



**Ochieng v Kenya Accreditation Service (Employment and Labour Relations  
Petition E118 of 2024) [2025] KEELRC 1502 (KLR) (19 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1502 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E118 OF 2024**

**HS WASILWA, J  
MAY 19, 2025**

**BETWEEN**

**DAVID OUMA OCHIENG ..... PETITIONER**

**AND**

**KENYA ACCREDITATION SERVICE ..... RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion dated 8<sup>th</sup> January 2025 seeking orders that: -
  1. Spent
  2. this court reviews, varies and/or sets aside its ruling and order delivered on 3<sup>rd</sup> December 2024.
  3. The costs of this application be provided for.
2. The Application was supported by an affidavit sworn by the Applicant's Chief Executive Officer, Dr. Walter Ongeti.

**Respondent/Applicant's Case**

3. The Applicant avers that this court delivered a ruling on 3<sup>rd</sup> December 2024 which addressed and determined issues central to the substratum of the main suit.
4. The Applicants avers that the impugned ruling failed to grant any reliefs sought by the Petitioner/ Respondent in his Notice of Motion dated 30<sup>th</sup> July 2024 which sought for conservatory order and instead it is worded in terms suggesting a final determination of the main suit.
5. The Applicant avers that the impugned ruling amounts to a substantive determination of the main suit without affording it a fair and reasonable opportunity to present evidence and make submissions in support of the case.



6. It is the Applicant's case that the Court's actions are in breach of Article 50 of the Constitution which guarantees the right to a fair hearing and are equivalent to unjust exercise of judicial authority contrary to Article 159 of the Constitution.
7. The Applicant avers that unless this Court reviews, varies or sets aside its ruling and orders of 3<sup>rd</sup> December 2024, the ongoing proceedings in the main suit will be rendered futile as the Court's position on the substantive issues are already prejudicial to the Applicant.

#### **Petitioner/Respondent Case**

8. In opposition to the Application, the Petitioner/Respondent filed a replying affidavit dated 3<sup>rd</sup> February 2025.
9. The Petitioner/Respondent avers that the application should be struck out as the Applicant has indicated the application is supported by the affidavit of Mr. David Ouma Ochieng whereas the same has not been annexed instead the annexed affidavit belongs to Dr. Walter Ongeti. This offends Rule 74 (3) of the Employment and Labour Relations Court Procedure Rules, 2024 ('ELRC Rules').
10. The Petitioner/Respondent avers that he filed the present suit vide a certificate of urgency dated 30<sup>th</sup> July 2024 and on 1<sup>st</sup> August 2024, the Court issued interim orders pending the hearing of the Application interparties on 6<sup>th</sup> August 2024 directing that there be a stay of implementation of the decisions conveyed by the Respondent's letter dated 19<sup>th</sup> February 2024 and 2<sup>nd</sup> July 2024.
11. The Petitioner/Respondent avers that on 8<sup>th</sup> August 2024, the matter came up for mention to confirm compliance and Hon. Justice Hellen Wasilwa directed that ruling on the application will be delivered by notice by Hon. Justice Anna Ngibuini Mwaure.
12. The Petitioner/Respondent avers that on 3<sup>rd</sup> December 2024, the Court delivered its ruling where it held that he has established a prima facie case as he was employed on fixed term contracts that terminated by effluxion of time. The prayers sought in the Application were granted as prayed and each party directed to bear its own costs.
13. It is the Respondent's case that the Applicant has failed to elaborate how the ruling is worded in terms of suggesting a final determination of the main suit.
14. The Respondent avers that the Applicant wants the court to handle an appeal in its application and that no new matters have been discovered since entry of judgment to warrant orders of review and there is no error apparent on the face of the record.
15. It is the Respondent's case that the Applicant has not explained which aspect of the ruling requires review. The ruling may have been erroneous in the Applicant's view but a wrong determination of an issue by the Court in the Applicant's mind does not constitute a ground for review but it may be a ground for appeal.
16. The Respondent avers that the Applicant has not adduced any cogent evidence to demonstrate it would suffer any injustice if a not awarded a review of the ruling.

#### **Applicant's Submissions**

17. The Applicant submitted on three issues: whether the Applicant's application lacks standing on the ground that it is supported by the affidavit of Dr. Walter Ongeti, rather than Mr. David Ouma Ochieng, as indicated in the application; whether the Applicant has established sufficient grounds to



warrant a review of this Honourable Court's ruling; and whether this Honourable Court should grant the orders sought in the application.

18. On the first issue, the Applicant submitted that Rule 74(3) of the ELRC Rules is express and unequivocal in stipulating that an application for review must be accompanied by a notice of motion supported by an affidavit. The Notice of Motion dated 8<sup>th</sup> January 2025 is supported by the Supporting Affidavit of Dr. Walter Ongeti, sworn on the same date. This means that the application is fully compliant with Rule 74(3) of the ELRC Rules.
19. The Applicant submitted that the Respondent's argument the application is fatally defective because the Notice of Motion mistakenly references to a Supporting Affidavit of David Ouma Ochieng instead of Dr. Walter Ongeti; is wholly misconceived, as it ignores the substance of the application and elevates form over merit.
20. It is the Applicant's submission that the Respondent's objection is entirely technical and does not go to the core of the application. An application would only be struck out under the terms sought by the Respondent, where the applicant fails to accompany the application with the requisite supporting affidavit.
21. The Applicant submitted that it is trite law that procedural objections must be anchored on demonstrable prejudice. The Respondent has not proved any prejudice suffered as a result of the clerical error in the Notice of Motion.
22. On the second issue, the Applicant submitted that by limiting its determination solely to the establishment of a prima facie case, the Court condemned it unheard, as its submissions on the remaining two grounds, irreparable harm and balance of convenience, were neither considered nor addressed. The impugned ruling acknowledges the necessity of assessing all three grounds for the grant of interlocutory relief but neglected or omitted the latter two in its final determination. This constitutes an error apparent on the face of the record and warrants the intervention of this Court through a review of its ruling.
23. The Applicant submitted that the impugned Ruling constitutes a judgment as it addressed and determined issues central to the substratum of the main suit by resting the entire determination on the existence of a prima facie case. This approach contravened established legal principles governing interlocutory relief and amounts to an error that justifies review.
24. On the third issue, the Applicant submitted that it has met the threshold for review under Order 45 Rule 1 of the Civil Procedure Rules and Rule 74 of the ELRC Rules, as the oversight is not a matter for appeal but a patent error that goes to the core of the ruling.

