



Kenya Chemical Workers Union v Mac's Pharmaceuticals Limited (Cause E222 of 2021) [2025] KEELRC 1534 (KLR) (16 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1534 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E222 OF 2021**

**AK NZEI, J
MAY 16, 2025**

BETWEEN

KENYA CHEMICAL WORKERS UNION CLAIMANT

AND

MAC'S PHARMACEUTICALS LIMITED RESPONDENT

RULING

1. This Court (Dr. Jacob Gakeri, J) delivered its Judgment on 7th March, 2024 after taking evidence from both parties in a full trial, and allowed the Claimant's claim in the following terms:-
 - “(1) The Respondent is directed to pay CWI, Peninah Waitherero and CWII, Grace Nduta Kamau, their terminal dues as appropriate, including two (2) months gross salary as compensation for the unlawful termination of employment.
 - (2) The Claimant union is awarded Kshs.40,000/= for the direct expenses incurred.”
2. The Claimant is not shown to have appealed against the said Judgment. On 3rd October, 2024, approximately seven (7) months from the date of the Court's said Judgment, the Claimant filed a Notice of Motion dated 26th September, 2024 seeking Orders:-
 - a. That the Court be pleased to review, vacate, vary or set aside the Judgment dated 7th March, 2024.
 - b. That the Court do award all the nine (9) employees their terminal dues.
 - c. That the Court do issue any other order as it may deem fit and just.
 - d. That the Respondent bears costs of the application.



3. The application sets out on its face the grounds on which it is based, which are substantially replicated in the affidavit of Peter Ouko Onyango sworn on 26th September, 2024 in support of the application.
4. It is deponed in the said supporting affidavit:-

- “ 13. that the Claimant discovered, after exercise of due diligence and after Judgment was delivered, that some seven (7) (sic) were left out in the Judgment on account that they did not testify.
14. that the grievants were members of the Claimant/Applicant Union and by dint of that qualified to enjoy the parties’ negotiated CBA which stipulated their entitlement.
15. that the Claimant now urges the Court, in the interest of justice to the seven (7) grievants, to review, vary, vacate or set aside the Judgment delivered on 7th March, 2024.
16. that the Applicant urges the Court to find that the nine (9) grievants were entitled to their benefits, and further to this compensate them for the pain and suffering they have endured in their bid to seek Justice.
17. . . .
18. that it is in the interest of Justice that the dismissal orders be set aside and/or reviewed and this matter be set down for hearing and expeditious disposal.”

5. The foregoing sounds like a catalogue of grounds of appeal. I have noted from the Court’s Judgment delivered on 7th March, 2024 that the trial Judge made the following observations in the Court’s said Judgment:-

- “ 32. Before delving into the foregoing issues, it is essential to determine who the Claimant union is suing on behalf of in this case.
33. In the Memorandum of Claim dated 18th February, 2021, the Claimant union states that the Respondent had refused to pay severance and gratuity to 9 employees, ostensibly who are its members, though no shred of evidence was adduced to prove union membership such as membership card or union dues deduction forms.
34. More puzzling, however, is that the Claimant has not identified the alleged 9 employees anywhere in its documents . . .
39. Surprisingly, only 2 witnesses of the alleged 9 testified in court, and did so on their own behalf. None of the two witnesses testified on behalf of the others, and their cases remain unprosecuted and thus abated.
40. The Respondent did not file a list of the other grievants or identify them in its Memorandum of Claim . . .”

6. On being served with the Claimant’s application herein, the Respondent filed a lengthy preliminary objection to the application, dated 21st February, 2025, which I summarise as follows:-



- a. The Application for review is incompetent, incurably, defective and legally untenable as it contravenes the express provision of Section 16 of the *Employment and Labour Relations Court Act* and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016, which strictly delineate the permissible grounds for review.
 - b. The application is res-judicata within the meaning of Section 7 of the *Civil Procedure Act* as the issues therein have already been conclusively adjudicated upon and determined by this Court in its Judgment delivered on 7th March, 2024.
 - c. The application constitutes an appeal disguised as a review, contrary to established judicial principles, as it seeks to re-litigate matters already determined instead of invoking the proper appellate procedure.
 - d. The application seeks to introduce new evidence that was well within the Claimant's knowledge at the time of hearing and determination of the suit, thus violating the strict legal threshold for admissibility of new evidence in review applications.
 - e. The application is an abuse of the Court's process and offends the doctrine of finality of litigation, which is a fundamental principle of justice.
 - f. The application is frivolous, vexatious and intended to obstruct and delay execution of a valid Court Judgment, amounting to abuse of process.
7. On 20th March, 2025, I directed that the foregoing preliminary objection be treated as the Respondent's response to the Claimant's application herein.
8. This Court's power and Jurisdiction to review its own orders and decrees flow from Section 16 of the *Employment and Labour Relations Court Act* and Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024 (previously Rule 33 of the 2016 Edition of the Court's said Rules). The Rule (Rule 74(1) 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.”
9. Both parties filed written submissions on the application pursuant to the Court's directions in that regard.
10. The Respondent submitted that the Claimant's application fails to establish any of the grounds set out in the foregoing rule. In this regard, the Respondent cited the decided case of Republic – vs – Public



Procurement Administrative Review Board and 2 Others ex parte Rongo University [2018] eKLR, where the Court stated that an application for review must strictly conform to the statutory provisions governing review Jurisdiction.

