



**Esevwe v University of Nairobi (Cause E458 of 2022)
[2023] KEELRC 737 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 737 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E458 OF 2022
B ONGAYA, J
MARCH 24, 2023**

BETWEEN

FRANK ESEVWE CLAIMANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th March, 2023)

RULING

1. The claimant filed on November 17, 2022 an application by the notice of motion dated November 16, 2022 in person, and, on January 30, 2023 appointed Omongo Gatune & Company Advocate to act in the suit. The application was under section 12 of the *Employment and Labour Relations Court Act, 2011*, the inherent powers of the court, rule 32 of the Court's (Procedure) Rules 2010 and all other enabling provisions of law. The applicant prayed for orders:
 - a. That the honourable court be pleased to review its ruling as made on October 27, 2022 to find that the unilateral reduction of house allowance by the respondent exhibits a prima facie case warranting an injunction against the respondent.
 - b. That the ruling be reviewed to find that the claimant, applicant, stands to suffer irreparable injury if the injunction does not issue in that his children and more so the one studying at Kenya Medical Training College is on the verge of being sent home owing to outstanding fees arrears which could have been sorted by the wrongfully reduced house allowance for the past 6 months.
 - c. That the honourable court does review the ruling to find that the claimant having established the twin grounds as above the balance of convenience lies in issuing the injunction sought pending the hearing and determination of the main suit.



- d. That costs of the application be provided for.
2. The application was based on the annexe4d claimant's supporting affidavit and upon the following grounds:
 - a. The ruling to be reviewed was delivered on October 27, 2022.
 - b. The court found that the applicant had shown a prima facie case but had failed to establish irreparable injury to be suffered thus the balance of convenience did not tilt in favour of the applicant. further, the court found that irreparable harm had not been confirmed because no documentary evidence was adduced to foment that ground.
 - c. The applicant has since received a copy of his daughter's letter and fees structure from Kenya Medical Training College. That as much as that issue was at play the claimant was not in possession of the documents. The documents show the irreparable harm the claimant will suffer once his daughter is sent away from school on account of the respondent's unilateral and unjustified actions and this will effectually assist the court in arriving at a just finding.
 - d. That no prejudice will be occasioned to the respondent should the honourable court review the ruling by considering the documents on record that establish the irreparable injury.
 3. The respondent opposed the application by filing the replying affidavit of Harrison Akala sworn on November 9, 2022 (and it is not explained how the affidavit was sworn on a date prior to filing of the application on November 17, 2022 as dated November 16, 2022). The replying affidavit was sworn and filed by CS. Fredrick Collins Omondi, respondent's Director Legal and Corporate Services. It was urged for the respondent as follows:
 - a. The application for review of the court's ruling of October 27, 2022 has not met the laid down jurisdiction and scope of review under rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*. It is not a sufficient ground for review that the claimant's children and more so the one studying at the Kenya Medical Training College is on the verge of being sent home. Nor can it be a ground for review that outstanding fees arrears could have been sorted by the wrongfully reduced house allowance for the past six months.
 - b. There is no established discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the ruling and order subject for review was made.
 - c. Further the applicant has not established any other prescribed ground that may justify a review such as on account of some mistake or error apparent on the face of record, or, any other sufficient reason.
 - d. The application is camouflaged as a review but is actually a measured appeal on the three pillars of prima facie case, irreparable injury and balance of convenience for grant of a temporary injunction and a review should not be a disguised appeal whereby an erroneous decision is reheard and corrected. The application for review is an abuse of court process.
 4. The respondent also filed the grounds of opposition dated February 14, 2023 and urged as follows:
 - a. The applicant has not demonstrated any ground to justify review of the decision.
 - b. The grounds upon which the application for review has been made namely matters relating to school fees payment were either within the applicant's knowledge or after the exercise of due diligence could have been within his knowledge at the time of presenting his application



dated June 28, 2022 (the initial application for interlocutory injunction decided by the ruling subject of the application for review).

- c. The application is camouflaged as one for review but is essentially an application purporting to introduce new evidence and reopen the application dated June 28, 2022. It is essentially an appeal against the ruling of October 27, 2022 based on additional evidence which was not before the trial court.
 - d. The application is plainly frivolous and without merit.
5. Submissions on the application were filed for the parties. The court has considered the parties' respective cases. The court returns as follows.
 6. The court has perused the ruling subject of the review application delivered by court on October 27, 2022. The court has also perused the memorandum of claim and the application dated June 28, 2022 subject of the said ruling. Nowhere did the claimant plead or mention the difficulty he would suffer being that his children would be forced out of school for want of school fees payable out of the house allowance claimed in the instant case. The court finds that as submitted for the respondent, the application falls outside the ambit of review because the purported fresh evidence is not based upon the claimant's pleaded case both in the memorandum of claim or the application for temporary injunction dated June 28, 2022. The court considers that the window for review is not available to a litigant who sets out to change the character of the pleaded case or without such change of the facts of the case sets out to urge evidence, purportedly as new evidence not available at initial trial, but which in fact is not founded or anchored upon the pleaded material facts. Such purported evidence outside the initial character of the suit (or application) is not such new evidence that, in the opinion of the court, would justify a review. In determining new evidence for purposes of justifying a review, it appears to the court that the applicant must show that the alleged new evidence seeks to support a material fact already pleaded and before the court at the initial trial or hearing of the dispute. It is not that the alleged new evidence walks outside the pleaded case and if it does as appear to be the case in the instant case, such evidence is irrelevant as, in the court's opinion, it does not seek to prove or disprove a material fact before the court.
 7. The court upholds the respondent's submission that the applicant has failed to establish any of the grounds for review as prescribed in rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016. That the applicant cited revoked rules of the court as well operates as an impetus to dismissing the application. The costs of the application shall be in the cause.

In conclusion the claimant's application for review dated November 16, 2022 and filed on November 17, 2022 is hereby determined with orders:

1. The application is hereby dismissed with costs in the cause.
2. Parties to mention the suit for directions towards the expeditious hearing and determination of the main suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 24TH MARCH, 2023

BYRAM ONGAYA

PRINCIPAL JUDGE

