



**Mutisya v Machakos County Assembly Service Board (Cause
4 of 2018) [2025] KEELRC 1845 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1845 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
CAUSE 4 OF 2018
B ONGAYA, J
JUNE 26, 2025**

BETWEEN

NELLY ITUMBI MUTISYA CLAIMANT

AND

MACHAKOS COUNTY ASSEMBLY SERVICE BOARD RESPONDENT

RULING

1. The Respondent (applicant) filed a Notice of Motion application dated 20.03.2024 through Mulekyo and Company Advocates. The application was under section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 45 Rule 1, 2 and 3 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law. The applicant was seeking the following orders:
 - a. That this Honourable Court to review its orders issued on the 08.03.2024.
 - b. That upon review above the Honourable Court do extend time for the applicant (respondent) to file its notice of appeal on liability out of time.
 - c. That cost of this application be borne by the claimants.
2. The application is supported by the affidavit of Denis Mutui, and made on the following grounds:
 - a. Vide orders of the Honourable Court dated 08.03.2024, the application dated 06.11.2023 seeking extension of time to file appeal was dismissed with costs.
 - b. That the applicant has since waived its right to appeal against the said ruling by withdrawing its Notice of appeal dated 12.03.2024 vide a notice of withdrawal dated 13.06.2024.
 - c. The applicant is aggrieved by the order issued on 08.03.2024 as it has subjected it to great prejudice by locking its doors to ventilate its issues in the appellate forum.



- d. That the appellant has learned from its previous counsel that she was not issued with a notice to attend court when the judgment, subject matter of this application was delivered on the 21.06.2023.
 - e. That the counsel learned of the judgment through an email from the claimant's advocate by which time the timeline for filing the Notice of Appeal had lapsed triggering the application dated 24.07.2023.
 - f. That there is sufficient ground to grant the orders sought herein.
 - g. That it is in the interest of justice that the orders sought be granted.
3. The respondent filed Grounds of Opposition dated 28.04.2025, through Musembi Ndolo & Company Advocates and on the grounds:
- a. The said application is incompetent, bad in law and an abuse of court process, embarrassing and vexing the court in that:
The application offends Rule 33(1) of the ELRC (Procedure) Rules, 2016 in that the applicant is guilty of inordinate, unexplained delay as the order sought to be reviewed was made on year ago on 08.03.2024.
 - b. The application offends Rule 83(3) of the Court of Appeal Rules 2022 in that the purported withdrawal of appeal dated 12.03.2024 is ineffective and unlawful as the applicant has failed to attach an order from the registrar marking the said notice as withdrawn.
 - c. The said application offends section 6 of the *Civil Procedure Act*, the doctrine of *functus officio* and *res-judicata* in that, the applicant has made similar application seeking same order involving to the same parties which application were either dismissed by the court or withdrawn or abandoned as demonstrated by the following applications (the respondent seeks courts leave to refer to court pleadings and proceedings).
 - i. Application dated 06.11.2023 that was dismissed by the Court.
 - ii. Application dated 24.07.2023 was withdrawn on 27.10.2024 by the applicant and matter marked as settled.
 - iii. Application dated 26.06.2024 was withdrawn by the applicant on 28.02.2024.
 - iv. On 09.07.2024 the applicant made yet another similar application that was struck out by the court with costs.
 - d. The applicant having withdrawn similar application dated 24.07.2023 (c (ii) supra) and marked the matter as settled under the principle of estoppel is estopped from filing a similar application.
 - e. The applicant is guilty and in breach of Rule 84 of the Court of Appeal Rules 2020 that require the applicant to file in the appropriate register an appeal within 60 days.
 - f. To grant the orders sought would be prejudices to the 107 decree-holders as it would violate the overriding objective of the court and Article 50 and Article 159 of *the constitution* that requires justice shall not be delayed and should be concluded without unreasonable delay.
 - g. The applicant has been overtaken by events as the 107 claimants have filed judicial review application for purposes of execution of court decrees against the judgement-debtor/applicant herein.



4. The parties filed their respective submissions. The court has considered the parties' respective positions and makes finding as follows:
- a. The record shows that a similar application dated 24.07.2023 was withdrawn on 27.10.2024 thus, "By consent the application by notice of motion 24.07.2023 is marked withdrawn with no orders on costs." As urged for the claimants, indeed parties are bound by that consent, the Court is *functus officio* and the matter is settled by the parties' own consent order. The Court finds that the consent order can only be set aside by the parties own agreement but which has not been shown to exist.
 - b. The applicant alleges that it has discovered new evidence being that when a similar application dated 06.11.2023 was dismissed on 08.03.2024, the affidavit by the applicant's former Counsel Caroline Kamende Advocate sworn on 03.07.2024 shows that the Court delivered judgment on 14.10.2022 without notice and despite Counsel's formal inquiry on 26.01.2022. Looking at the timelines, it appears to the Court that nothing is before the Court to show that with due diligence, the applicant could not have known and informed the Court on dismissal of the application on 08.03.2024 that the judgment desired to be appealed against had been made without notice to the applicant. The Court finds for the claimant that there is no well-established reason to grant the review.
 - c. The applicants submits extensively on whether the desired appeal would raise arguable points but the Court considers that since it cannot sit on appeal upon its own decision such are matters best left to the consideration of the Court of Appeal in an appropriate proceeding.
 - d. The Court further finds that per the claimant's submissions, there is no demonstrated formal withdrawal of the appeal per rule 83 of the Court of Appeal Rules because the registrar has not formally marked the notice as withdrawn
 - e. As urged for the claimant, the applicant failed to invoke the relevant provisions of the Employment and Labour Relations Court (Procedure) Rules and which operates as an impetus to dismissal of the application.
5. In conclusion the application dated 20.03.2025 is hereby dismissed with costs and the Deputy Registrar to return the case file to the Machakos Sub-registry forthwith.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 26TH JUNE, 2025.

**BYRAM ONGAYA,
PRINCIPAL JUDGE**