11. On its assertion that the Claimant's application is res-judicata, the Respondent submitted that matters raised in the application have already been adjudicated upon and conclusively determined by this Court in its Judgment delivered on 7th March, 2024. The Court was referred to the Court of Appeal's decision in Independent Electoral and Boundaries Commission – vs – Maina Kiai and 5 Others [2017] eKLR, where the Court stated that for a matter to be res-judicata, the following elements must be present:-
 - a. The matter was directly and substantially in issue in the former suit.
 - b. The matter was between the same parties.
 - c. The matter was heard and finally determined by a competent court.
12. The Respondent further submitted that the application was an appeal disguised as an application, with the Claimant seeking to re-litigate matters already determined. The Court was referred to the case of Francis N. Gachie and Another – vs – Kenyatta University and 2 Others [2012] eKLR, where the Court emphasized that review is not an avenue for an aggrieved party to seek a different decision where no error apparent on the face of the record exists.
13. On the argument that the Claimant was attempting to introduce new evidence improperly, the Respondent cited the case of Nyamogo and Nyamogo Advocates – vs – Kago [2001] EA 173 where the Court stated that a review cannot be used to introduce evidence that was available but not tendered during trial. That the application is legally untenable.
14. In its submissions, the Claimant/Applicant re-stated the averments made in both the application and the affidavit sworn in support thereof, and submitted that exclusion of seven employees from the reliefs given by the Court amounted to an error in law and a breach of the principles of fairness, natural justice and equal treatment as enshrined in *the Constitution* of Kenya 2010. That the excluded seven employees' claims were substantially identical to the two granted, and that redundancy had not been disputed. That the Respondent was aware that the seven excluded employees were the Claimant's Union members.
15. It was the Claimant/Applicant's further submission that the doctrine of res-judicata does not apply in the present case as the issue before the Court is "exclusion of seven employees from relief due to failure to testify, which issue was not determined in the Original Judgment."
16. A substantial part of the Claimant's written submissions appeared to be addressing the Court on the exercise of its Judicial Review jurisdiction. The application before this Court is for review of the Court's Judgment delivered on 7th March, 2024.
17. The single issue for determination, in my view, is whether the order of review sought by the Claimant/Applicant is merited.
18. It ought to be noted, right from the onset, that a Court of law determines disputes presented to it for determination based on the pleadings filed in Court by parties to the suit, evidence presented by the parties in proof of matters pleaded, and the law. A party, not having pleaded any particular matter, cannot validly accuse a trial court of failure to determine the unpleaded matter. It is trite that parties are always bound by their pleadings. This principle is as old as the legal system itself, and yet ever new.



19. As already stated elsewhere in this Ruling, the trial Judge stated as follows in the Judgment sought to be reviewed:-

“ 40. The Respondent did not file a list of the other grievants or identify them in the Memorandum of Claim.”

20. The trial Judge further observed in the Court’s said Judgment that the Claimant had not identified the alleged 9 employees anywhere in its documents, and that no shred of evidence had been presented to prove the alleged grievants’/employees’ union membership. The trial Judge concluded by stating that as none of the alleged seven employees had testified in Court and the two who testified did not testify on their behalf, the (seven) alleged grievants’ cases remained unprosecuted and thus abated.

21. If the Claimant/Applicant was aggrieved by the foregoing determination, then it ought to have appealed against the same. This Court cannot sit in appeal against its own decisions/decrees.

22. For this Court to review its own decrees and orders, an applicant must demonstrate the existence of the matters enumerated in this Court’s Rules as set out in paragraph 8 of this Ruling. The Claimant has not demonstrated discovery of any new and important evidence which could not be presented at the trial despite exercise of due diligence. The Claimant/Applicant has also not demonstrated the existence of a mistake or error apparent on the face of the record, and has not demonstrated that this Court’s said Judgment requires clarification. Further, the Claimant/Applicant has not demonstrated the existence of any other sufficient reason on the basis of which this Court’s Judgment delivered on 7th March, 2024 can be reviewed.

23. The Claimant/Applicant’s submission that “exclusion” of the alleged (unidentified) seven (7) grievants/employees from the award of relief (by the Court) was “an error of law” cannot be left unaddressed. It was stated as follows in the case of National Bank of Kenya Limited –vs- Ndungu Njau [1997] eKLR:-

“ 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 provision of law cannot be a ground of review.

In the instant case, the matter in dispute had been fully canvassed before the Learned Judge. He made a conscious decision on the matter in controversy. . . .

An issue that has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

24. In view of all the foregoing, and having considered written submissions filed by both parties herein, I find no merit in the Notice of Motion dated 26th September, 2024, and the same is hereby dismissed. Each party shall bear its own costs of the application.

25. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY 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.

AGNES KITIKU NZEI

JUDGE

Mr. Mutongoi for the Claimant/Applicant

No appearance for the Respondent

