hired on fresh terms as regular and permanent employees, or issued with any fixed-term contracts. Consequently, there is lack of evidence of continuity of employment or fresh engagement of the grievants at the respondent.
 - c. Whereas the respondent's supporting affidavit makes reference to employment records showing the grievants in active employment and having been paid, no such employment record is attached to the application to confirm the veracity of the said statement. The respondent/applicant should have availed monthly payment slips or monthly remittance of statutory deductions or a verified copy of the payroll, or all these documents together to prove its allegation.
 - d. Additionally, there are no affidavits by individual grievants stating on oath that they were neither terminated from employment nor were interested in pursuing the claim and resultant Judgment.
 - e. The claimant/respondent has since learnt that only Mr. Christopher King'o was re-hired on casual terms. However, his fresh appointment has no effect on the claim and Judgment as he was first terminated from employment and later re-hired afresh.
 - f. An order staying the execution of a judgment is a serious, grave interruption of the right of the successful party to enjoy the fruits of the judgment. A stay of execution should not be imposed unless, beyond all reasonable doubt, the execution ought not to be allowed to continue. Further, the power to order stay of execution should be exercised sparingly, in exceptional circumstances and unless no cause of action lies in law or in equity.
 - g. There is no evidence before this Court that the grievants have been in employment and that executing the judgment would result into undue enrichment.
 - h. On the order seeking to review, vary and/or set aside the Judgment of 19.12.2024, no new or fresh evidence has been placed before the Court to warrant a review of judgment as provided under rule 74(1) of the ELRC (Procedure) Rules, 2024. There is also no sufficient reason given in the application to move the Court to review the Judgment. In any event, not every new fact will qualify for interference with the Judgment or Decree sought to be reviewed.
 - i. The respondent/applicant has failed to answer why the information that the grievants were not terminated from employment and have all along been in employment was not brought to the attention of the Court from 2020 when the claim was filed, and in the entire period leading to the Judgment.
4. The applicant filed a further application dated 15.10.2025 through Kabugu & Company Advocates. The applicant prayed for an order that the Court be pleased to admit and consider as further evidence the P9 forms of the eight claimants which have only become available and which substantiate the details previously contained in the Excel table annexed to the applicant's notice of motion dated 04.06.2025. The application was heard on 23.10.2025 and upon consideration of the parties' respective



submissions the Court ordered thus, “ Application dated 15.10.2025 is hereby determined with documents allowed with no costs and with claimant’s submission that in any event the Court to consider that the documents exhibited in the application are not new evidence”. The applicant has stated that the the P9 forms were previously not in possession of the applicant as at the time the application was filed. Further, the forms constitute official payroll and records which corroborate the information previously presented in the excel table and which shows that each claimant was paid monthly emoluments and thus remained in active employment of the applicant over the relevant period. The claimant’s case as submitted was that the P9 forms are not new or fresh evidence because with due diligence, the same would have been produced at the hearing of the suit and at filing of the review application.

5. Submissions on the application for review were filed for the parties. The Court has considered the parties respective positions and returns as follows.
6. First, it is rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024 that provides for review of the decisions of the Court. The rule states as follows:
 - (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 a new and important matter or evidence which, despite 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 subrule (1) 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.

It is noted that the applicant has failed to invoke that rule and instead has invoked the cited Civil Procedure Rules but which in effect have substantially similar provisions.

7. Second, the applicant alleges that there is new evidence by way of the excel sheets on payroll and the P9 forms which show the grievants continued in employment. It is submitted for the applicant that the excel sheets and became available only after the audit and were not available because of changing computer systems and COVID -19 situation. However, as urged for the claimants, the applicant has failed to show that with due diligence, the alleged new evidence could not be availed at the hearing of



the suit. The Court finds that if the grievants continued in employment, it would have been an obvious fact to be proved by relevant primary evidence such as of letters of re-engagement, attendance registers, or primary evidence of payment of salaries. The Court finds for the claimant that any subsequent employment, and which the claimant admits to have been for only one of the grievants on casual basis, the re-engagement would have not operated to defeat the fact of unfair termination as was found in the judgment and the remedies awarded consequential to that finding. Accordingly, the Court finds that the alleged new evidence could be availed at the hearing with due diligence and does not pass the test of fresh or new evidence to justify a review in that respect. Further, the evidence is not credible to establish that in fact, the grievants continued in employment as it is not an authentic evidence of payment of wages or continued employment in that respect. Accordingly, the applicant has failed to establish new evidence not available at the time of the hearing to justify a review of the judgment as prayed for.

8. Third, as submitted for the claimant, there is nothing before the Court to defeat the finding in the judgment that the grievants were terminated and unfairly so. The termination letters were never set aside. There is no material fresh evidence to defeat that finding or to justify variation of the finding. In any event, if indeed the grievants were at work throughout and as at hearing of the suit, nothing prevented the applicant from calling them to testify as such.
9. Forth, there is no error on the face of the record as urged for the applicant and styled as that the findings and reliefs were based on an erroneous assumption that the grievants had been terminated by way of redundancy while in fact, the evidence was that they had been so terminated and the termination had never been reversed by the applicant.

In conclusion, the application for review dated 04.06.2025 is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 30TH OCTOBER, 2025.

BYRAM ONGAYA

PRINCIPAL JUDGE

