



**Republic v Director of Occupational Safety and Health Services & another;
Freedom Airline Express Limited (Exparte Applicant) (Judicial Review
E033 of 2024) [2024] KEELRC 13429 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13429 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E033 OF 2024
HS WASILWA, J
DECEMBER 17, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH
SERVICES 1ST RESPONDENT**

ABDIRAHMAN ABDULLAHI MOHAMED 2ND RESPONDENT

AND

FREEDOM AIRLINE EXPRESS LIMITED EXPARTE APPLICANT

RULING

1. The 2nd Respondent raised a Preliminary Objection dated 22nd October 2024 seeking to strike out the Ex Parte Applicant’s Judicial Review Application on the following grounds:
 - i. Doctrine of Exhaustion: The Ex Parte Applicant has failed to exhaust internal mechanisms for appeal or review as provided under the Work Injury Benefits Act, contrary to Section 9(2) of the Fair Administrative Actions Act.
 - ii. Violation of Section 52(2) of the Work Injury Benefits Act: The application for a writ of Certiorari is contrary to the statutory remedy available to a person dissatisfied with the decision of the Director of Occupational Safety and Health Services.
 - iii. Non-Compliance with Order 53 Rule 3: The substantive Motion, filed on 3rd October 2024, was brought outside the statutory period following leave granted on 31st July 2024, rendering the Motion incurably incompetent.



- iv. **Functus Officio Doctrine:** This Court lacks jurisdiction to entertain the Judicial Review Application as it adopted the award of the Director of Occupational Safety and Health Services on 9th July 2024. The award, now an order and judgment of the Court, can only be varied by an appellate court or through a review application.
 - v. **Improper Transfer of Suit:** The Judicial Review Application, originally filed in a court without jurisdiction (Milimani HCJR E145 of 2024), was transferred to this Court contrary to Section 18(1) of the *Civil Procedure Act* and the binding precedent in *Equity Bank Limited v Bruce Mutie Mutuku T/A Diani Tour & Travel (2016) eKLR*. The 2nd Respondent prays for the suspension of proceedings on the merits and urges the Court to prioritize the hearing of this Preliminary Objection. Additionally, the 2nd Respondent seeks the dismissal or striking out of the Judicial Review Application with costs.
2. The Exparte Applicant filed an application dated 6th November 2024 seeking the following orders:
 - i. Spent
 - ii. Consolidation and disposal of the application alongside the 1st Respondent's Preliminary Objection dated 22nd October 2024.
 - iii. Extension of leave granted on 31st July 2024 to file a substantive judicial review motion.
 - iv. Admission of the substantive motion dated 13th August 2024 and filed on 3rd October 2024 as duly filed.
 - v. Costs to be in the cause.
 3. The application is based on the following grounds:

The court granted leave on 31st July 2024 for the Applicant to file a substantive judicial review motion, with an additional directive for the 1st Respondent to deposit KES 10,000,000 in a joint account as security. Although the Applicant attempted to file the motion on 13th August 2024, e-filing system downtime and subsequent engagements with the 1st Respondent over substitution of the security deposit with a bank guarantee caused inadvertent delays.
 4. Further, the matter was complicated by garnishee applications filed by the 1st Respondent, preoccupying the Applicant's counsel and leading to the motion not being filed within the stipulated timeline. A subsequent change of counsel occurred under the mistaken belief that the motion had already been filed. It was only on 3rd October 2024, during a mention in a related matter, ELRC Petition No. 129 of 2023, that the oversight was discovered, prompting immediate filing of the motion.
 5. Parties later recorded a consent in the related matter, agreeing to maintain the security deposit and to dispose of the substantive motion on its merits. However, the 1st Respondent subsequently reneged on this agreement, filing a Preliminary Objection to strike out the motion for late filing.
 6. The Applicant argues that the delay was unintentional and arose from genuine counsel error. The court has discretion to extend the leave period and admit the motion as duly filed. Failure to do so would unjustly lock the Applicant out of judicial recourse, causing significant prejudice. The 1st Respondent, having consented to proceed on merits, suffers no prejudice from the late filing.
 7. The Applicant urges the court to exercise its equitable jurisdiction to extend the leave period and allow the matter to proceed substantively.



