



**Wijenje & another v Directline Assurance Company Limited & 7 others
(Cause 165 of 2020) [2024] KEELRC 2490 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2490 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 165 OF 2020
NJ ABUODHA, J
OCTOBER 11, 2024**

BETWEEN

**TERRY WIJENJE 1ST CLAIMANT
GAKOI MAINA & CO ADVOCATES 2ND CLAIMANT**

AND

**DIRECTLINE ASSURANCE COMPANY LIMITED 1ST RESPONDENT
ROYAL MEDIA SERVICES LIMITED 2ND RESPONDENT
ROYAL CREDIT LIMITED 3RD RESPONDENT
SAMUEL KAMAU MACHARIA 4TH RESPONDENT
PURITY GATHONI MACHARIA 5TH RESPONDENT
ISAAC NGARU 6TH RESPONDENT
DAVID NGUGI 7TH RESPONDENT
KAMAU KURIA & CO ADVOCATES 8TH RESPONDENT**

RULING

1. This ruling is in regards to two applications the first one being the 1st to 8th Respondents dated 27th March,2024 and the second by the 1st Claimant dated 8th April,2024 and amended on 26th April,2024.
2. The first application dated 27th March,2024 sought the following:-
 - a. Spent
 - b. Spent



- c. An order to review and set aside the order made by Lady Justice Mbaru on 28th March,2023 inter alia adopting as an order of the court a consent filed herein on 24th November,2022.
 - d. An order to review and set aside the consent decree issued herein on 15th March,2024 pursuant to the purported consent filed in court on 24th November,2022.
 - e. An order to review and set aside the order issued on 3rd April,2023.
 - f. Spent
 - g. Costs
3. The Application was based on the grounds set on the application and affidavit sworn by Samuel Kamau Macharia the 4th Respondent herein who averred that he swears the affidavit in support of the application for review of the orders and decree made herein between 28th March,2023 and 26th March 2024 where the Claimant was requesting to be paid by 29th March,2024 Kshs 168,381,028/=
 4. The Applicants averred that on 5th March,2024 the commissioner of insurance who is the Executive Officer of the Insurance Regulatory Authority communicated to the directors of the 1st Respondent and copied both shareholders and purported shareholders and other persons the verdict pertaining to the shareholders and control of the 1st Respondent since 2005.
 5. That the returns the court acted on in 28th March,2023 showing AKM Investment Limited, Janus Limited and other companies hold 90.336% of the shares in the 1st Respondent was wrong and that the truth was that those were not shareholders of the 1st Respondent. That if that truth was before the court it would have held that the purported directors who purported to appoint Gakoi Maina & Company Advocates to act for the Respondent in this suit had no authority to do so, since Kamau Kuria & Company advocates were the lawful advocates for the 1st Respondent and purported consent order signed by those advocates and Kieti and Company Advocates was worthless.
 6. The Applicants averred that the consent order done by person without authority was null and void and consequently the consent order and decree sought to be executed by the Claimant null and void
 7. The Applicants averred that the 1st Respondent applied to be registered as an insurance company on 28th May,1999 and was so registered on 28th July,1999. That no one could acquire 10% or more shares without the approval of the Commissioner and that AKM Investments Limited and Janus Limited and Triple A Company Limited purported to acquire more than 10% of the allotted shares without the approval of the commissioner.
 8. In response one Lisa Anyango Amenya the director of AKM Investments Ltd one of the alleged shareholder of the 1st Respondent swore an affidavit on 3rd May,2024 in opposition to the Respondents Application who averred that the court found on 28th March,2023 the counsel properly on record was M/s Gakoi Maina & Co. Advocates. That the Respondents appealed the said Ruling.
 9. Ms. Lisa averred that the said letter cannot form the basis for the application for review as the Respondents had filed various applications seeking stay of execution (23rd April, 2023), to suspend operation of search CR-12 in respect of 1st Respondent (21st November,2023) and all were dismissed on 28th November,2023. That the Respondents filed another suit ELRCC E004 OF 2023 which was also dismissed the same day.
 10. Ms Lisa averred that the effect of the said letter had been stayed by the Insurance Appeals Tribunal. That the Respondents have filed a number of suits on the shareholding issue of the 1st Respondent



and the application was therefore res judicata and an abuse of court process. That the 1st Respondent would raise preliminary objection on points of law as litigation must be brought to an end. That AKM investments and Janus ltd were not parties to this suit and the application should be dismissed.

