



**Irungu v Wow Beverages Limited (Cause E6483 of 2020)  
[2024] KEELRC 1136 (KLR) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1136 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E6483 OF 2020**

**JK GAKERI, J  
MAY 21, 2024**

**BETWEEN**

**EMMA WANJIKU IRUNGU ..... CLAIMANT**

**AND**

**WOW BEVERAGES LIMITED ..... RESPONDENT**

**RULING**

1. Before the court for determination is the Respondent's Notice of Motion dated 5<sup>th</sup> October, 2023 filed on 11<sup>th</sup> October, 2023 under Certificate of Urgency seeking orders that;
  1. Spent.
  2. Spent.
  3. Spent.
  4. The court do review/set aside and/or vary the ruling and orders of 9<sup>th</sup> February, 2023.
  5. Spent.
  6. The costs of this Application be provided for.
  
2. The Notice of Motion is based on the grounds set out on its face and the Supporting Affidavit sworn by Philippe Cauviere on 5<sup>th</sup> October, 2023 who deposes that during the conduct of this matter since January 2019, the Respondent had no access to its offices and records at Thika owing to the investigation and KRA did not hand over the premises back even after a court order dated 23<sup>rd</sup> November, 2020 until December 2022 and the premises had been vandalized and in a state of ruin and thus could not file instant application on time as documents were inaccessible and data was lost.



3. The affiant deposes that after closure of the Respondent, the KRA froze its bank accounts from 2<sup>nd</sup> February, 2019 to 7<sup>th</sup> May, 2019 during which time the Claimant was paid a stipend to enable her carry out day to day activities and after re-opening of the accounts, the Respondent paid applicable salary arrears accrued from January to May 2019.
4. The affiant further deposes that the Claimant's staff pension was also remitted to Britam Life Insurance Co. (K) Ltd.
5. That the Claimant was untruthful as to the reasons for her resignation.
6. For unexplained reasons, the affiant deposes on matters that transpired before the suit was filed in 2015/2016 including to Criminal Case No. 1069 of 2015 which the Respondent withdrew.
7. The affiant further states that the Claimant faced disciplinary hearings in 2017/2018.
8. Finally, the affiant disposes the Claimant's performance from February to May 2019 was unsatisfactory and the financial impropriety was discovered after the Claimant's resignation.

### **Response**

9. By her Replying Affidavit sworn on an unspecified date in 2023, the affiant deposes that although Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provide for review of a judgment in certain circumstances, the application ought to be made without delay and the applicant had not demonstrated any new evidence capable of having the judgment altered and merely regurgitated documents already on record prior to the judgment.
10. That the Respondent is untruthful on access to its premises and the same ought to have been raised during the pendency of the case.
11. The affiant states that although the Respondent's bank accounts were frozen from 2<sup>nd</sup> February, 2019 to 7<sup>th</sup> May, 2019, the suit herein commenced in 2020 and the demand letter was not honoured and payment of salary, PAYE and pension deductions were the Respondent's obligations and proof of payment of salary is by bank records and statements which have not been availed.
12. The affiant deposes that evidence of a disciplinary hearing does not affect a constructive dismissal.
13. The affiant deposes that the Respondent's application was not made within reasonable time as judgement was delivered on 9<sup>th</sup> February, 2023.

### **Applicant's submissions**

14. As to whether the Respondent's application for review is merited, the applicant relies on Rule 33(1) (a) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* which addresses discovery of new and important matter or evidence not within the applicant's knowledge and could not be produced at the trial citing the cordoning off of its offices by the KRA since January 2019 and thus found the documents in December 2022 when access was granted.
15. The applicant urges that the Claimant's salary for February and March was paid as well as pension payments. That the Claimant was dishonest and resigned voluntarily.
16. Reliance was made on the sentiments of the court in *Alpha Fine Foods Ltd v Horeca Kenya Ltd & 4 others* (2021) eKLR, *Muyodi v Industrial & Commercial Development Corporation & another* (2006) 1 EA 243 and *Attorney General v Law Society of Kenya & another* Civil Appeal (Application) No. 133



of 2011 to urge that the Respondent had demonstrated a case for review of the judgment delivered on 9<sup>th</sup> February, 2023.

17. Finally, the applicant submits that the application was made without unreasonable delay.

### **Claimant's Submissions**

18. As to whether the orders sought should be granted, the Claimant submits that the applicant had not adduced any new evidence to warrant a review of the judgment.
19. That payment of PAYE is not clear evidence of payment of salary in the absence of evidence of transfer of funds to the Claimant's account.
20. The Claimant submits that evidence of a disciplinary hearing against the Claimant would not affect a claim founded on constructive dismissal as held by the learned trial judge.
21. The Claimant urges the court to dismiss the notice of motion with costs.
22. It is common ground that the Claimant filed the instant suit on 20<sup>th</sup> November, 2019 alleging unfair termination of employment and unlawful labour practices including non-payment of terminal dues.
23. The Claimant's evidence reveal that she resigned by written notice dated 10<sup>th</sup> June, 2019 which also served as the one month notice and served till 30<sup>th</sup> June, 2019.
24. The Claimant pleaded and itemised particulars of constructive dismissal namely; non-payment of salary for 4 months, unfriendly working conditions and variation of the terms of employment.
25. After the hearing, the trial judge delivered a judgment on 9<sup>th</sup> February, 2023, in favour of the Claimant.
26. The learned judge found and held that the Claimant was constructively dismissed by the Respondent and awarded compensation at Kshs.1,006,425/= comprising; notice pay Kshs.201,285/=, salary for February 2019 at Kshs.126,285/=, salary for April, May and June 2019 Kshs.630,855/= and leave pay Kshs.87,069.23.
27. Additionally, the court directed the Claimant to return the Respondent's laptop within 14 days, or the amount of Kshs.89,400/= would be deducted from the award made and the Claimant was to clear with the Respondent within 30 days. The Claimant was also awarded costs.
28. The Respondent's counter-claim was dismissed in its entirety.
29. This is the judgment against which the applicant seeks review and/or setting aside.
30. It is trite law that the law provides for review of judgments and orders and as correctly submitted by the Applicant/Respondent, Rule 33 of the *Employment and Labour Relations (Procedure) Rules, 2016* is the operative legal framework.
31. Rule 33 of the Rules provides;
  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 on the face of the record.



- c. if the judgment or ruling requires clarification; or
  - d. for other sufficient reason.
32. Before delving into the issue of the new evidence obtained, it is essential to dispose of the issue of timing of the application which is contested. While the Applicant Submits that it was filed without unreasonable delay, the Claimant urges that it was filed late as Rule 33(1) insists on reasonable time.
  33. It is trite that what constitutes reasonable time is a question of fact dependent heavily in the circumstances of the case.
  34. It is common ground that the judgment sought to be reviewed was delivered on 9<sup>th</sup> February, 2023 and the instant application was made on 11<sup>th</sup> October, 2023 more than 8 months later and the Applicant has not provided any scintilla of evidence or justification for the delay of 8 months which in the court's view is not reasonable and the Notice of Motion is amenable to being struck out for having been filed outside reasonable time. (See *Gatere Njamunyu v Joseck Njue Nyaga* (1983) eKLR).
  35. In its Submissions, the Applicant/Respondent discloses that it was relying on Rule 33(1)(a) of the *Rules*, that it had unearthed new evidence which was not within its knowledge at the time the judgment was delivered.
  36. In its response, the applicant, though mentioning specific documents did not demonstrate what it was intended to demonstrate for purposes of the review.
  37. For instance, what were the 11 unclear and unauthenticated pictures intended to demonstrate? When, where and by whom were they taken? In what room or building were they taken?
  38. Second, the Ruling by the trial Magistrate in MCCR Case No. 1333 of 2019 was delivered on 23<sup>rd</sup> November, 2020, long before the hearing took place on 27<sup>th</sup> September, 2022 and was thus within the applicant's knowledge, almost 2 years earlier.
  39. Similarly, evidence of emails on payment of Kshs.5,000/= as weekly transport allowance was adduced by the Claimant and was within the applicant's knowledge.
  40. Relatedly, printed pages of the payroll reveals the entitlement of employees including deductions but does not show whether the amounts specified were remitted to employee accounts.
  41. Also notable is the fact that while Mr. Kimeu did not rely on the emails on the Claimant's performance, he testified about it and alleged that the Claimant was to undergo disciplinary hearing for absconding work but availed no evidence.
  42. Mr. Kimeu admitted that the Claimant resigned from employment and did not clear with the Respondent.
  43. Finally, the rest of the documents relate to the Claimant's Suspension in October 2015 for 3 months at half pay pending investigation, invitation for disciplinary hearing scheduled for 1<sup>st</sup> February, 2016, notice to show cause and a warning letter dated 26<sup>th</sup> February, 2016.
  44. Also attached is a suspension and show cause letter dated 22<sup>nd</sup> December, 2017, invitation for a hearing and unsigned minutes for a disciplinary hearing held on 9<sup>th</sup> January, 2018 and 1<sup>st</sup> February, 2018.
  45. The probative value of the letters of suspension, warning and disciplinary hearing before 2015, 2016 and 2018 is that the Claimant had been suspended, warned and subjected to disciplinary hearing and may have been one of the parameters to be considered in the assessment of the quantum of compensation in the context of Section 49(4) of the *Employment Act*, 2007, although the trial judge



did not make a finding that the Claimant was guilty of any misconduct having found that it was a constructive dismissal.

46. To the question whether the applicant has demonstrated the discovery of new evidence which was not within its knowledge and could not have been produced before the decree was passed, the answer is in the negative as it accessed its premises before the judgement was delivered and could have made an application to re-open its case.
47. Similarly, the applicant had knowledge of the information in the documents. The only thing it did not have at the hearing were the actual documents and as such it did not discover any new evidence, it merely retrieved documentation on the information in its possession.
48. The court is further guided by the rendition of Musinga JA in *Attorney General v Law Society of Kenya & another* (*supra*) that;
- “Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”
49. Significantly, since the applicant’s accounts were frozen from 2<sup>nd</sup> February to 7<sup>th</sup> May, 2019, and the suit was filed in November, 2020, more than one (1) year later, the applicant had access to all records of payments made or transfers made but did not avail such evidence to prove the fact of payment of salary for February 2019.
50. In the upshot, it is the finding of the court that the Applicant has failed to make a sustainable case to justify a review of the judgment delivered by Monica Mbaru J. on 9<sup>th</sup> February, 2023.
51. Consequently, the Applicant/Respondent’s Notice of Motion dated 5<sup>th</sup> October, 2023 is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF MAY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