### **Petitioner/Respondent's Submissions**

25. The Petitioner/Respondent submitted on three issues: whether the Respondent's Application dated 8<sup>th</sup> January 2025 should be struck out; whether the Respondent has established the grounds for review of the ruling; and whether the Respondent is entitled to the orders sought.
26. On the first issue, the Petitioner/Respondent submitted that on the face the present application, it is supported by the Affidavit of a Mr. David Ouma Ochieng, however, the affidavit of David Ouma Ochieng has not been annexed instead the annexed affidavit belongs to Dr. Walter Ongeti. By virtue of this, the Application is not supported by an affidavit and is not compliant with Rule 74(3) of the ELRC Procedure Rules.



27. The Petitioner/Respondent submitted that the failure by the Applicant to file the supporting affidavit of Mr. David Ouma Ochieng renders the application incompetent and therefore a nullity that cannot be saved by Article 159 of the Constitution or Section 3A Criminal Procedure Act.
28. The Petitioner/Respondent submitted that the Application is irregularly before this Court as the Applicant ought to have annexed a formal extracted decree or order if which the review is sought. No such order was attached to the present application hence it is fatally defective and should be struck out.
29. On the second issue, the Petitioner/Respondent submitted that Rule 74 [sic] of the ELRC Procedure Rules and similarly Order 45 of the Civil Procedure Rules, 2010 as read together with Section 80 of the Civil Procedure Act provides:
- “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.”
30. The Petitioner/Respondent submitted that the power of review is discretionary and unfettered this was held in the case of Kenya Union of Hair and Beauty Salon Workers v Black Beauty Products Ltd; Kenya Scientific Research International & Technical Institutions Workers Union (Interested Party) [2018] eKLR, where the court cited with the approval the Court of Appeal in Shanzu Investment Ltd vs. the Commissioner of Lands, Civil Appeal No. 100 of 1993 [1993] eKLR that: “The court has a wide discretion to set aside judgment and there are no limitations and on the discretion of the judge except if the judgment is varied, it must be done on terms that are just.”
31. The Petitioner/Respondent submitted that the application has not illustrated what error apparent on the face of the record was made by the Court the impugned ruling. An error apparent on the face of the record should not require an elaborate argument to illustrate its existence; it should be self-evident on the face of the record.
32. It is the Petitioner/Respondent’s submission that the Applicant has simply questioned the Court’s decision that in its analysis the impugned ruling constitutes a judgment as it addressed and determined issues central to the substratum of the main suit by resting the entire determination on the existence of a prima facie case. The Respondent submits that the Applicant’s arguments clearly demonstrates that it was not satisfied with the Court’s decision as such should have exercised its right to file an appeal, rather than seek a review yet the Court cannot sit in appeal over its own judgment.
33. The Petitioner/Respondent submitted that the Applicant pointed out that the impugned ruling failed to analyse the other two criteria in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, namely irreparable harm and balance of convenience yet it proceeds to admit the fact that the learned judge at paragraph 33, noted that for the court to grant injunctive orders, it must consider the three principles



set out in *Giella v Cassman Brown & Co. Ltd* (supra). Clearly the Court considered all the three principles before arriving at its decision.

34. On the last issue, the Petitioner/Respondent submitted that the application lacks merit and is merely intended to delay the fast tracking of the hearing of the Petition. Further, the Applicant seeks to appeal against the ruling of the Court camouflaged as an application for review whereas this Court is already *functus officio* in this regard. The Judge would be sitting in appeal on her own judgment which is not permissible in law as expressed in *Abdullahi Mohamud v Muhammad Kahiye* (2015) eKLR that: "It seems clear to me that the plaintiff in his application for review is faulting the failure by the Hon. Waweru Judge to consider the evidence on record and in arriving at a decision that was not reasoned (Explanation) which, as I have slated, would be a good ground for appeal but not for an application for review."
35. I have considered the averments and submissions of the parties herein. The Applicant sought court's direction for review of its ruling of 3/12/2024 arguing that it determined the entire petition without giving him an opportunity to be heard.
36. The ELRC (Procedure Rules 2024) at Rule 74(1) 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.
37. The Rule sets out grounds under which the court may review its order or judgment. The issue of a just decision of judicial authority as averred by the Applicant cannot be a matter for review but for appeal. The Applicant avers that the ruling of this court determines in finality the petition and thus seeks a review of that position.
38. The question being raised by the Applicant in my view falls outside the purview of a review and needs a determination by the appellate court.
39. The application for review cannot therefore stand and is dismissed accordingly. Costs in the petition.

**READ, DELIVERED AND SIGNED THIS 19<sup>TH</sup> DAY OF MAY, 2025.**

**HELLEN WASILWA**

**JUDGE**