11. The 1st Respondent and the Claimant proceeded to raise a PO to the effect that the application was an abuse of court process since the same was brought by an advocate with no capacity to bring the application, the application dated 27th March,2024 purports to be brought by and /or on behalf of the 1st Respondent whereas the 1st Respondent was not privy to the same, the Application was res judicata for raising prayers similar in previous applications and the application offends Rule 33 of the Employment and Labour Relations Court Rules while seeking to review while at the same time Appealing.
12. The Claimant Terry Wijenje herein swore undated further affidavit in opposition to the Respondents' application and averred that there was no material nondisclosure on her part while making the application to attach the 1st Respondent's monies held by the 1st to 6th Respondents. That the Respondent's application was made to avert execution after her letter dated 22nd March 2024 requesting to be paid.
13. The Claimant averred that the CR-12 is prima facie evidence of the shareholding of a company and ought to be relied on in case of a dispute as it is issued by the Registrar of Companies, the government office mandated to keep such records. That the CR-12 being not stayed remains conclusive proof of its shareholding as held by the court in the said ruling. That an issue of shareholding should not be canvassed before this court as this was before the High Court for determination.
14. The Claimant avers that a reading of the letter of the IRA confirms that AKM Investments and Janus remains the majority shareholders of the 1st Respondent. That an appeal has been filed challenging the contents of the IRA's letter and that the said letter has been stayed. That the letter having being stayed the status quo remains and cannot be the basis of the orders sought by the Respondents. That the decree issued in her favour remains valid and ought to be satisfied. That should the Insurance Appeals Tribunal uphold the contents of the letter issued by IRA the Respondents would be at liberty to move the court accordingly.
15. The Claimant averred that the Respondent seeks to review the court's ruling while they have appealed the same and the issues in the application are res judicata as they have already been adjudicated and determined by the court before by the two rulings dated 28th March,2023 and 28th November,2023 and an abuse of court process.
16. The Claimant averred that she is capable of refunding the decretal sum via shares held by her nominee company Janus Limited in the 1st Respondent in the unlikely event that the shareholding dispute is determined otherwise and she is ordered to do so. That she has suffered and continues to suffer great prejudice as her dues have been unlawfully withheld from her since 2019 and it is just that this court makes the garnishee order absolute.
17. The second Application dated 8th April,2024 as amended on 26th April,2024 sought the following.
 - a. Spent
 - b. Spent
 - c. An order for this court to issue a garnishee order absolute attaching the monies in the following judgment Debtors accounts held by the 1st-6th Garnishees in satisfaction of the decree issued



on 4th March,2024 for the amount of Kenya Shillings One Hundred and Sixty Eight Million Three Hundred and Eighty One Thousand and Twenty Eight (Kshs 168,381,028/=)

- i. 1st Garnishee, Capital Centre Branch Account Number 0801334001 and fixed Deposit Accounts held in the name of the Judgment Debtor.
- ii. 2nd Garnishee, Kenyatta Avenue Branch Account Number 00101598271810
- iii. 3rd Garnishee, Upperhill Corporate Branch Account Number 0180290260915
- iv. 4th Garnishee, Paybill Number 509800 and Mpesa Till Number 571642
- v. 5th Garnishee, Account Number 3000033721 and fixed Deposit Accounts held in the name of the Judgment Debtor
- vi. 6th Garnishee, CDS Account number 109037-1

d. Costs

18. The Application was based on the grounds set on the application and the affidavit sworn by TERRY WIJENJE the Claimant herein who averred that on 28th March,2023 she was reinstated to her employment in the capacity of the Managing Director of the judgment debtor without any loss of benefits with all prior rights, access and approvals incidental to the position.
19. The Claimant averred that the judgment debtor was ordered to pay her withheld salary of Kshs 2,666,667 per month from November,2019 to the date of reinstatement in the payroll and to regularize the payment of her future salary. That the judgment debtor was also ordered to pay her withheld employer pension contribution calculated at Kshs 266,666 from November 2019 to the date of reinstatement.
20. The Claimant averred that the above amounts have been outstanding for over a year as at 22nd March 2024 where the judgment debtor owes her Kshs 168,381,028/=) despite two demand letters dated 31st March,2023 and 22nd March,2024 being sent to the judgment debtor on the same who has failed to pay her.
21. The Claimant averred that she was aware that the 1st to 6th Garnishees hold monies belonging to the judgment debtor which she seeks to attach to satisfy the decree.
22. The Respondents on the other hand swore a further affidavits sworn by the 4th Respondent on behalf of the Respondents sworn on 16th, 17th, 18th and 21st May,2024 where the Applicants averred that the 4th Respondent his wife the 5th Respondent and the 3rd Respondent were three of the four subscribers to the Memorandum and Articles of Association of the 1st Respondent.
23. The Applicants averred that AKM Investments and Janus Companies with which Lisa Anyango and Terry Wijenje are associated are companies that have been trying to take away from subscribers their investments taking the form of business of the 1st Respondent. That Lisa Anyango swore a false affidavit.
24. The Applicants averred that they were aware that the said Lisa Anyango had filed in High Court Commercial Division Miscellaneous Application No E250 of 2021 Directline Assurance Co. Ltd v Philip Alier to nullify the arbitral award of 5th March,2022 on the ground that there was no proof of approval from the Commissioner for the said parties to acquire more than 10% of the shares in the 1st Respondent. That Lisa and Terry had filed an appeal at the Insurance Appeals Tribunal Appeal No. 4 of 2024 AKM Investments Ltd and Janus Ltd vs Comissioner of Insurance and Insurance Regulatory



