



**Onyango v Office of the President Ministry of Interior and National Administration
& 2 others; Commission of Administrative Justice (Interested Party) (Judicial
Review E004 of 2024) [2024] KEELRC 13319 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13319 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E004 OF 2024
JK GAKERI, J
DECEMBER 4, 2024**

BETWEEN

CHRISPINE ONYANGO APPLICANT

AND

**OFFICE OF THE PRESIDENT MINISTRY OF INTERIOR AND NATIONAL
ADMINISTRATION 1ST RESPONDENT**

OFFICE OF THE COUNTY COMMISSIONER 2ND RESPONDENT

MR MOSES K LILAN OGW 3RD RESPONDENT

AND

COMMISSION OF ADMINISTRATIVE JUSTICE INTERESTED PARTY

RULING

1. Before the Court for determination is the Applicants Notice of Motion dated September 23, 2024, filed on September 24, 2024 under Certificate of Urgency seeking Orders that:
 1. The Court be pleased to review its judgment delivered on September 23, 2024 in the above entitled case.
 2. The Court do find and hold that the interdiction of the Applicant through the letter dated 9th September, 2024 was without basis and is due for quashing.
 3. The costs of this suit and application be awarded to the Applicant.
2. The Notice of Motion is expressed under Rule 33 of the Employment & Labour Relations Court (Procedure) Rules 2016 and Order 45 of the Civil Procedure Rules and is based on the grounds set



forth on its face and the affidavit of the Petitioner sworn on 23rd September, 2024 who deposes that he was interdicted on 9th March, 2024 on charges filed on 28th January, 2024.

3. The affiant deposes that the case was fixed for hearing on 22nd February, 2024 and the Respondent sought time to file a Replying Affidavit but did not do so and did not file submissions but filed a Replying Affidavit dated 23rd July, 2023 with submissions and introduced a charge sheet dated 8th March, 2024 which post-dated the interdiction letter thereby casting doubt on the legitimacy of the basis of the interdiction.
4. The affiant deposes that in rendering its decision, the Court erroneously relied on the charge sheet and Replying Affidavit which were introduced without following due process.
5. According to the Applicant reliance on the documents filed late occasioned grave miscarriage of justice as the interdiction letter dated 9th February, 2024 and had no basis and the Court's finding based on a non-existent charge sheet at the time violated his right to fair hearing and fair administrative action.
6. That attempt to file an application on 22nd September, 2024 to alert the Court of these irregularities was too late to arrest the judgment.
7. That it is in the interest of justice that the judgment be reviewed and quashed the interdiction letter.

Response

8. Although the instant application was served on the Attorney General vide email to email address cl.kisumu@ag.go.ke and no failure notice was received by the Petitioner's Advocate, there was no response.

Applicant's submissions

9. As to whether the Respondents post-closure filings and nature of documents introduced necessitate a review of the judgment Counsel for the Applicant submitted that Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 gave the Court power to review judgments to correct procedural errors or injustices occasioned by errors and relied on the decision in Republic V Kenya Revenue Authority Ex parte Shake Distribution Ltd [2018] eKLR on the need to ensure fairness in decision making.
10. Reliance was also made on Judicial Service Commission V Mbalu Mutava & Another [2015] eKLR and Anarita Karimi Njeru V Republic [1979] KLR 154.
11. According to the Applicant's Counsel the irregularly filed documents and the Respondent's failure to comply with Court Orders justified a review of the judgment as it is a breach of procedural fairness and mislead the judicial process.
12. That the judgment influenced by irregularly filed documents resulted in an unjust outcome that violated the Applicant's constitutional rights.
13. Counsel submitted that had the charge sheet been presented before the close of pleadings the Court would have had legitimate grounds to assess the authenticity and factual basis of the interdiction but the Respondent post-dated the evidence.
14. Counsel urges that the unwarranted acceptance and consideration of documents filed without leave of the Court prejudiced the Applicant by introducing contested facts which violated the principles of natural justice as the decision failed to consider the full procedural context and the rights of the Applicant.



15. Counsel, finally submitted that he had demonstrated “sufficient reason” as required by Order 45 of the Civil Procedure Rules to unlock the Court’s discretionary favour to review and set aside the judgment dated 23rd September, 2024.

The Respondent did not file submissions.

16. The only issue for consideration is whether the Applicant’s Notice of Motion dated 23rd September, 2024 is merited.

17. It is not in contest that the Applicant filed this suit in February 2024 and when the matter came up on 22nd February, 2024, the Court granted leave to the Applicant to file for Judicial Review orders.

18. On 19th March, 2024, the Court directed the Respondent’s Counsel M/s Orege to file their Replying Affidavit within 14 days and each party had 14 days thereafter to file and exchange submissions but by 3rd June, 2024, the Respondent had not filed a response and the Applicant was accorded 14 days to file submissions.

