



Muriuki & another (Suing as the legal representatives of Patrick Kiburu Muriithi) v Isinya Roses Limited (Miscellaneous Application E006 of 2022) [2024] KEELRC 313 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 313 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E006 OF 2022
DN NDERITU, J
FEBRUARY 22, 2024**

BETWEEN

BEATRICE GATHONI MURIUKI 1ST APPLICANT

ALVIN WAJIKU KIBIRU 2ND APPLICANT

SUING AS THE LEGAL REPRESENTATIVES OF PATRICK KIBIRU MURIITHI

AND

ISINYA ROSES LIMITED RESPONDENT

RULING

I. Introduction

1. In a ruling dated 29th March, 2023, this court issued the following orders –
 - a. The preliminary objection by the Respondent succeeds partially on the ground that the application and the action herein is statutorily time-barred.
 - b. The Notice of motion dated 14th February, 2022 by the Applicants is dismissed as the same was filed out of the time allowed in law.
 - c. Each of the parties shall meet own costs.
2. In a notice of motion dated 2nd May, 2023 (sic), filed in court on 4th April, 2023 (the application) the applicants are seeking for the following orders –
 1. That the Honourable Court be pleased to set aside or review the ruling delivered on the 29th day of March, 2023.



2. That this Honourable Court be pleased to review the ruling delivered on the 29th of March, 2023 and find that the claim is not statute barred considering the special circumstances surrounding WIBA matters for the period until Supreme Court of Kenya pronouncement on Petition No.4 of 2019; *Law Society of Kenya vs. Attorney General & Another* (2019) eKLR.
3. That the costs of this application be provided for.
3. The application is expressed to be brought under the provisions of sections 1A, 1B, & 3A of the *Civil Procedure Act*, Order 45, rule 1 and Order 51 rule 1 & 3 of the *Civil Procedure Rules* and all other enabling provisions of the law. It is based on the grounds on its face and supported with the affidavit of Peter Chege, Advocate, sworn on even date with several annexures thereto.
4. The respondent is opposed to the application as per the replying affidavit of Avril Mbulwa sworn on 8th September, 2023, and filed in court on 13th September, 2023.
5. By consent of Miss Achieng' for the applicants and Miss Kendi for the respondent, the court directed that the application be canvassed by way of written submissions. The submissions by the applicants' counsel were filed on 8th November, 2023, but none were filed by the respondent's counsel.

II. Background

6. The applicants are the legal representatives of Patrick Kibiru Mureithi (deceased) who died while on duty in the employment of the respondent on 9th June, 2016. The applicants obtained a limited grant of letters of administration ad litem on 27th July, 2017, issued by the High court at Nyahururu.
7. Following the death of the deceased a claim was lodged with the director of occupational safety and health officer, Nakuru office, and by a notice dated 22nd September, 2016 the director informed the respondent that the compensation for the death had been assessed at Kshs.5,230,392/= and the respondent was demanded to settle the claim or ostensibly appeal in case it was dissatisfied with the same.
8. The respondent neither settled the award nor appealed against the same. As a result, the applicants commenced proceedings by way of a notice motion dated 14th February, 2022 (over five years since the award was made) which was filed in court on 6th April, 2022, seeking to enforce the award. It is this application that was heard and determined by the court vide the ruling and orders issued on 29th March, 2023, alluded to in the first paragraph of this ruling.
9. It is the above-mentioned ruling that the applicants are now seeking to have set aside and or reviewed through the instant application.

III. Evidence

10. In the supporting affidavit it is deposed that in delivering the ruling of 29th March, 2023, the court failed to appreciate the circumstances of the matter as at the time the award was made there were allegedly in force stay orders of all claims under *Workmen Injury Benefits Act* (WIBA) pending the outcome in Supreme Court Petition No. 4 of 2019 – *Law Society of Kenya v The Attorney General & Another* (2019) eKLR.
11. It is stated that the applicants filed Engineer CMCC No. 150 of 2017 for adoption of the award but the same was stayed pending the outcome of the foregoing petition in the Supreme Court. It is alleged



that the applicants had no way of enforcing the award until the Chief Justice issued directions in the circular of 15th September, 2020.

12. It is deposed that the applicants were not indolent in bringing the application for enforcement of the award that was denied as stated above. It is deposed that the confusion in the procedure to be adopted in the enforcement of the award caused the delay.
13. It is urged that if the court fails to review and or set aside its orders of 23rd March, 2023, the applicants shall suffer prejudice.
14. In the replying affidavit it is deposed that the application does not meet the threshold for review set under Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules* – 2016 as no error has been demonstrated on the face of the record, no new evidence that could not be obtained earlier on with due diligence has been presented to court, and no other sufficient cause has been demonstrated as to persuade the court to review or set aside its said orders.
15. It is deposed that all the “new” evidence and circumstances now alleged by the applicants were within their knowledge as at the time of filing the application for the adoption of the award which was denied by the court.
16. It is deposed that what the applicants have filed, in disguise of an application for review, is an appeal against the ruling of the court, yet the court cannot sit on appeal over its own ruling or orders.
17. It is deposed that at no time did the Supreme Court issue stay orders for causes pending in court under *WIBA* and the applicants have not disclosed the fit of the cause filed in the Magistrate’s court at Engineer alluded to above.
18. Further, it is deposed that this court is *funtus officio* in regard to the issues raised having determined the application, and that the application is filed in total abuse and violation of the court process. The court is urged to dismiss the application.