- Authority for retrial of their verdict where the 2nd to 5th Respondents had made an application to be enjoined as 3rd to 6th Respondents. The Applicants averred that instead of the resorting to several avenues to address this issue, The High Court and the Insurance Appeals Tribunal should hear the matter to avoid conflicting decisions.
25. The Applicants averred that Janus Ltd and AKM Investments Ltd were not shareholders nor the said Lisa a director. That Hon. Justice Mbaru relied on the purported shareholding of 90.336/= on a purported arbitral award which relied on a CR-12 reflecting the false assumption that AKM Investments Ltd and Janus were shareholder and further that the Claimant was trying to obtain from the 1st Respondent through false pretenses.
 26. The Applicants further contended that the 1st Respondent did not owe the Claimant money which could be enforced through a garnishee order and that the ruling dated 28th March,2023 was null and void.
 27. The Applicant stated that the Court as at the time it made the ruling was not aware of the fact that both AKM and Janus were not shareholders and that the 1st Respondent did not have the benefit of the information of the letter dated 5th March,2024 which showed that the better remedy for the 1st to 5th Respondent was in applying for review of the ruling as opposed to appealing.
 28. The Applicants further contended that Lisa's Affidavit was based on misapprehension of the law that a company belongs to the shareholders who elect Board of Directors and further that AKM Investments Limited and Janus Ltd were confirmed not to be shareholders. The applicant further contended that the court should act on evidence and the law. That is section 3 of the *Insurance Act* which gives statutory function to Insurance Regulatory Authority to enforce the standards such as shareholder qualification and requirements.
 29. It was further argued by the applicant that Rule 33 of the Employment and Labour Relations Rules and Order 45 of the Civil Procedure Rules gave the Court power to correct such mistakes as was made in the said ruling.
 30. The two Applications were disposed of by written submissions. Dr. Kuria for the applicants submitted in the main that the 1st to 7th respondent did not know the fact of shareholding as reviewed by records of the Insurance Regulatory Authority (IRA) which was the sole custodian of which person had met or not met the requirements of section 166 of the *Insurance Act*. They could not avail that evidence to either Lady Justice Mbaru or Justice Abuodha (this Court) until after 5th March, 2024. This according to Counsel was in line with rule 33(1)(a) of ELRC Rules as it amounted to discovery of a 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 or the order made. In this case, the letter from the IRA of 5th March, 2024 was not supplied to the parties by the Authority at the time of the ruling. The Court therefore made the ruling on the basis of the Alike award which wrongly purported to state that AKM Investments Limited and Janus Limited held 90.33% of the shares in the 1st respondent. Counsel relied on the case of Mapala -v- British Broadcasting Corporation [2002] EA 132. Counsel further relied on the case of Macfoy -v- United Africa Company Ltd (1961) 3 All ER 1179 to submit that once an action is found to be illegal all the subsequent actions became illegal hence all actions by non-shareholders in the 1st respondent namely Janus and AKM Investments Limited were null and void and further that the consent order entered into by the advocates appointed by them was also null and void.
 31. Mr. Kieti for the 1st Claimant submitted in the main that the issue of 1st respondent's representation had been adjudicated upon and determined by the Court and the Court could not sit on appeal over its



own decision. Counsel further submitted that the review application did not raise sufficient grounds warranting review of the orders issued by Hon. Lady Justice Monica Mbaru on 28th March, 2023.

