



**Nganga v Sinopec International Petroleum Services Corporation Limited (Employment and Labour Relations Appeal 57 of 2017) [2024] KEELRC 834 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 834 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 57 OF 2017**

**HS WASILWA, J  
APRIL 11, 2024**

**BETWEEN**

**PAUL NGANGA ..... APPELLANT**

**AND**

**SINOPEC INTERNATIONAL PETROLEUM SERVICES CORPORATION  
LIMITED ..... RESPONDENT**

**RULING**

1. Before me for determination is the Appellant/ Applicant Notice of Motion dated 25<sup>th</sup> January, 2024, filed under certificate of urgency pursuant to Article 50 of the Constitution, Section 16 of the Employment and Labour Relations Court Act, Rule 33 of the Employment and Labour Relations Court(Procedure) Rules, 2016 and all other enabling provisions of the law, seeking for the following Orders; -
  1. That this Application be and is hereby certified urgent and be set down for hearing on priority basis.
  2. That the judgement and decree dated and delivered by Hon. Lady Justice M. Mbaru on the 23<sup>rd</sup> day of January, 2020 be and is hereby reviewed and set aside and the Appellant Appeal is determined on merits.
  3. That costs of the Application abide the Appeal.
2. The Application is based on the grounds on the face of the Application and the supporting affidavit of applicant sworn on 25<sup>th</sup> January, 2024.
3. It is stated that the Appellant herein had proffered an appeal to this Court from the subordinate Court in Naivasha under CMCC Case Number 222 of 2014, for compensation for damage arising out of work related injuries.



4. After hearing of the Appeal, this Court-Justice Monica Mbaru delivered her judgment on 23<sup>rd</sup> January, 2020, declining to take up the Appeal for want of jurisdiction citing the supreme Court decision in Petition No 4 of 2019; *Law Society of Kenya v The Attorney General & Central Organization of Trade Union*. However, the Judge set aside the judgement and decree of the trial Court.
5. That the Appellant herein was aggrieved by that decision and appealed the matter further to the Court of Appeal under Nakuru COACA No 18 of 2020, which Appeal has been withdrawn to pave way for the hearing of this review application.
6. Subsequently, that the Chief Justice vide a Gazette Notice number 5476 of 28<sup>th</sup> April, 2023 gave directions interalia that; -
 

“All claims in respect of compensation for work related injuries and disease filed after commencement of *Work Injury Benefits Act*, 2007-WIBA and before the supreme Court decision at the Employment and Labour Relations Courts or the Magistrates Court shall proceed until conclusion before the said Court.”
7. Accordingly, that in light of the aforesaid directions, the judgement of this Court of the 23<sup>rd</sup> January, 2020 is untenable, erroneous on the face of record and therefore that there is sufficient reason to warrant review and setting aside of the judgement and decree.
8. He stated that he has constitutional right to have his appeal determined by this Court as enshrined under Article 50 of the *Constitution* of Kenya.
9. He stated that it would be discriminatory to the appellant were judgement and decree of this Court issued on 23<sup>rd</sup> January, 2020 is allowed to stand because the Appellant would be denied the right to have his appeal proceed to its conclusion and treated differently from the other litigants with similar claims filed before the supreme Court decision was made.
10. He stated that this Court has powers to review its judgement and decree to ensure ends of justice are met.
11. The Application is opposed by the Respondent who filed a replying affidavit deposed upon on 9<sup>th</sup> February, 2024 by Omwenga Kwamboka, the advocate ceased of the conduct of this matter on behalf of the Respondent.
12. The affiant state that this Honourable Court judgement, subject of the Appeal, was properly rendered as per the law prevailing at the material time. As such that, this Court set aside the judgment in the trial court delivered on 6/12/2017 hence the subordinate Court case is still alive and should be prosecuted to its logical conclusion.
13. The Respondent maintained that the Appellant herein has not been discriminated upon because he still has the window of prosecuting the trial Court case, pursuant to the direction issued by the supreme Court of Kenya.
14. The affiant stated that the notice of withdrawal of the Appellant’s Appeal No 18 of 2022 has not been endorsed and no order has been issued to that effect as such the Appeal is still alive in absence of an order endorsing the same.
15. The Deponent stated that the directions issued by the Chief Justice vide Gazette Notice No 5476 of 28<sup>th</sup> April, 2023 has not been indicted to apply retrospectively to the judgement that was rendered on 23/1/2020.



16. He stated that as it stands the Appeal has been determined and the Court is functus officio, hence the current application is not tenable.
17. He maintained that there was no error apparent on record that can be corrected by this Court and also that the Appellant has not given this Court sufficient reason to review its Judgement.
18. Directions were taken for the Application to be canvassed by written submissions.

