



**Dancan Ayiecha Ogeto v East Africa Cans & Closures Limited (Miscellaneous Case E037 of 2024) [2025] KEELRC 918 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 918 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS CASE E037 OF 2024**

**AK NZEI, J  
MARCH 21, 2025**

**BETWEEN**

**DANCAN AYIECHA OGETO ..... APPLICANT**

**AND**

**EAST AFRICA CANS & CLOSURES LIMITED ..... RESPONDENT**

**RULING**

1. The application before me for determination is the Applicant's Notice of Motion dated 24<sup>th</sup> September, 2024. Before delving into the application, however, it is imperative that I set out the background thereof in order to put the application into proper perspective.

**Background**

2. On 15<sup>th</sup> February, 2024, the Applicant herein filed a Notice of Motion dated 14<sup>th</sup> February, 2024 seeking Orders:-
  - a. That the Court be pleased to adopt as its Judgment the award of the Director of Occupational Safety and Health dated 3<sup>rd</sup> May, 2023.
  - b. That Judgment be entered for the Applicant against the Respondent for Kshs.456,049/= being the amount assessed under the *Work Injury Benefits Act*.
  - c. That the Court be pleased to award interest at Court rates on the amount/award from the date of assessment until payment in full.
  - d. That the Court be pleased to award any other relief that the Court may deem fit and just to grant.



3. The application was expressed to be supported by the Applicant's supporting affidavit sworn on 14<sup>th</sup> February, 2024. Annexed to the said affidavit were copies of documents which, according to the Court's record, included Forms DOSH/WIBA 1 and DOSH/WIBA 4; among others.
4. The Court's record shows that on 8<sup>th</sup> March, 2024, the Respondent filed an evenly dated Notice of Preliminary Objection, calling for the Applicant's said application to be struck off on grounds:-
  - a. That the application was improperly before the Court.
  - b. That this Court had no Jurisdiction to enforce decisions arising from the Director of Safety and Health.
  - c. That in light of the foregoing, the application be struck off with costs.
5. The Applicant filed an affidavit in response to the Respondent's said Preliminary Objection, sworn by him on 16<sup>th</sup> April, 2024. Both parties filed written submissions on the Preliminary Objection pursuant to the Court's directions in that regard. The Court delivered its Ruling on the Preliminary Objection on 31<sup>st</sup> July, 2024 and struck off the Applicant's said Notice of Motion dated 14<sup>th</sup> February, 2024 with no Order as to costs. The Court (Dr. Jacob Gakeri, J) rendered itself as follows:-

“ 17. The issues for determination are as follows:-

- i. Whether there is a valid assessment of compensation by the DOSHS.
  - ii. Depending on the answer to (i) above, whether the court has jurisdiction to enforce the DOSHS award.
18. Concerning the 1<sup>st</sup> issue, the documentation on record provide a determinative answer.
  19. As admitted by the Applicant in its supplementary affidavit, the court has noted that the DOSH Form 1 had not been signed and stamped in Part III and DOSH Form 4 dated 3<sup>rd</sup> May, 2023 had not been stamped.
  20. The affiant depones that his Counsel wrote to the DOSHS on 22<sup>nd</sup> April, 2024, who wrote back enclosing the duly stamped DOSH 1 and DOSH 4, and copies of the documents were attached and marked as annexures.
  21. Regrettably, and as adverted elsewhere in this ruling, the alleged signed and stamped forms were not filed in the E-filing system as the supplementary affidavit dated 3<sup>rd</sup> June, 2024 was filed on even date and had no annexures.
  22. Consequently, the incomplete DOSH/FORM 1 and unauthenticated DOSH/FORM 4 remain as the foundation of the Claimant's application.
  23. ...
  24. ...
  25. ....
  26. ....
  27. ...



