



Sukhija v NMC Fertility Point Kenya Limited (Employment and Labour Relations Cause E262 of 2021) [2025] KEELRC 1769 (KLR) (17 June 2025) (Ruling)

Neutral citation: [2025] KEELRC 1769 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E262 OF 2021**

**HS WASILWA, J
JUNE 17, 2025**

BETWEEN

DR. SARITA SUKHIJA CLAIMANT

AND

NMC FERTILITY POINT KENYA LIMITED RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion dated 21st February 2025 seeking orders that: -
 1. Spent
 2. this Court be pleased to review and/or amend the Judgment issued on 4th February 2025 to reflect the undisputed terminal dues of USD 5,287,335 or USD 50,840 owed to the Applicant.
 3. costs be in the cause.

Claimant/Applicant's Case

2. The Applicant avers that the judgment in the claim was delivered on 4th February 2025 for the total sum of Kshs. 7,811.57 which was 25 days leave at USD 6666.57 and annual air tickets to India at USD 640 and 505 for 2019 and 2020 respectively.
3. The Applicant avers that the final award only recognised USD 7,811.57 being payments for unpaid leave and air tickets and remained silent on the issue of the terminal dues which was pleaded in the Statement of Claim dated 25th March 2021.
4. The Applicant avers that the Respondent's own documents and submissions dated 29th November 2024 admitted that the Claimant/Applicant terminal dues to the tune of Kshs. 5,287,335 or USD 50,840. This fact was recognised by the court under paragraph 43 of the court's judgment dated 4th February 2025.



5. It is the Applicant's case that in its final judgment, the court by way of a mistake on the face of the record did not take into account the money already admitted as owing to the Claimant/Applicant by the Respondent.
6. The Applicant avers that this was an error on the face of the court record and which ought to be corrected in the interests of justice.
7. The Applicant avers that unless the orders are issued as prayed, she shall continue to be denied the fruits of her judgment while the Respondent continues to unjustly detain money owed to the Claimant by the Respondent.
8. The Applicant avers that the judgment ought to be reviewed to reflect the sum of Kshs. 5,287,335 or USD 50,840 owed to the Claimant as terminal dues and which is uncontested.
9. The Applicant avers the application has been brought timeously and without any unreasonable delay.

Respondent's Case

10. In response to the Application, the Respondent filed a replying affidavit dated 6th March 2025 sworn by Rufus Maina, its Director, Strategic Initiatives and Legal.
11. The Respondent avers that this court pronounced itself satisfactorily in respect of every limb of the reliefs sought by the Claimant. The terminal dues pleaded were salary variables which addressed by this court in paragraph 55 of the judgment.
12. The Respondent avers that the issue of terminal dues was discussed by this court under paragraph 55 of the judgment as follows:

“The claim that the claimant's salary was unilaterally reduced by the respondent is therefore not correct and the claimant is therefore not entitled to payment of salary variables made during the said period.”
13. The Respondent avers that the Claimant cannot purport to claim the sum of Kshs. 5,287,335 or USD 50,840 disguising the same as terminal dues yet what was pleaded as terminal dues is salary variables for June- December 2020 USD 20,500.
14. The Respondent avers that the relief on the terminal dues awarded by the court is the air ticket and the 25 days leave.
15. It is the Respondent's case that it is trite law that parties are bound by their pleadings; there is nothing that can be subject of a review in the final judgment of the court as the court made a determination of this matter in accordance with the Claimant's pleadings.
16. The Respondent avers that the issue at hand goes to the fault attributed to the drafters of the Claimant's pleadings and not a question of oversight, error apparent on the face of the record or fault on the part of the court; thus, an admission (if any) is only binding to the extent that it related to a fact pleaded by the Claimant.
17. The Respondent avers that the Claimant has not demonstrated any mistake or error apparent on the face of the court record.
18. The Respondent avers that issues does not fit the matrix of a review but an appeal; raises a merit issue and not a mistake or error apparent on the court. The Claimant is not seeking to correct any errors but



challenging the findings of the court and the application of the law by the court on the issue which is an issue of the appellate court.

19. It is the Respondent case that the Claimant cannot seek a review of a mistake that originate from her own pleadings and was never corrected at the opportune time. If the court grants the instant application, it would mean that the Claimant must as well amend her pleadings and the time and discretion for such an exercise has passed.

