



**Tsuma v Kombo t/a Mulolongo Community Health Care (Cause 637 of 2017) [2023] KEELRC 3293 (KLR) (11 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3293 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**  
**CAUSE 637 OF 2017**  
**AK NZEI, J**  
**DECEMBER 11, 2023**

**BETWEEN**

**RIZIKI CHAKA TSUMA ..... CLAIMANT**

**AND**

**KOMBO MSANIFU KOMBO T/A MULOLONGO COMMUNITY HEALTH CARE ..... RESPONDENT**

**RULING**

1. This court delivered its judgment, upon full trial, on 10/7/2023 and awarded the claimant/respondent a total of ksh. 263,000, costs of the suit and interest. The court's record shows that on 24/7/2023, the respondent/applicant filed a notice of appeal regarding this Court's said judgment, upon which the claimant filed a notice of address for service pursuant to *Court of Appeal Rules*.
2. On 9/8/2023, the respondent filed an evenly dated Notice of Motion herein seeking the following orders:-
  - a. that pending inter-partes hearing of the application herein, there be a stay of execution of the judgment delivered on 10/7/2023 and decree thereof.
  - b. that the court be pleased to review and/or vary and/or set aside the judgment delivered on 10/7/2023 and substitute the same with dismissal of the claimant's claim.
  - c. that costs of the application be provided for.
3. The application, shown to be brought under sections 1A, 1B, and 80 of the *Civil Procedure Act*, order 45 and order 51 rule 1 of the *Civil Procedure Rules*, is supported by the respondent's affidavit sworn on 9/8/2023. It is deposed in the said affidavit that the respondent/applicant has discovered that there exists a Certificate of Registration of a Community Based Organization in respect of The Ark of Hope Community Project C.B.O which had an initiative and project termed as Mlolongo



Community Health Care, wherein the respondent/applicant was the lead person. That the existence of the certificate of registration was not within the respondent/applicant's knowledge as at the time of hearing and determination of the claim herein.

4. The Respondent/Applicant further deposed that discovery of the existence of the Certificate is material to the claim herein as it tends to prove that there was no employer-employee relationship between himself and the claimant herein.
5. The application is opposed by the claimant/respondent. Both parties filed written submissions on the application pursuant to this Court's directions in that regard, which I have considered.
6. This Court's power and jurisdiction to review its orders, judgments and decrees provided in section 16 of the *Employment and Labour Relations Court Act* and rule 33(i) of the *Employment and Labour Relations Court (procedure) Rules 2016*. Rule 33(1) of this Court's said Rules provides as follows:-

“ 33.

(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.”

7. It is quite clear from the foregoing rule that a party who has appealed against this Court's decree cannot turn round and apply for review by this Court of the decree appealed against. Order 42 rule 6(4) of the *Civil procedure Rules*, which is among provisions of the *Civil procedure Rules* saved into this Court's Rules under section 13 of the *Employment and Labour Relations Court Act* and rule 32 of this *Court's Rules*, provides as follows:-

“(4) for the purpose of this rule, an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that Court notice of appeal has been given.”

8. The respondent/applicant appealed against this court's decree passed on 10/7/2023. This Court has not been told what became of the said appeal, and whether the same was withdrawn by the Respondent/Applicant before filing the present application. Indeed, the Applicant has not even mentioned the pendency of his said appeal in the application herein. An application for review of judgment/decrees and an appeal against the decree sought to be reviewed cannot be pursued concurrently.



9. The claimant/respondent cited the Court of Appeal decision in CACA 43 of 2020 (Nairobi) *Consolidated Bank Limited v Boniface Kivindyo Mutisya & 2 others* where the Court stated:-

“A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of such appeal is common to the applicant and the appellant, or when being respondent, he can present to the appellate court the case on which he applies for review.”

10. The claimant/respondent also referred the Court to the case of *Mary Wambui Njuguna v William Ole Nabala & 9 others* [2018] eKLR, quoted with approval by the Court of Appeal in the aforesaid case, where the court stated as follows:-

“We agree with the conclusion by the learned judge that it was not open for the appellant to pursue an appeal and at the same time a review of the same orders...”

11. Regarding the respondent/applicant’s averment that he has discovered a certificate of registration of a Community Based Organisation (CBO) by the name Ark of Hope community Project CBO which had an initiative termed as Mlolongo Community Health Care and of which the respondent/applicant was the lead person, it is my finding that the allegation does not meet the threshold set by rule 33(1) (a) of this *Court’s Rules* as the Respondent/Applicant did not demonstrate:-

- a. how registration documents regarding an alleged Organisation of which he was the lead person could not have been within his knowledge, and were out of his reach when the suit herein was heard and determined.
- b. how, when and from where/whom he finally got the documents.

12. I have also noted from the respondent/applicant’s pleadings, and particularly his response to the claimant’s claim, that there is no mention of any community based organisation by the name The Ark of Hope Community Project C.B.O. Indeed, one of the documents annexed to the respondent/applicant’s supporting affidavit, a letter by the Chief of Chaani Location in Changamwe, is dated 7/8/2023 long after delivery of this court’s judgment.. This is amazing, to say the least.

13. I find no merit in the respondent’s notice of motion dated 9/8/2023, and the same is hereby dismissed with costs.

14. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11<sup>TH</sup> DECEMBER 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:



.....Claimant

.....Respondent