28. . . .
29. . . .
30. . . .
31. Flowing from the foregoing, it is clear that the two documents relied upon by the Applicant are incomplete and being the cornerstone of the Applicant's Notice of Motion dated 14<sup>th</sup> February, 2024, it is evident that the same is defective and cannot proceed to the next stage of determination whether the court has or has no jurisdiction.
32. There is neither a valid nor competent assessment by DOSHS for consideration by the Court.
33. In the upshot, the Applicant's Notice of Motion dated 14<sup>th</sup> February, 2024 is struck out with no orders as to costs."
6. It is clear from the foregoing that the Court did not address the issue of whether or not this Court has jurisdiction to enforce decisions/awards of the Director of Occupational Safety and Health Services (DOSHS), which is a point of law, and which was the sole issue raised in the Respondent's Preliminary Objection dated 8<sup>th</sup> March, 2024. Instead, the Court delved into matters of fact which had neither been disputed at that point nor raised in the Preliminary Objection which was before the Court for determination, and was supposed to be the subject of the said ruling. This is a mistake and an error that is apparent on the face of the record.
7. In my view, matters of fact could only be determined once the issue of jurisdiction had been determined. The issue of jurisdiction remained and remains undetermined. The Supreme Court of Kenya stated as follows in the case of *Munene - vs - King'ara & 2 Others (Petition 7 of 2014)* [2014] KESC 37 (KLR) (5<sup>th</sup> May, 2014) (Judgment):-
- "68. . . . The question of Jurisdiction is a pure question of law. This court has on several occasions adopted the dictum of Nyarangi J.A. in the Owners of Motor Vessel "Lillian S" - vs - Caltex Oil (Kenya) Ltd [1989] KLR 1 that it has to be determined from the start, and that where the Court finds it has no jurisdiction, it should down tools. This is the approach this court adopted when it considered the application for conservatory orders in this matter. We will, therefore, consider this issue of nullity first, as it touches on the Jurisdiction of this Court."
8. Having stated the foregoing, I now turn to the application before me for determination, the Notice of Motion dated 24<sup>th</sup> September, 2024.
9. The application is expressed to be brought under Sections 1A and 1B of the *Civil Procedure Act*, Orders 45 and 51 of the Civil Procedure Rules and Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024. That Applicant seeks the following Orders:-
- a. That the Court be pleased to review the Ruling it made virtually on 31<sup>st</sup> July, 2024.
  - b. That the Court do order the Backend Professionals working on the Judiciary e-filing system to prompt the Applicant's Advocates to pay the further court fees on the annexures marked DOA5 (a-e).



- c. That the Court be pleased to award any other relief the Court may deem fit and just to grant.
  - d. That costs of the application do follow the cause.
10. The application is based on the Applicant's supporting affidavit sworn on 24<sup>th</sup> September, 2024. It is deponed in the said affidavit:-
  - a. that the Ruling delivered on 31<sup>st</sup> July, 2024 was mistakenly made as annexures marked "DAO5 (a-e) had been filed and paid for as per the parameters allowed on the Judiciary E-filing System. That the annexures were paid for vide a receipt dated 3<sup>rd</sup> June, 2024, as annexures to a supplementary affidavit dated 3<sup>rd</sup> June, 2024.
  - b. that the Court's (e-filing) system as currently constituted does not, during filing, allow payment for more than one annexure at a time; and that professionals on the system's backend usually prompt Advocates on record to pay further court fees, which they did not do on 15<sup>th</sup> February, 2024. That further court fees for the annexures marked as DOA 1-4 was prompted and paid on 27<sup>th</sup> February, 2024, and a receipt in that regard was printed. That no prompting to pay for annexure DAO5 (a-e) was made.
  - c. that the Applicant's application dated 14<sup>th</sup> April, 2024 was struck out due to a fault of the e-filing portal and a mistake of the backend professionals, hence the Ruling dated 31<sup>st</sup> July, 2024 ought to be reviewed.
11. The application is opposed by the Respondent vide a replying affidavit of Bett Winny Jepkoech Advocate sworn on 15<sup>th</sup> November, 2024. It is deponed in the said affidavit that the Applicant's application is bad in law, frivolous, vexatious and a waste of precious Judicial time. That there was no error in the making of the Court's ruling delivered on 31<sup>st</sup> July, 2024.
12. It was further deponed on behalf of the Respondent:-
  - a. that the fact that the Applicant uploaded one (1) annexure is an indication that the system was working perfectly, and that there could not be subsequent payment prompts in the absence of subsequent uploads.
  - b. that since the annexures in issue were not paid for, then they were not properly on record.
  - c. that the Applicant is acting deceptively, has come to the court with unclean hands, and is attempting to revive a dead suit almost two (2) months after delivery of the Ruling; hence prejudicing the Respondent.
13. In my view, the sole issue that presents for determination is whether the prayer for review of this Court's Ruling delivered on 31<sup>st</sup> July, 2024 is deserved.
14. Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024 provides 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 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 was 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 sub-rule (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.”

