Zakayo v Timaflor Limited (Miscellaneous Application E005 of 2024) [2025] KEELRC 2273 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2273 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

MISCELLANEOUS APPLICATION E005 OF 2024

ON MAKAU, J

JULY 31, 2025

BETWEEN

ABRAHAM ZAKAYO ..... APPLICANT

AND

TIMAFLOR LIMITED ..... RESPONDENT

RULING

1. On 20th December 2024 I rendered a ruling whereby I adopted as Judgment of the court assessment by the Director of Occupational Safety and Health (DOSH). The sum assessed was Kshs.638,214.05 plus costs and interest. The respondent/ Judgment Debtor was aggrieved and brought the Notice of Motion dated 4th February 2025 seeking the following orders: -

    a. That the Honourable Court be pleased to review its ruling delivered on the 20th December 2024 and specifically discount the sum of Kshs.477,042.00 from the sum payable to the applicant, being the medical expenses directly incurred by the employer/applicant.

    b. That the costs of the application be provided for.

2. The motion is supported by the Affidavit of the Legal Officer of the applicant's insurer, Cheryl Odipo sworn on 4th February 2025 and it is opposed by the respondent (claimant) vide a Replying Affidavit sworn on 28th February 2025.

3. The applicant's case, is that there is an error on the face of the record in the impugned ruling because the medical expenses of Kshs.477,042 paid by the applicant on behalf of the respondent were counted as part of the awardable sums to the injured employee. It is further applicant's case that granting the sum of Kshs.477,042 to the respondent would amount to unjust enrichment since he never met the said medical expenses.

4. The respondent's case on the other hand, is that the application has been made after inordinate delay of two months. It is further respondent's case that the applicant failed to challenge the award before the Director and therefore the award is now due and owing. The respondent further avers that the alleged payment of medical expenses were paid long after he was discharged from the hospital. Finally, he averred that the issue being raised now was dealt with by the court in the impugned ruling.

5. The motion was canvassed by written submissions. I have considered the motion, Affidavits and the submissions. The issue for determination is whether the applicant has demonstrated to the satisfaction of the court, that there exists an error apparent on the face of the record, that warrants review and/or varying of the impugned ruling.

6. The relevant law to the instant motion is rule 74 (1) of 2024 which provides that: -

> "74(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."

7. The application, was made about two months after the impugned Ruling and the respondent contends that it was an inordinate delay. However, considering that there was a court recess in between, I do not find the delay in making the application to be unreasonable.

8. Turning to the merits of the motion, the Replying Affidavit sworn by Cherly Odipo on 24th July 2024 in response to the application for adoption of the DOSH Assessment, stated as follows in paragraph 7-10: -

> 7. That the respondent had offset the medical expenses incurred in the treatment of the applicant herein as demonstrable in the funds transfer proof attached hereto and marked CO2 made in favour of M/s Nanyuki Cottage Hospital.
>
> 8. That as the respondent's insurer, we upon notification of the claim by the respondent did remit the sum as assessed by the director on the permanent and temporary incapacity and the medical expenses refund to the contractual limit totaling Kshs.370,225 as per the discharge voucher attached and the remittance advice hereto and marked CO2.
>
> 9. That the applicant having not met the medical expenses, it would be tantamount to unjust enrichment to condemn the respondent refund the claimant that which he did not incur.

10. That the respondent has at all times been ready and willing to pay the award made by the Director under the permanent and temporary incapacity as evidenced in the copy of the cheque dated 29th March, 2024 for Kshs.136,752.00."

9. Then, in my ruling, I stated in paragraph *8* and *9* as follows: -

8. However, the respondent alleges that it referred the applicant for a second medical opinion whereby the disability was reviewed and the award compensation went down to Kshs.370,225.00 which was paid.

9. There is no documentary evidence showing that the applicant underwent the second medical examination and finally received any payment of Kshs.370,225.00 from the respondent or at all. I took the trouble of checking from the CTS e-files but saw no such documentary evidence."

10. There is no doubt that the above excerpt from my ruling points to an error on the face of the record as there was no mention of second medical examination in the Replying Affidavit that led to the reduction of the DOSH award of Kshs.638,214.05 to Kshs.370,225. The said Kshs.370,225 was the sum assured that was paid to the employer by the insurer and not the employer to the injured employee as indicated in the impugned ruling.

11. Having said that, I proceed to review the impugned ruling by varying the same to the extent that the sum of Kshs.477,042 is discounted while paying the respondent (claimant) the DOSH award of Kshs.638,214.05. The reason for the foregoing is that, the respondent (claimant) did not prove that he paid the said sum which was assessed as medical expenses. Besides, the applicant had filed a Domestic Fund Transfer to prove that it is the one that paid the medical expenses of Kshs.477,042 on 21st June 2022. Whether the medical expenses were paid after the discharge of the respondent is not material.

12. In conclusion, I allow the application dated 4th February 2025 in terms of prayer 3 thereof. Each party shall bear own costs of the application because it was occasioned by an error apparent on the face of the record.

DATED, SIGNED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.