Hayombe v Kenya Water Institute (Employment and Labour Relations Cause E151 of 2022) [2025] KEELRC 2423 (KLR) (4 September 2025) (Ruling)

Neutral citation: [2025] KEELRC 2423 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E151 OF 2022

HS WASILWA, J

SEPTEMBER 4, 2025

BETWEEN

PATRICK HAYOMBE .... CLAIMANT

AND

KENYA WATER INSTITUTE .... RESPONDENT

RULING

1. The Claimant/Applicant filed Notice of Motion dated 10th April 2025 seeking orders that: -
    1. spent
    2. the firm of Isinta & Company Advocates be allowed to come on record for the Applicant herein in place of the Office of the Attorney General.
    3. there be a stay of execution of the Honorable Court's Judgment entered on 20th February 2025 pending hearing and determination of this Application.
    4. the Honorable Court be pleased to set aside the Judgment entered on 20th February 2025.
    5. the Applicant herein, through its witness; be allowed to adduce evidence demonstrating the Respondent/Claimant was earning a second salary from another public institution to wit Jaramogi Oginga Odinga University of Science and Technology while employed at the Applicant Institute.
    6. the Claimant/Respondent herein be recalled for cross-examination to respond solely on whether he was earning a salary from two public entities.
    7. the costs of this Application be provided for.

Respondent/Applicant's Case

2. The Applicant avers that when the matter came up for inter partes hearing of the main suit, the Applicant's witness was not able to produce evidence confirming the Claimant/Respondent was earning a salary from two separate public institutions.

3. The Applicant aver that for reasons best known to them; the state counsel who represented the Applicant failed to present documentary evidence confirming that the Claimant/Respondent was earning two salaries from public entities.

4. The Applicant avers that it would be against public policy and prudent management of taxpayer funds for the judgment herein to stand uncontested.

5. It is the Applicant's case that the Office of the Attorney General did not take reasonable steps to prepare the Applicant's witnesses and produce evidence in aid the Applicant's case during the main hearing.

6. It is the Applicant's case that the application could have been brought earlier but the Office of the Attorney General took long to update it on the delivery of the judgment.

7. The Applicant avers that it has raised valid grounds to convince this court review its judgment and it would be greatly prejudiced if the judgment is not reviewed

8. The Applicant avers that there would be wastage of public funds if it is compelled to pay the decretal sum arising from the judgment. Further, the Claimant/Respondent would suffer no prejudice if the judgment is set aside and the matter be heard again partly.

Claimant/Respondents' Case

9. In opposition, the Claimant/Respondent filed a replying affidavit dated 6th May 2025.

10. The Claimant/Respondent avers that the Applicant lost the right to seek a review as a perusal of the judiciary e-filing portal reveals a notice of appeal dated 6th March 2025 filed on 11th March 2025 though the same has not been served upon him or his advocates on record. He relies on Order 45 Rule 1(a) provides that any person aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred may apply for a review without unreasonable delay.

11. The Claimant/Respondent avers that There is no new evidence or important matter discovered to invoke the court's jurisdiction to allow the orders sought in the application and that such evidence is not placed before this court. The Applicant had all this information knowledge yet failed to produce it thus cannot seek to rely on it late in the day.

12. The Claimant/Respondent avers that the Applicant has never produced any correspondences to demonstrate that it wrote to any institution seeking evidence that he was earning a double salary. Furthermore, this Court interrogated the matter and concluded that the Applicant's allegations are untrue and unfounded.

13. The Claimant/Respondent avers that it is unreasonable and unfair to allow this application for reason that the matter was registered on 8th March 2022 and since then it has been mentioned at least 9 times, when the Applicant failed to seek the court's indulgence to file any new evidence. Additionally, the matter came up for hearing on 7th December 2023, 11th April 2024 and 9th July 2024 wherein the Applicant was granted leave to file a witness statement. At no point did he seek to file any new evidence as he confirmed he had filed all evidence needed in the case.

14. It is the Claimant/Respondent's case that if the Applicant is purporting that counsel from the office of the Attorney General handling the matter is either incompetent or offered inadequate representation, he has a recourse by writing to the Attorney General but not by seeking to review the judgment.

15. The Claimant/Respondent avers that it is in public interest that taxpayers who are unfairly terminated from employment like him should be compensated once a court of competent jurisdiction pronounces itself to enable him utilize the money in profit making ventures which will in turn yield more taxes to the government thus the Applicant risks to lose nothing.