8. Further the 2nd Respondent filed a Replying Affidavit dated 21st November 2024, stating that the application is based on half-truths and misrepresentations aimed at misleading the Court into granting unwarranted orders. It is contended that the Applicant is seeking leave to file a substantive judicial review motion only after the issue of time limitation was raised in the Preliminary Objection dated 22nd October 2024.
9. The 2nd Respondent argues, based on advice from counsel, that once a Preliminary Objection addressing jurisdiction is raised, the Court must first hear and determine it before entertaining any other applications. He relied on the Supreme Court decision in *Isaac Aluoch Polo Aluochier v Independent Electoral and Boundaries Commission & 17 Others (Supreme Court Petition No. 20 of 2022)*, which held that jurisdiction can only be conferred by *the Constitution* or statute, and not by consent of the parties. Furthermore, the 2nd Respondent asserts that the consent recorded in ELRC Petition No. 129 of 2023 only pertained to the withdrawal of garnishee applications and the establishment of a joint account for security purposes, without addressing or waiving jurisdictional objections.
10. The 2nd Respondent alleged bad faith on the Applicant's part for failing to provide requested bank statements of the joint account, despite repeated correspondences. It is further argued that granting the orders sought would amount to the Court acting without jurisdiction, contrary to established legal principles. The 2nd Respondent also asserts the principle that a successful litigant is entitled to enjoy the fruits of their judgment, citing that the Applicant's actions constitute an abuse of court process aimed at delaying recovery.
11. The 2nd Respondent prays for the dismissal of the Ex Parte Applicant's Motion dated 6th November 2024 in the interests of justice and fairness.
12. I have examined the averments and submissions of the parties herein. For good order let me clear out of the way this issue of the orders of this court dated 31.7.2024. This court (Hon J Mwaure) granted leave to the ex parte applicant to apply for orders of certiorari against the decision of the Director of Occupational Safety and Health Services dated 16th May 2024 and served upon the ex parte applicant on 16th May 2024. the said application was to be filed within 21 days.
13. In the current application, this court is now being asked to strike out the JR application filed as directed by court on the grounds set herein and in particular failure to exhaust internal mechanisms for appeal or review as provided under the *Work Injury Benefits Act*, contrary to Section 9(2) of the *Fair Administrative Actions Act*.
14. The applicants also aver that the ex parte applicant violated Section 52(2) of the *Work Injury Benefits Act* for the reason that a writ of Certiorari is contrary to the statutory remedy available to a person dissatisfied with the decision of the Director of Occupational Safety and Health Services.
15. The P.O raised is in my view an appeal on the orders of this court of 31.7.2024 and does not stand as a P.O stricto sensu. This court is actually being asked to sit as an appellate court and vacate its orders so made. The only way this court can vacate its own orders or orders of a court of competent jurisdiction is by review yet what sits before me is not an application for review.
16. Without considering the merits of the orders of certiorari, the court did direct filing of the JR Application which has now been filed. The court cannot consider any PO on the said directions. If the applicants felt the need to raise a P.O this should have been raised before the courts directions on 31.7.24. Moreover in a related matter being Petition no E129 of 2024, Parties recorded a consent dated 23rd October 2024, agreeing to maintain the security deposit and to dispose of the substantive motion



in this JR application on its merits. The 1st Respondent has subsequently reneged on this agreement and filed this P.O. As it is now the issue of the P.O is found to have been overtaken by events and is found without merit and is dismissed accordingly.

17. Costs of this application will be in the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF DECEMBER, 2024.

HELLEN WASILWA

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.

HELLEN WASILWA

JUDGE