15. The Ruling sought to be reviewed was delivered on 31<sup>st</sup> July, 2024, and the present application for review of that ruling was filed on 18<sup>th</sup> October, 2024, approximately 2½ months from the date of the Ruling. The application was, in my view, filed within a reasonable time. There was no unreasonable delay in filing it.

16. As already stated elsewhere in this Ruling, the Applicant filed an application dated 14<sup>th</sup> February, 2024 and the Respondent thereupon filed a Preliminary Objection (P.O) dated 8<sup>th</sup> March, 2024, which the Court directed to be heard first. On 18<sup>th</sup> April, 2024, the Court ordered as follows:-

“(1) to be canvassed by way of written submissions, 14 days a piece.

(2) Mention on 27<sup>th</sup> May, 2024.”

17. The Preliminary Objection (P.O) as raised by the Respondent is reproduced in paragraph 4 of this Ruling. The Court did not determine the issue of Jurisdiction presented before it vide the P.O, but instead went into matters of fact which could only be delved into once the issue of jurisdiction as raised in the Preliminary Objection had been determined. As already stated elsewhere in this Ruling, the issue of jurisdiction was not determined, as the Court never addressed itself to the issue. This fact is apparent on the face of the said Ruling of the Court, and is an error/mistake apparent on the face of the record. It is also a sufficient reason for review pursuant to Rule 74(1)(d) of this Court’s Rules. The Court stated as follows in the case of Nyamogo & Nyamogo – vs – Kogo [2001] E.A 170:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefinitiveness inherent in its very nature, and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous



decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of an error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

18. The High Court of Kenya in Judicial Review Misc. Application No. 317 of 2018 (Republic – vs – Advocates Disciplinary Tribunal and Apollo Mboya [2019] eKLR stated as follows:-

“ 18. The term “mistake or error apparent” signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of record . . .

19. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it does not manifest or self-evident and requires an examination or argument to establish it (Batuk K. Vyas – vs – Surat Municipality AIR (1953) BOM 133) . . .

21. The power of review is available only when there is an error apparent on the face of the record . . .”

19. Failure by the Court to determine the issue of jurisdiction, which was a pure point of law raised by way of a Preliminary Objection, and proceeding to determine matters of fact which had not yet been placed before it for determination, was a mistake, and an error apparent on the face of the record which automatically must invoke and attract the Court’s power of review.

20. Having considered written submissions filed on behalf of both parties herein, I allow the Applicant’s Notice of Motion dated 24<sup>th</sup> September, 2024 in terms of Prayers 1 and 3 thereof, and make the following Orders:-

a. This Court’s Ruling delivered on 31<sup>st</sup> July, 2024 is hereby reviewed, and is quashed.

b. The Applicant shall compile a hard copy of his Notice of Motion dated 14<sup>th</sup> February, 2024, duly bound and paginated, and shall include therein the affidavits already filed by him on the application, annexures to the affidavits and court receipts issued on filing of those affidavits and annexures thereto; and shall file and serve the hard copy within 7 days of the date of this Ruling.

c. The Respondent shall file and serve response to the said application (dated 14<sup>th</sup> February, 2024) within 7 days of being served with the hard copy referred to in (b) above, and shall place on record a hard copy of the response.

d. Directions on disposal of the application and/or any preliminary objection thereon shall be taken on 12<sup>th</sup> May, 2025.

21. Each party shall bear its own costs of the Notice of Motion dated September 24, 2024.

22. Orders accordingly.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH 2025**

**AGNES KITIKU NZEI**

**JUDGE**

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Appearance:

Mr. Makau for the Applicant

Miss Bett for the Respondent