16. The Claimant/Respondent avers that it is wastage of public resources to seek to re-litigate a matter which was raised in the proceedings simply because the Applicant failed to place concrete evidence in court. The Claimant should not be punished for the Applicant's failure to present a solid defence in court.

Respondent/Applicant's Submissions

17. The Applicant submitted that it was never made aware of any appeal being filed as the Office of the Attorney General did not inform it the said appeal. In any case, no steps have been taken to prosecute such an appeal. The Office of the Attorney General acted on its own when it filed the Notice of Appeal as it lacked the Applicant's instructions. The Applicant contends that at the time its newly appointed advocates filed this application under certificate of urgency, they had no way of knowing the Notice of Appeal had been filed.

18. It is the Applicant's submission that the fact that a Notice of Appeal had been filed did not preclude it from approaching this court for review of its judgment. Further, filing of a Notice of Appeal on its behalf did not translate into an actual appeal. It relied in Swaleh & 6 others v Compact Freighters Systems Limited [2023] KEELRC 983 (KLR) which cited the Court of Appeal case of Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited, Communications Commission of Kenya & Kenya Broadcasting Corporation [2020] KECA 633 (KLR).

19. The Applicant submitted that from the holding in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited(supra), it is apparent that an appeal at the Court of Appeal is considered beyond the notice of appeal. A Memorandum of Appeal as well as a Record of Appeal would have to be lodged for it to be considered and appeal. The Claimant/Respondent herein merely indicated that a notice of appeal has been filed, which does not in any way close the door for review to the Applicant.

20. The Applicant submitted that failure to annex the Decree/Order would not render the application fatally defective as held in Karanja (Suing as the Representative of the Estate of David Karanja Ng'ang'a) v Kiboinet t/a Sweetland Consultant Limited & 2 others [2024] KEELC 3654 (KLR) wherein it was held:

> "On whether the failure to attach the order/ruling would render the Application fatally defective, this Court notes that there is no requirement under Order 45 of the Civil Procedure Rules for an applicant to annex the order or ruling sought to be reviewed. This requirement appears to have arisen from practice. Being a procedural requirement, it is in some circumstances curable by Article 159 (2)(d) of the *Constitution* of Kenya 2010 and hence, in those rare instances, it is not fatal to the application."

21. It is the Applicant's submission that there is sufficient reason to warrant review of its judgment as it is uncontroverted that the Claimant did actually hold another job while working for the Applicant. It

is on record that the Applicant did raise this issue through its witness during hearing but the requisite evidence had not been filed.

22. The Applicant submitted that the letter from Jaramogi Oginga Odinga University of Science and Technology goes to core of demonstrating that the Claimant is not deserving of this court's judgment. The Claimant in his replying affidavit dated 6th May 2025, does not deny this fact; he only indicates that the Applicant has not demonstrated that it wrote to any institution seeking for evidence. The Applicant contends that as long as the Claimant fails to explicitly deny that he was holding two jobs, he basically admitted to the fact.

23. It is the Applicant's submission that it is not uncommon for a party's advocate to fail to exercise diligence in preparation and filing of pleadings and documents. The fact that the Applicant's witness mentioned the issue of the Claimant holding another job while working for the Applicant should be sufficient cause for the court to interrogate the issue further.

Claimant/Respondent's Submissions

24. The Claimant/Respondent submitted that the conditions precedent to granting of orders of review are: there is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge and which could not therefore produce at the time the order was made; or some mistake or error apparent on the face of the record; or any other sufficient reason. Additionally, the application must be made without unreasonable delay.

25. It is the Claimant/Respondent submissions that the Applicant had the document in its possession but failed to adduce it into evidence. Additionally, the Applicant has not demonstrated that basic due diligence could not have led to the discovery of the evidence.

26. The Claimant/Respondent submitted that during vetting and/or interviews for the position of CEO, the Applicant carries out thorough due diligence, therefore, it is untrue that basic due diligence could not have led to discovery of the document sought to be relied on. The Applicant already had the documents in their possession and failed to produce the same hence they cannot form a basis for an application for review.