### **Appellant's Submissions**

19. The Appellant submitted on whether the Applicant has established grounds for review of the decision of Justice Monica Mbaru rendered on the 23<sup>rd</sup> January, 2020. It was argued that the Appellant/Applicant herein had instituted a claim at the Naivasha Law Courts to wit Naivasha Civil Suit Number 222 of 2015 seeking damages for injuries that he had sustained while working at the Respondent's premises. The matter proceeded for hearing on diverse dates and parties filed their respective submissions. Judgement was delivered by Hon. D. Nyambu on the 6<sup>th</sup> December 2017 wherein he awarded the Appellant Kshs 1,005,000/= less 20% contribution. Being dissatisfied with the said decision, the Appellant herein lodged this Appeal. The same came up for hearing before Justice Monica Mbaru wherein she delivered a Judgment as follows and stated as follows.

“...Accordingly, for reasons set out above, the trial court acted without Jurisdiction, the judgement delivered on the 6<sup>th</sup> December 2017 is hereby set aside. Each party shall bear it's own costs.”

20. Based on the facts above and the decision rendered by this Court, the Appellant submitted that Rule 33 of *Employment & Labour Relations Court (Procedure) Rules 2016* states as follows;
  - (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 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.
  - (2) An application for review of a decree or order of the Court under subparagraphs(b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.
  - (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed. (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
  - (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
  - (6) An order made for a review of a decree or order shall not be subject to further review.



21. Similarly, that the Appellant seeks to have the Judgment issued by Justice Mbaru reviewed on the basis of any other sufficient reason as provided for under Rule 33 1(d) and aided by the directions issued by the Chief Justice vide Gazette No 5476 of 28<sup>th</sup> April 2023 gave directions inter alia, that;-

“All claims with respect to compensation for work related injuries and disease filed after commencement of *Work Injury Benefits Act, 2007*- WIBA and before the Supreme Court decision at the Employment and Labour Relations Courts or the Magistrates’ Courts shall proceed until conclusion before the said courts.’
22. On that basis, he argued that, the decision of the Honourable court rendered on the 23<sup>rd</sup> January 2020 is untenable and hence this application. Further that the said Gazette Notice had an effect of acting retrospectively in that Work Injury claims which were pending before the Magistrates Courts which had been closed for want of Jurisdiction are being heard to their logical conclusion in line with the directions issued.
23. Conversely, that the argument that the lower court file still exists at the Magistrates court is a bit unfounded and it is not true that the Appellant can proceed with the matter there as the court is already functus officio.
24. In conclusion, the Applicant submitted that he has demonstrated reasonable grounds following the withdrawal of the Appeal to have this court grant the orders sought and hear his appeal on merit.
25. The Respondent’s Submissions were not on record at the time of writing this ruling.
26. I have considered the averments and submissions of the parties herein. The applicant seeks review orders against the judgment of this court date 23/1/2020 declining jurisdiction to handle an appeal from the Naivasha CMCC No 222/2014 of 6/12/2017.
27. The applicant has averred that the ruling of this court (J – Mbaru) was erroneous in view of the judgment of the Supreme Court in Supreme Court of Kenya Petition No 4 of 2019 *Law Society of Kenya v Attorney General & COTU* and the subsequent Chief Justice’s directions vide gazette Notice No S476 of 28<sup>th</sup> April 2023 which directed that all cases related to work injury should proceed before the Employment and Labour Relations Court.
28. The appeal in respect of the ruling being sought to be reviewed was delivered on 6<sup>th</sup> December 2017. A decision of the Court of Appeal and for the Supreme Court of Kenya in the Petition No 4 of 2019 Petition No 4 of 2019 *Law Society of Kenya v Attorney General & COTU* and the Chief Justice’s direction indeed directed that the parties who had filed cases in court during the ensuing period of uncertainty had a legitimate expectation that the said cases would be concluded before the courts where they had been filed. Direction No 5 indeed stated as such in no uncertain terms in 2023.
29. The decision by Hon. J. Mbaru was however made before the practice directions by the Hon Chief Justice which clarified the confusion.
30. In the circumstances, it is true that the Hon. Court made an error which was an honest error before the practice directions were issued. The directions made by the Chief Justice makes it clear that matters were to proceed and be concluded in court where they had been filed. Given the judgment of Hon. J. Mbaru, an innocent litigant was locked out of court without any avenue as which to access justice.
31. It is therefore apt that the said orders be reviewed so that the appeal is allowed to proceed. There would be the orders of this court. Costs will abide the outcome of the appeal.

**RULING DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF APRIL, 2024.**



**HON. LADY JUSTICE HELLEN WASILWA**  
**JUDGE**

In the presence of: -

Amboko for Appellant – Present

Omwenga for Respondent – Present

Court Assistant - Fred