Applicant's Submissions

20. The Applicant submitted that the Respondent in their evidence as well as submissions dated 29th November 2024 stated that they owed the Claimant USD 50,840 or Kshs. 5,287,335
21. It is the Applicant's submission that the application was made without unreasonable delay; this application was filed on 7th March 2025 barely 2 months after delivery of the judgment on 3rd December 2024. Page 58 of the Respondent's list of documents dated 16th October 2023 annexed a final settlement and final dues of Sarita Sukhija Staff No. 60010 indicating the said amount; and the same was reiterated under paragraph 46 of the Respondent's submissions.
22. It is the Applicant's submission that the Respondent in their evidence, pleadings and submissions confirm that the Claimant was owed terminal dues and the Claimant did pray for the same in her statement of claim. The court acknowledged the Claimant sought to be paid her terminal dues, but did not consider the same in the final part of her judgment which was an error apparent on the face of the record. She relied on the Court of Appeal case of National Bank Of Kenya Limited vs Ndungu Njau [1997] KECA 389 (KLR) where the court observed:

“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 for review.”

23. The Applicant submitted that Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules provides grounds that the court may review its decision as follows:

“ Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.



Respondent's Submissions

24. The Respondent submitted that there is no error apparent on the face of the record. The Applicant has wrongly filed this application under Order 45 Rule 3 of the Civil Procedure Rules which renders the application incompetent and should be dismissed on that ground.
25. The Respondent submitted that the Applicant has not identified any clerical, jurisdictional or manifest legal error in the judgment. The Applicant seeks a re-litigation of the merits which is impermissible in review; the court having rendered its decision the matter became *functus officio*. It relied on the description of the doctrine of *functus officio* in *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] KEHC 7107 (KLR) that:
- “*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”
26. The Respondent submitted that the prayer for terminal dues in the claim for USD 20,500, Kshs. 888,589.47 and USD 8,000 and not Kshs. 5,287,335 or USD 50,840 as claimed in the application was considered by the Court and rejected.
27. The Respondent relied on the definition of an error apparent on the face of the record in *Muyodi vs. Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:
- “In *Nyamogo & Nyamogo -vs- Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”
28. The Respondent submitted that the issue at hand goes to the fault attributed to the drafters of the Claimant's pleadings and not a question of oversight, error apparent on the face of the record or fault on the part of the court. Thus, an admission (if any) is only binding to the extent that it relates to a fact pleaded by the Claimant. The Claimant has not demonstrated any mistake or error apparent on the face of the record.
29. It is the Respondent's submission that the application does not fit the matrix of a review but an appeal; raises a merit issue and not a mistake or error apparent on the court. The Claimant is not seeking to correct any errors but challenging the findings of the court and the application of the law by the court on the issue which is an issue of the appellate court.
30. The Respondent submitted that the Claimant's Statement of Claim did not include a claim for the sum of Kshs. 5,287,335 or USD 50,840; the first mention of this amount arose in the application for review herein. Even the Respondent alluded to this figure, this cannot create a new cause of action. What was pleaded as terminal dues is: Salary Variable for June-December 2020- USD 20,500; Salary



Variable for June – October 2020 - Kshs 888,589/47; Salary December 2020- USD 8,000; Unpaid leave 25 days – USD 6,666.57; and Annual Air Ticket 2019 and 2020 USD 640 and 505.

31. The Respondent submitted that this court pronounced its judgment on terminal dues by awarding leave days and the air ticket; it did not award the salary variable as the “salary was unilaterally reduced by the Respondent”; as was stated in the judgment.
32. The Respondent submitted that it is trite law that parties are bound by their pleadings. The Claimant pleaded salary variable which the court pronounced its determination on the same. There is nothing that can be the subject of a review in the final judgment of the court as this court made a determination of this matter in accordance with the Claimant’s pleadings.
33. The Respondent submitted that its admission was mistaken given that the court correctly found no legal basis existed for the terminal dues given that a valid Addendum Agreement signed by both parties had reduced the salary of the Claimant and hence there was no need to claim the salary variables.
34. It is the Respondent’s submissions that the court’s duty is to ensure justice prevails over technical admissions. Since the terminal dues were not legally recoverable, the court was right to dismiss the claim.
35. I have considered the averments and submissions of the parties herein. In the claim filed by the claimant herein, para 21(3) the claimant prayed for payment of her terminal dues and compensatory damages.
36. The respondents in their response at para 17(iv) of the response admitted that they have not paid the claimant her terminal dues since she had not cleared with the respondents.
37. In their submissions before court, the respondents also acknowledged an outstanding amount of kshs 5,287,335/- or USD 50,840 owing to the claimant which included leave days and salary variables.
38. In my judgment, I found for the claimant and awarded her the leave not taken at USD6,666.57 but failed to make further awards as pleaded and acknowledged by the respondent to the tune of USD 50,840. This is an error apparent on the record which I proceed to review at para 57 of my judgement to include the 50,840 terminal dues.
39. The judgment is accordingly reviewed at para 57 to indicate that the claimant is entitled to her terminal dues inclusive of the leave granted at para 56 and the total thus awarded :
 1. 1,144 USD – air ticket to India.
 2. 50,840 terminal dues.Total = 51,985 USD plus costs of this suit and interest at court rates with effect from the date of the judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH OF JUNE, 2025.

HELLEN WASILWA

JUDGE