27. The Claimant/ Respondent relied in the case of Pentecostal Assemblies of God v Peter Gathungu & others [2021] KEELC 3506 (KLR) wherein it was held:

> " On the issue of whether there was discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants' knowledge. The case of Republic -v- Advocates Disciplinary Tribunal Exparte Apollo Mboya (2019) eKLR the court held that: "For material to qualify to be new and important evidence or matter, it must be of such a nature that could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court."
>
> Similarly, in the case of Evan Bwire v Andrew Aginda Civil Appeal No. 47 of 2006 cited in the case of Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR the Court of Appeal held as follows:
>
> > " An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case a fresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated

> the existence of new evidence which he could not get even after exercising due diligence."

28. The Claimant/Respondent submitted that the court proceedings and the replying affidavit have shown clearly that the Claimant did not hold two positions at the same time. The court was satisfied with his explanation under oath and found no merit in the allegations by the Respondent hence dismissed the same. Therefore, the Applicant's assertion that it was impossible to get the details about the Claimant holding two jobs at the same time and that the Claimant did not deny this assertion is untrue.

29. The Claimant/Respondent submitted that a party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending as held by the Court of Appeal in Kisya Investments Ltd Vs Attorney General and another Civil Appeal No 31 of 1995 (unreported). Additionally, the Supreme Court in University of Eldoret & another v Sitienei & 3 others [2020] KESC 76 (KLR) held:

> " It is evident that following the decision of the Court of Appeal, the applicants were faced with two options – to, either file for review of the decision to the same Court or pursue an appeal before this Court within either of the applicable jurisdictional contours. The applicants, as advised by their advocates, chose the former. We agree with the applicants' advocates that they could not concurrently pursue both options as that would be an outright abuse of judicial process."

30. It is therefore the Claimant/Respondent submission that the remedy of review is only available to a party who, though has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. Thus, the person cannot exercise both the right of appeal and review at the same time.

31. The Claimant/Respondent submitted there is no imminent risk or threat of execution as the decree is yet to be extracted. Furthermore, the decree-holder is yet to commence execution process as Section 21 of the *Government Proceedings Act* and Order 53 of the Civil Procedure Rules provides that the decree-holder must institute judicial review for orders of mandamus compelling the judgment debtor to settle the decretal sum. Therefore, the application is premature and must fail.

32. The Claimant/Respondent submitted that it is not in public interest that public resources be expended in filing application after application especially after a party had been given adequate and sufficient time to prosecute its defence. He further contends that obligation of employers once found culpable of unfair labour practices to comply with the law by settling judgment awarded to their former employees.

33. It is the Claimant/Respondent's submission that the Applicant has not demonstrated any grounds to warrant this court's discretion in its favor. There is no new evidence, mistake or error apparent to warrant a review of the judgment.

34. I have examined all the averments and submissions filed by the parties herein. The issues to determine are basically threefold;-

    1. Whether counsel can be allowed to file an application seeking leave to come on record and in the same application seek other substantive orders after closure of a case and delivery of judgement without leave of court.

    2. Whether a party who has filed an application for appeal can also seek review orders when the appeal in pending.

3. Whether the applicants application meet the requisite prerequisites for grand of orders of review.

35. On the first issue, order 9 rule 9 of the Civil procedure Rules 2010 states as follows:-

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

In the current application, there is no indication that the applicants counsel sought leave to come on record before filing the application for review. The application for review cannot be filed by a counsel improperly on record. In the circumstances of this case then the application for review cannot be allowed to proceed when counsel is not properly seized of the authority to file the application.

36. On the issue of whether the applicants who have already filed a notice of appeal can also file an application for review, the respondents submitted that the applicants cannot choose to file both an appeal and also seek orders for review. Rule 74 (1) of the ELRC rules 2024 state as follows:

Review (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. My understanding of the above rule is that an application for review is available where no appeal is allowed and where no appeal has been preferred. In the current case however, the applicants filed a notice of appeal and later an application for review. My view is that the applicant should choose one path and not both and in so doing this is an abuse of the court process

38. On issue of whether the application is grounded on valid reasons, rule 74 is clear on when an application for review can be filed. The applicant has not explained any new evidence not in their possession which could not be submitted before court. Their failure to call evidence cannot be equated to absence of the said evidence at the time they were to produce it.

39. It is my finding that the application cannot therefore stand in the circumstances and is dismissed accordingly with costs

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF SEPTEMBER 2025.

HELLEN WASILWA

JUDGE