IV. Submissions by Counsel for Applicants

19. As stated in an earlier part of this ruling, counsel for the respondent did not file written submissions.
20. In her submissions, counsel for the applicants insists that the court got it all wrong in the ruling and orders issued on 29th March, 2023 by holding that the application for enforcement of the award of the director was filed out of time. It is submitted that there is no limitation for filing such proceedings. It is therefore submitted that the court erred in law and arrived at the wrong decision in dismissing the application for enforcement of the award.
21. Without availing any evidence, counsel alleges that there was a stay order from the Supreme Court in Petition No. 4 of 2019 (*supra*) which allegedly denied the applicants the opportunity to file the proceedings for enforcement within the period of three years.
22. Further, it is submitted that the court misapprehended the application by applying the *Employment Act* instead of solely relying on the provisions of *WIBA*. The court is urged not to be “obsessed with the strict and in all fairness ambiguities of the law at the expense of a prejudiced litigant”.
23. According to counsel for the applicants, proceedings for enforcement of an award by the director under *WIBA* have no time limitation and it is therefore urged that the application be allowed as prayed.



V. Analysis & Determination

24. In my considered view, there is only one main issue for determination in this application – Should the court review and or set aside the orders issued in the ruling of 29th March, 2023?
25. While there is no doubt that the provisions of the [Civil Procedure Act](#) apply to this court (ELRC), just like any other statute in force in the Republic, it is important to note that the court has its own rules of procedure – The [Employment and Labour Relations Court \(Procedure\) Rules](#) - 2016 – that regulate the proceedings before it. Rule 33 of those rules provides for review as follows –
1. A person who is aggrieved by a decree or an order from which an appeal is allowed may within reasonable time, apply for a review of the judgment or ruling-
 - a. if there is discovery of new and important matter or evidence which, after 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.
26. The above law is unambiguous on the circumstances and reasons for which this court may set aside and or review its orders, rulings, or judgments. There is no debate that no court shall sit on appeal over its own decisions, and the only way a court may revisit its own decisions is by way of a review as provided for in the law cited above. It is the above provisions that shall be applied to the facts and circumstances of the application herein in order to determine if indeed the court should set aside and or review the ruling and the orders issued on 29th March, 2023.
27. It is paramount to keep it in mind that the very reason that the court struck out the application seeking for enforcement of the award of the director in the ruling of 29th March, 2023, is that the application was filed way out of time, beyond the three years within which employment and labour relations claims should be filed under section 90 of the [Employment Act](#). There is no doubt that the award that the applicants wish to have enforced arose from an employment relationship between the deceased and the respondent herein.
28. Under rule 33 of the [rules](#) of this court, the impugned ruling and the orders therein may only be set aside and or reviewed on the grounds of any of the clear and unambiguous conditions set out in the reproduced law above.
29. It is the finding and holding of this court that no new and important evidence has been presented by the applicants to the court which has been discovered subsequently and which the applicants, with due diligence, were not aware of or was not within their knowledge as at the time the proceedings were commenced. The only new information availed is that the applicants had filed a claim with the Chief Magistrates Court, Engineer, over the same subject matter. The applicants are economical with information on the status of that cause and why, if so, they have not prosecuted the same to logical conclusion. In fact, if the applicants are admitting, and indeed that is the position, that they commenced the proceedings herein while the suit in the lower court was pending, then the applicants are in total abuse of court process.



30. It is also alleged by the applicants that all proceedings under *WIBA* were at some point stayed by the Supreme Court. No evidence of such an order or directive for stay has been availed in court and the court is not aware of such an order.
31. The applicants allege that there is a mistake or error apparent on the face of record because, according to them, the court misapprehended the law in issuing the ruling and orders of 29th March, 2023. For all intents and purposes, that is a ground of appeal not a ground for review or setting aside the said ruling and orders.
32. The applicants are not seeking clarification of any alleged ambiguity in the said ruling and orders issued or the interpretation of the same.
33. The court has then to ask itself if there are other sufficient reasons or circumstances that may incline the court towards allowing for the review or setting aside of the impugned ruling and the orders. As stated above, the ruling exhaustively dealt with the issue of limitation of time in filing claims emanating from or relating to employment and labour relations. The applicants are not asking the court to extend or enlarge the time within which to file the enforcement proceedings, and even if that was the application, the law is couched in mandatory terms and there are no provisions for such extension or enlargement.
34. In the considered view of the court, the applicants are asking this court to sit on appeal of its own ruling and orders for the reason that the court, in the opinion of the applicants, misapprehended the law when it held that the claim was time barred.
35. It is also the finding and holding of the court that there is no evidence, circumstances, and or reasons that may persuade the court to review the said ruling and orders under rule 33 cited above. It is not alleged that the order was made as a result of clerical mistake, incidental error, or omission that may be corrected or rectified under rule 34 cited above.
36. As difficult and agonizing as it may be, the court is not persuaded to review or set aside its orders in the ruling of 29th March, 2023.
37. That said and as the court stated in the said ruling, the respondent should consider the moral and corporate implications of its failure to settle the award and not necessarily hide or shield itself behind the ruling of this court which was purely based on limitation of time in filing of the claim.

VI. Orders

38. Consequently, the notice of motion by the applicants dated 2nd May, 2023 is hereby dismissed with no order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 22ND DAY OF FEBRUARY, 2024.

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DAVID NDERITU

JUDGE