19. On 25th June, 2024 Mr. Obiero reported that the Respondent had not filed submissions and a judgment was fixed on 23rd July 2024.

20. On the date of delivery of judgment Mr. Obiero for the Applicant informed the Court that he had noticed that some documents had been smuggled into the Court file and he had made an application to arrest the judgment but the trial Judge indicated that no application had been received that morning and delivered and signed the Judgment.

21. The learned trial Judge found that the Respondents had authority to interdict the Ex Parte Applicant, the interdiction was justified and the Ex Parte Applicant was not entitled to the reliefs sought. The motion was dismissed with costs.

This is the Judgment the Ex Parte Applicant wants reviewed and set aside.

22. As correctly submitted by Counsel for the Ex Parte Applicant, it is trite law that the law provides for the review of Judgments, Rulings and Orders.

23. Noteworthy, counsel for the Ex Parte Applicant cited Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2010 erroneously as the original Employment and Labour Relations Court (Procedure) Rules, were operationalized in 2016 not 2010 and have since been revoked by the Employment and Labour Relations Court (Procedure) Rules 2024, the operative rules.

24. However, the provisions remains as it was in the previous Rules.

25. Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024 provides that -

- a. if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of 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 clarifications; or
- d. for any other sufficient reason.

26. Puzzlingly, in the instance case the Ex Parte Applicant appears uncertain on the specific provision of rule 74, in that while the grounds relied upon suggest an error on the face of the record or mistake, the



Supporting Affidavit makes a strongly case that the learned trial Judge arrived at an erroneous decision by relying on a charge sheet filed by the Respondent late.

27. The submissions on the other hand urge the Court to find that the Applicant had provided “sufficient reasons” for the Court to review the judgment dated and delivered on 23rd September, 2024, which would implicate Rule 74(d) of the Rules.
28. Similarly, the body of the submissions by the Applicant’s Counsel is an assailment of the trial Court’s judgment for having relied on documents filed by the Respondents late and thus occasioning miscarriage of justice.
29. In sum, the Ex Parte Applicant is challenging the Court’s judgment on alleged procedural improprieties.
30. The pith and substance of the Ex Parte Applicant’s case is that had the learned trial Judge not relied on the Respondent’s documents, which were filed out of time, the Court’s decision would have been different.
31. A panoramic view of the Ex Parte Applicant’s case is that he is challenging the decision of the Court as being erroneous.
32. Evidently, rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024 can only be invoked by a party that has the right to file an appeal against the judgment or ruling but is not desirous of appealing or the party has not right of appeal.
33. The net effect of Rule 74 which is based on the previous Order 44, but now Order 45 of the Civil Procedure Rules, 2010, a party cannot exercise the right to appeal and review a decision or ruling simultaneously.
34. In the instances, case, it is not contested that the Ex Parte Applicant filed a Notice of Appeal and requested for certified copies of typed proceedings vide letter dated 26th September, 2024, and the same were prepared by the Court.
35. It is unclear whether the Ex Parte Applicant lodged the Record of Appeal and paid Court fees which constitutes the appeal as held in *Yani Haryanto V E. D. & F. Man (Sugar) Ltd* Civil Appeal No. 122 of 1992. However, the Notice of Appeal is not a bar to the Court entertaining an application for review as in this case.
36. As regards the Ex Parte Applicant’s application, the sentiments of the Court of Appeal in *Muyondi V Industrial Commercial Development Corporation & Another* [2006] IEA 243, are instructive. The Court stated as follows:

...There is a real distinction between a mere erroneous decision and an error apparent on the face of the record”.
37. The Ex Parte Applicant has not pleaded that there was an error on the face of the record but assails the Courts decision on miscarriage of justice and violation of the Ex Parte Applicant’s right to fair hearing and administrative action, matters which in the Courts view, were more suitable for an appeal against the decision.



38. In *Abasi Belinda V Fredrick Kagwamu & Another* [1963] EA 557 cited with approval by the Court of Appeal in *Solacher V Romantic Hotels Ltd & Another* Civil Appeal 167 of 2019 [2022] KECA 771 (KLR) it was held that;

A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal”.

39. Finally, in *National Bank of Kenya Ltd V Ndung’u Njau* [1997] eKLR the Court stated:

...It will not be a sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing of statute or other provision of law cannot be a ground for review”.

40. Guided by the foregoing authorities, the Court is of the considered view that since the applicant is challenging the evidence the Court relied on in arriving at its decision and is thus challenging the decision of the Court and has not demonstrated that any of the provisions of Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024, is applicable the Court is satisfied that the Ex Parte Applicant’s Notice of Motion dated September 23, 2024 is bereft of merit and is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 4TH DAY OF DECEMBER, 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 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 *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.

