



Kenya Engineering Workers Union v Kenya General Industries (Cause E075 of 2022) [2024] KEELRC 940 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 940 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E075 OF 2022
M MBARÚ, J
APRIL 18, 2024

BETWEEN
KENYA ENGINEERING WORKERS UNION CLAIMANT
AND
KENYA GENERAL INDUSTRIES RESPONDENT

RULING

1. The claimant, Kenya Engineering Workers Union filed a Review Notice of Motion dated 20 February 2024 under the provisions of Rule 33 and Section 16 of the [Employment and Labour Relations Court \(Procedure\) Rules](#), 2016 seeking orders that;
 1. Spent.
 2. Spent.
 3. The court deem fit and issue an Order setting aside and or reviewing the ruling delivered on 25 May 2023 either partial or in totality.
 4. The court do order the respondent to pay the grievant their accrued benefits by herself in her letter dated 11 October 2023 to the court,
 5. Costs of this application be in the cause.
 6. Any other relief that the court may deem fit
2. The application is supported by the affidavit of Wycliffe Nyamwata on the grounds that on 25 May 2023, the court delivered a ruling dismissing the claimant's suit due to the limitation of time with costs to the respondent. It came to the attention of the claimant that on 15 February 2024, the respondent had written to the court on 11 October 2022 proposing payment of accrued benefits which were not in the possession of the claimant at the time the preliminary objections were addressed.



3. The court awarded the respondent costs but the respondent has filed a bill of costs for the entire suit yet the same was filed out of time and without leave. Accrued benefits are not employers' money and do not have limitations as some companies choose to pay annually and some do put them in pension schemes therefore the same cannot be denied. The respondent was only a custodian of the grievants' accrued benefits hence the reason they offered to pay.
4. In his affidavit, Nyamwata aver that he is the general secretary of the claimant and conversant with the claim and in support of the application.
5. In reply, the respondent filed the Replying Affidavit of Cecilia Mango advocate for the respondent on the grounds that on 21 May 2023 parties attended herein, and preliminary objections were addressed with a finding by the court that the claim was time-barred per section 90 of the *Employment Act*, 2007. The ruling of 25 May 2023 dismissed the claim with costs to the respondent. It has since been over 10 months without the claimant taking any action and the instant application is only filed after service of the Bill of Costs. The claimant has not met the requirements of Rule 33 of the *Court Rules* to claim for a review. Upon the dismissal of the claim, the respondent is justified in claiming costs and the instant application is without merit and should be dismissed with costs.
6. Both parties attended and made oral submissions. These submissions are analysed and the issues which emerge for determination are the following;
 1. Whether the court should set aside or review the ruling delivered on 25 May 2023;
 2. Whether the respondent should be ordered to pay the grievants their accrued benefits as proposed; and
 3. Whether there should be a stay of the taxation proceedings.
7. A review of court orders is allowed in terms of Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 (the *Court Rules*). However, an applicant must satisfy the threshold thereof. In that there must be an error apparent on the face of the record, the discovery of a new matter that was not present at the time the decision was issued and that there is a good cause.
8. The principles for a review application are also outlined by the Court of Appeal in Civil Appeal No. 2111 of 1996, *National Bank of Kenya Vs Ndungu Njau*, the Court held that;
9. 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-evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law.
10. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
11. The claimant has relied on the letter dated 11 October 2022 on the basis that the respondent had offered to pay some grievants their employment dues. This letter was sent to the court by the respondent who was seeking more time to help parties to negotiate the claims out of court. The import of this letter was not to the claimant admitting liability or offering to settle the claim but a letter to the Court with the sole aim of seeking more time to negotiate.



12. The letter is copied to the claimant, through the Nairobi office, Mombasa branch and the general secretary, Wycliffe Nyamwata. This letter proceeded with the hearing of the objections filed by the respondent and a ruling delivered on 25 May 2023.
13. The claimant cannot justify a claim that they only discovered this letter after the fact of the court ruling.
14. A matter dismissed for being time-barred is complete on that basis. The court is without jurisdiction to move forward. It cannot be revived through a review application or other craft. Jurisdiction is at the core of the court's judicial function. Without it, the court must stop as held in *Owners of Motor Vessel Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 that;

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

15. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulabi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR held that;

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another vs. Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;

1.
2. The jurisdiction either exists or does not *ab initio* ...
3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

the finding that there is no jurisdiction for want of application of Section 90 of the *Employment Act, 2009* cannot be revised by a letter dated 11 October 2022 seeking to negotiate the matter out of court. This is not the discovery of a new matter per the provisions of Rule 33 of the *Court Rules*.

16. On whether the respondent should be ordered to pay the grievants their accrued benefits, was a proposal made by the respondent as a point of negotiations. Did the claimant accept the offer? Was the offer negotiated successfully? Such are matters now removed from the court with the finding that the claim is time-barred by operation of the law.
17. As addressed above, the proposal dated 11 October 2022 must be reviewed in context. It related to the court attendance and the need to have more time to negotiate. The finding on the claims being time-barred resolved the matter with finality.
18. The claimant asserts that the grievants cannot be denied their employment dues particularly those secured in pension. The affidavit of Wycliffe Nyamwata does not elaborate there general averments. The amounts claimed, are they premised on a pension scheme? Are they employee benefits within employment or after employment?
19. The Memorandum of Claim related to the following claims;
 1. Gratuity pay;



2. Certificates of service;
 3. Costs.
20. The foundation of the claims thus outlined, the question of the offer to pay the grievances cannot be extended to pension payments. The claim did not relate to such matters. Where indeed the grievants had a pension scheme while in the service of the respondent, pension schemes apply a different regime of operations outside the employer and such is secured.
21. Should the court stop the taxation proceedings? Parties must attend before the Taxing Master and make their submissions. The Taxing Master is allowed to address and make a ruling and if dissatisfied, there is a procedure for redress. To stop the taxation proceedings at this stage would be to negate the role and mandate of the Taxing Master.
22. At this stage, the court should not be seen to influence on how the Bill of Costs should be addressed. Such mandate remains with the Taxing Master.
23. Accordingly, the application dated 20 February 2024 is without merit and is hereby dismissed with costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18 DAY OF APRIL 2024.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Japhet

..... and

The Judiciary of Kenya

