



**Muriithi & 8 others v Registered Trustees of the Sisters of Mercy(Kenya)
t/a The Mater Misericordiae Hospital (Cause 153, 212 & 241 of 2015
(Consolidated)) [2022] KEELRC 1376 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1376 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 153, 212 & 241 OF 2015 (CONSOLIDATED)**

MA ONYANGO, J

JULY 5, 2022

BETWEEN

**JOHN MURIITHI 1ST CLAIMANT
JACKSON AWUOR 2ND CLAIMANT
JOICE ONYANGO 3RD CLAIMANT
JUDY OBURA 4TH CLAIMANT**

AND

**REGISTERED TRUSTEES OF THE SISTERS OF MERCY(KENYA) T/A THE
MATER MISERICORDIAE HOSPITAL RESPONDENT**

AS CONSOLIDATED WITH

CAUSE 212 OF 2015

BETWEEN

**JAMES MUTISO KALOKI 1ST CLAIMANT
SUSAN KAGENDO KARANJA 2ND CLAIMANT
JACKSON NGUNJIRI GATHOGO 3RD CLAIMANT
ALICE WAMBUI NJAMBI 4TH CLAIMANT**

AND

**REGISTERED TRUSTEES OF THE SISTERS OF MERCY(KENYA) T/A THE
MATER MISERICORDIAE HOSPITAL RESPONDENT**

AS CONSOLIDATED WITH



CAUSE 241 OF 2015

BETWEEN

LAWRENCE GACAGA MUIGA CLAIMANT

AND

REGISTERED TRUSTEES OF THE SISTERS OF MERCY(KENYA) T/A THE
MATER MISERICORDIAE HOSPITAL RESPONDENT

RULING

1. Vide an application dated 28th January 2022, the Claimants'/Applicants seek the following orders –
 - (i) The Order granted on 21st May, 2020 be reviewed and varied and the decretal sum be released to the Claimant.
 - (ii) Costs of the application be provided for.
2. The application is grounded on the supporting affidavit of Lawrence Gicaga Muiga, the Claimant in ELRC Cause 241 of 2015 and on the following grounds:
 - (a) On 21st May, 2020 the Honourable Court granted an open ended stay of execution of the decree pending filing and determination of appeal.
 - (b) The Respondent filed Notice of Appeal but is yet to file a Record of Appeal.
 - (c) The Respondent has not informed the Claimant reasons why it has not filed Appeal.
 - d. There is no indication when the Respondent is likely to file the intended appeal.
 - e. The intended Appeal is unlikely to be heard in the foreseeable future due shortage of judges of the Court of Appeal and the resultant backlog of cases,
 - f. The Claimant is unlikely to enjoy the fruits of his judgement for unforeseeable future for no fault of his own.
 - g. The Claimant is suffering double jeopardy of wrongful dismissal and the stay of execution of the decree.
 - h. Justice is now a mirage and a lofty concept to the Claimant.
 - i. The stay order ought to be varied in the interests of justice and to balance of equity.
 - j. The Respondent will suffer no injustice or prejudice if the stay order is varied as the remedy of restitution is available should it succeed in appeal or security in the form of bank or insurance guarantee.
3. The application is brought under Article 48, 50(1) and I59(2)(a)(e) of *the Constitution* of Kenya, 2010; Section 3 and 12(3)(viii) of the *Employment and Labour Relations Court Act*, 2011; Rule 33(1)(d), (2), (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions of the law.



4. In the supporting affidavit Lawrence Gicaga Muiga deposes that the Respondent having been granted an open ended stay of execution on 21st May 2021 and having filed notice of appeal, has failed to file record of appeal, that due to backlog the appeal is unlikely to be determined within the foreseeable future, that the Claimants are suffering and that it is in the interest of justice to grant the orders sought.
5. A similar application has been filed by Jackson Ngunjiri Gathogo, the 3rd Claimant in Cause No 212 of 2015. It is dated 17th November 2021. His grounds in support of the application is that the Claimants in that he has sufficient security and will be able to refund the decretal sum should the appeal be successful.
6. A third similar application has been filed by the 1st Claimant in Cause No. 153 of 2015. It is dated 2nd December 2021.
7. There is a fourth motion dated 10th October 2021 by 2nd 3rd and 4th Claimants in Cause No. 153 of 2015.
8. All the applications seek similar prayers and were disposed of together by way of written submissions.
9. In the submissions of the Applicants, they state that this Court has jurisdiction to grant the orders sought, that Order 42 Rule 6 of the Civil Procedure Rules does not provide that security to be deposited must be monetary, that in the ruling that I sought to be reviewed, the Applicants had omitted to avail evidence of their ability to refund the decretal sum which they have now submitted that one of the objectives of this Court, as set out in the Act is the proportionate dispensation of justice. The Applicants submit that they are entitled to the orders sought.
10. The Respondent filed a replying affidavit of Evelyn N. Maina, Inhouse Counsel for the Respondent who states that the delay in filing the appal has been occasioned by the Claimants who in the first place failed to co-operate to enable it deposit the decretal sums in Court from the time of delivery of the ruling dated 21st May 2020 until 24th February 2021 after intervention by the Court.
11. It is further the averment of the deponent that the proceedings have never been typed due to the fact that the file ha to be withdrawn from the proceedings section due to the numerous Court appearances and applications by the Applicants. That the Respondent has all along been following up the proceedings as evidenced by its exhibits at pages 20 – 25 of the affidavit.
12. The Respondent also filed grounds of opposition as follows:
 - (i) The Applications for Review have been lodged after an inordinate delay of more than one year without an explanation advanced in the grounds and affidavits in support of the same.
 - (ii) The trial Judge reached her decision as captured in paras. 32, 33, and 34 of the Ruling dated 21.5.2020 premised on affidavit evidence placed before her, and submissions thereto, by each party.
 - (iii) The Applicants can neither now blame the trial Judge before the review Judge for their own failure to prove ability to restitute the decretal sum awarded to them nor invite the review Judge to sit in judgment on the Ruling.
 - (iv) The Applicants are in essence seeking to re-open a matter which was long concluded, re-litigate I filling-up any gaps in their cases as previously laid before the trial Judge, with introduction of new and fresh evidence before the review Judge.
 - (v) The Applicants are barred by the principle of res judicata from re-agitating and resuscitating before the review Judge, matters that were considered and rejected by the trial Judge.