32. Counsel further submitted that Rule 33 of the Court Rules provide for the legal threshold for review. According to Counsel the applicant seeks review of the Court ruling on the grounds that the IRA issued a letter dated 5th March, 2024 purporting to review the shareholding of the 1st respondent and further that the letter amounted new important evidence which was not within its knowledge at the time when the ruling was delivered. Counsel however relying on the case of *Salama Mahmoud Saad -v- Kikas Investments Limited* [2014] eKLR submitted that discovery of new and important evidence did not automatically entitle a party to an order for review. A party must demonstrate that the new evidence was not within their knowledge in the first place as at the time. Counsel further relied on the case of *Dickson Muricho Muriuki -v- Timothy Kagundu Muriuki & 6 others* [2013] eKLR where it was held that where new points of law or circumstances arise after judgment, the Court is *functus officio* and the justiciable forum to consider the merits or otherwise of these new circumstances must shift to the Court of Appeal and not review. The said letter having been produced in March, 2024, according to counsel could not fall within the ambit of new and important evidence as it came to light after the consent had been entered into and not during the pendency of the matter before Court. In any event the said letter had been stayed in an appeal filed challenging its contents before the Insurance Appeals Tribunal which had the requisite jurisdiction to deal with the matter. The letter could not therefore be a ground for review.
33. Concerning the confirmation of the decree nisi, Counsel submitted that the claimant and the 1st respondent entered into a consent on 22nd November, 2022 and the same was adopted by the Court on 28th March, 2023. The claimant had since extracted a decree from the said consent and the decretal sum stood at Kshs. 168,381,028 as at 22 March, 2024. Mr. Kieti therefore submitted that there was a valid decree and the claimant ought to be allowed to enjoy the fruits of their judgment.

DETERMINATION

34. The court has considered the pleadings and submissions filed by the parties herein and proceeds to analyse them accordingly. The Court also notes the different applications which have been filed by parties and dispensed with. The first application dated 27th March, 2024 by the Respondents, is seeking review of the ruling of Hon. Lady Justice Mbaru and Consents thereon. This application is instrumental to the Claimant's application dated 8th April, 2024 as amended on 26th April, 2024 since the same seeks to enforce the ruling which the Respondents seeks to review.
35. The application is premised on the Insurance Regulatory Authority letter of 5th March, 2024 which stated that the AKM investments Ltd and Janus Limited did not seek its approval to acquire more than 10% of the shares as per section 166 of the *Insurance Act*. The Claimant alleged that the proper document to be relied on was the CR-12 from the Registrar of Companies and that the letter from IRA could not form basis for review as it had been stayed by the Insurance Appeals Tribunal.
36. Section 16 of the *Employment and Labour Relations Court Act* gives the Court power to review its judgements, awards, orders or decrees in accordance with the Rules. Further, Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides for review 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.

37. The Respondent relied on the said letter of 5th March, 2024 as the ground of discovery of new evidence. The Respondent averred that if the court knew that the CR12 relied on was not the true picture of the 1st Respondent's shareholding then the court would have arrived at a different decision. That the said impugned shareholders appointed the Gakoi Advocates. This therefore meant that the consent entered in to between such an advocate was null and void.
38. The court notes that section 3 of the *Insurance Act* gives the statutory function to IRA to enforce the standards such as shareholder qualification and requirements. IRA did a review of the shareholders of the 1st Respondent and established that AKM Investments Ltd and Janus Ltd did not prove how they became shareholders of the 1st Respondent. According to IRA they never sought approval to acquire more than 10 % shareholding in the 1st respondent. This court will not venture much into the issue of shareholding since parties have filed a case at the High Court (E250 of 2024) on the issue of shareholding. There is also an appeal pending at the Insurance Appeals Tribunal being Appeal 4 of 2024. The Court further notes that the said letter has been stayed by the Tribunal.
39. The Court appreciates the crucial nature of the letter from IRA clarifying the shareholding of the 1st Respondent to this application. The Court further notes that the contents of the letter from IRA dated 5th March, 2024 has been appealed to Insurance Appeals Tribunal Appeal being Appeal 4 of 2024 and further that the same has been stayed. The Court therefore out of abundance of caution will not determine the review application until the outcome of Appeal 4 of 2024 pending before the Insurance Appeals Tribunal. In the same vein the Court will not confirm the garnishee order nisi pending the determination of Appeal 4 of 2024 pending before the Insurance Appeals Tribunal.
40. It is in the vital interest of the parties herein to fast track the determination of Appeal 4 of 2024 pending before the Insurance Appeals Tribunal in order to make it possible for the Court determine the applications dated 27th March, 2024 and Claimant's application dated 8th April, 2024.
41. The Court therefore slates the matter for mention on 25th November, 2024 to be appraised on the status of Appeal 4 of 2024 pending before the Insurance Appeals Tribunal in order to give further directions on the two applications pending before it.
42. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024

DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER, 2024

Abuodha Nelson Jorum

Presiding Judge-Appeals Division

