



REPUBLIC OF KENYA



Muga v Sagala General Construction Limited (Miscellaneous Application E002 of 2023) [2024] KEELRC 2757 (KLR) (11 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2757 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E002 OF 2023**

**M MBARŪ, J
NOVEMBER 11, 2024**

BETWEEN

THOMAS ONYANGO MUGA APPLICANT

AND

SAGALA GENERAL CONSTRUCTION LIMITED RESPONDENT

RULING

1. The application filed an application dated 17 September 2024 seeking orders;
 1. Spent.
 2. Pending hearing and determination of this application intern parties, the Honourable Tribunal be pleased to discharge, review and/or set aside its ruling and/or orders issued on 6 July 2023 and all consequential orders.
 3. Upon review of orders herein being set aside, the court be pleased to allow the reliefs sought in the applicant’s application dated 10 January 2023.
 4. The firm of M/s Odunga & Associates Advocates be granted leave to come on record for the applicant after delivery of the judgment/ruling in place of M/s Auma, Jeptanui & Company Advocates.
 5. Costs of this application be provided for.
2. The application is supported by the applicant's Affidavit. He avers that upon investigations, on 12 August 2021, he sustained work injuries. The Director found he suffered 20% permanent incapacity, and on 30 November 2021, he was issued with an award of Ksh.1, 248,000. The respondent failed to make payment, prompting the filing of this suit.



3. In his Affidavit, the applicant avers that despite the respondent being served, no response was filed to his application. The court delivered a ruling on 6 July 2023. It dismissed the application because there was no evidence to demonstrate whether a demand notice was issued to the respondent as required under Section 26 of the *Work Injury Benefits Act*.
4. Upon examination of the records, the applicant realized there was an apparent error since he had annexed a letter dated 2 September 2022, demanding a notice to the respondent. The respondent received this letter and notice on 12 September 2022. Unless the orders and ruling of the court are reviewed to allow the application, the application will suffer loss and damage. The respondent has refused to make payment following work injury. The matter relates to enforcing the Director's award and is not contested by the respondent that there was no work injury.
5. In response, the respondent filed Grounds of Opposition, arguing that the application was bad in law and abused the court process. There is no error on the face of the record, as alleged. The alleged notice does not constitute what is required under Section 21 of the WIBA. The notice the applicant has relied upon does not conform to the provisions of Section 26 of the Act, and the court lacks jurisdiction to enforce awards emanating from the Director.
6. Both parties attended and made oral submissions in court. These submissions are analyzed and addressed in the analysis.

Determination

7. The respondent raised the question of jurisdiction, which has been addressed back and forth in various cases. This question is firmly addressed in the Employment and Labour Relations Court (Procedure) Rules, 2024, under Rules 2 and 69. This court, properly moved through a miscellaneous application, can address the award of the Director as a ruling or judgment of the court.
8. The application is seeking orders of review and for the firm of M/s Odunga & Associates Advocates to be granted leave to come on record for the applicant after delivery of the judgment/ruling in place of M/s Auma, Jeptanui & Company Advocates.
9. A court ruling concerning the enforcement of the Director's award is a final order. Upon the ruling, the applicant obtains a decree ready for enforcement.
10. On this premise, a change of advocates post such final order is regulated under Order 9 Rule 9 of the Civil Procedure Rules requires that;

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person, as the case may be.
11. In this case, there is no notice to the advocates acting for the appellant or the consent. None is attached to the applicant's Supporting Affidavit. The attendance by other advocates outside these provisions needs to be more regular.

The applicant cannot benefit from an irregular process.



12. The ruling delivered on 6 July 2023 sought to be reviewed and found the application dated 10 January 2023 premature. This allowed the applicant to attend and address the matter as appropriate.
13. The provisions of Order 9 Rule 9 are not technicalities that can be cured through the court's discretion or the overwriting provisions of Article 159 of *the Constitution*. The provisions thereof are mandatory.
14. The applicant must address why he has not notified his advocates or obtained consent to be represented by new advocates. Such are matters that the court cannot ignore. See *Said Sweilem Gheithan Saanum v Commissioner of Lands (Being Sued Through The Attorney General), Municipal Council of Mombasa, Norman Taherali Dawoodbhai, Hassan Taherali Dawoodbhai, Ali Ramandhan Mwatsau & Mohamed Naman Mohamed* [2015] KECA 284 (KLR) and the case of *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] KEHC 7414 (KLR).
15. The rules of procedure are meant to regulate the orderly administration of justice, not to assist the indolent, as the Court of Appeal held in *Hunker Trading Company Limited v Elf Oil Kenya Limited* Civil Application No Nai 6 of 2010.
16. It is not diligent to wait from 6 July 2023 to 16 October 2024 to file the instant application seeking a review.
17. Accordingly, the application dated 17 September 2024, filed on 16 October 2024, is hereby dismissed. Costs to the respondent.

DELIVERED VIA TEAMS VIRTUAL PLATFORM THIS 11TH DAY OF NOVEMBER 2024.

M. MBARŪ

JUDGE