- (vi) The review Judge is being invited to substitute the clearly expressed intention of the trial Judge into Ruling dated 21.5.2020 without justifiable or sufficient reasons.
 - (vii) The Applications for Review are an attack on the Intended Appeal before the wrong forum pursuant Order 42, rule 6(4) of the Civil Procedure Rules, 2010.
 - (viii) It is manifest from the Court record that the Consolidated matters remained before the trial Court up to 24.2.2021 for purposes of concluding with the actualisation of the joint Escrow Account for deposit of the entire decretal sum.
 - (ix) The 2nd, 3rd & 4th Claimants' Notice of Motion dated 10.10.2021 in Cause No. 153 of 2015 is incurably defective as it is without a valid Supporting Affidavit.
 - (x) The Applicants have not satisfied the prerequisites or threshold for invocation of the review jurisdiction by the review Judge.”
13. In its submissions, the Respondent refers the Court to the principles of review as stated by the Court of Appeal in *Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute* [2018] eKLR and in *John Peter Kamau Rubangi v Kenya Reinsurance Corporation* [2012] eKLR as follows:
- i. The Court may grant review whenever it considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident, and should not require elaborate argument to be established.
 - ii. The argument that a Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law is not a ground for review but one of appeal.
 - iii. The misconstruing of a statute or other provisions of law by the Court is not a ground for review but one of appeal.
 - iv. It is beyond the purview of review for a Court to sit on appeal on a decision of a Court of coordinate jurisdiction.
 - v. The prerequisite “for any other sufficient reason” confers an unfettered discretion in the Court to make such order as it deems fit on review. The omission of any qualifying words in the provision was deliberate.
 - vi. A point outside the purview of the review jurisdiction is not a ground for review.”
14. Section 16 of the *Employment and Labour Relations Court Act* vests this Court with the jurisdiction “to review its judgments, awards, orders or decrees”. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 “sets out the purview of the review jurisdiction”.
15. Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 of the *Civil Procedure Rules*, 2010 are the counterparts to Section 16 of the *Employment and Labour Relations Court Act* and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. Order 45, Rule 1 provides three (3) prerequisites for review of a decree or order of the High Court. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides four (4) prerequisites. The three prerequisites under the Civil Procedure Rules, 2010 are similar or in parri materia with Rule 33(1)(a), (b) and (d) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The decisions of the Court of Appeal on the application or interpretation of the said three prerequisites bind this Court.



16. It is the submission of the Respondent that the applications were lodged after inordinate delay, that the ruling was made after the Court considered all the evidence before it and the Applicants cannot blame the Court for their failure to prove ability to pay.
17. It is further the submission of the Respondent that the Applicants are attempting to reopen a concluded matter and are barred by the principle of res judicata from re-agitating or resuscitating the application. That the applications do not satisfy the threshold for review.
18. I have considered the applications, the responses thereto and grounds of opposition as well as all the submissions by the parties.
19. Review of orders of this Court is provided for in Section 16 of the Employment and Labour Relations Court (Act and in Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 as follows –

Section 16. Review of orders of the Court

The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.

Rule 33. Review

- (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.
 - (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.
 - (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or ruling or order to be reviewed.
 - (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
 - (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
 - (6) An order made for a review of a decree or order shall not be subject to further review.
20. This Court therefore has jurisdiction to review its orders.
 21. Rule 33 however sets out the circumstances under which this Court may review its orders. The Applicant's reasons are that there has been delay in filing the record of appeal and that they are in a position to refund the decretal sum should the appeal be successful.



22. As submitted by the Respondent, this is not information that is new to the Applicants. It is information that would have been brought to the Court at the time of hearing of the application in respect of which the ruling they seek to be reviewed was delivered.
23. They have also not alleged any mistake or error on the face of the record.
24. The other reasons by the Applicants in support of the application is that there has been delay in filing record of appeal. None of the Applicants has stated that the proceedings are ready for collection. I have not seen any copy of typed proceedings in the file.
25. As explained by the Respondent, the Applicants have caused the file to be retrieved from the proceedings section of the Court where typing of proceedings was ongoing twice, the first time when the file had to be placed before the Court for orders relating to the opening of escrow account and then for the hearing of the instant applications.
26. It is not the fault of the Respondent that the proceedings have not been ready to enable it file record of appeal. The upshot is that the Applicants have not met the threshold for grant of the orders sought. The same are accordingly dismissed.
27. Costs shall be in the appeal.
28. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF JULY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE

