



**Kiguru v Rai Plywoods (K) Ltd (Miscellaneous Civil Application
E007 of 2021) [2022] KEELRC 13421 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13421 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E007 OF 2021
NJ ABUODHA, J
NOVEMBER 21, 2022**

BETWEEN

JOSEPH KINYANJUI KIGURU CLAIMANT

AND

RAI PLYWOODS (K) LTD RESPONDENT

RULING

1. By notice of Motion dated 8th April, 2022 the applicant sought orders among others that this court review and or set aside its ruling delivered on 18th March, 2022 and reinstate the application dated 6th May, 2021 for hearing and determination.
2. The application was supported by the affidavit of the applicant in which he deponed among others that:
 - a. That I filed the notice of motion dated 6th May, 2021 in order to enlarge time and seek direction on settlement of an award by the director of occupational health and safety.
 - b. That the notice of motion was allowed and orders issued on 2nd July, 2021.
 - c. That the notice of motion was allowed and orders issued on 2nd July, 2021.
 - d. That once the order was served upon the Respondent, he filed an application herein dated 23rd July, 2021.
 - e. That the application was responded to and argued canvassed by way of written submissions.
 - f. That is during this time the court was misdirected that the application was similar to the one before the Chief Magistrate Misc. Civil Application No. 44 of 2020 and that it had been heard and determined.



- g. That the court record in this matter clearly shows that though the parties are similar the prayers and issues in the two applications are different.
- h. That whereas the prayers in the Chief Magistrate Misc. Civil Application No.44 of 2020 sought are as follows;
- i. Assessment made by the Uasin Gishu County Health Occupational Officer on behalf of the Director of Occupational Health and Safety on 5th April 2016 be adopted and deemed as an order of this Honourable court.
- ii. The respondent be compelled to pay the applicant the compensation assessed.
- iii. That in default of the above execution to issue.
- iv. Cost of this application be met by the Respondent.

The application dated 6th May, 2021 sought the following prayers:

- i. That the applicant be granted leave and the time enlarged to enable him initiate these proceedings.
- ii. That the Director Occupational Health and Safety award compensation made on 5th August 2016 be deemed a legitimate and this Honourable court do order settlement of the said award of Ksh. 540, 943 thereof or give any other direction leading to settlement of the award failure of which execution to issue.
- iii. Cost be provided for.
 - a. That further the ruling is clear that the orders/prayers in the CM'A Misc. Civil Application No. 44 of 2020 were not dealt with and a determination is clear that trial magistrate court as it stated lacked the jurisdiction to entertain the application as it was made out of time and could not deal with any other issue.
 - b. That the application dated 6th May 2021 was clearly seeking this extension of time and direction regarding the award by the Occupational Health and Safety Department which is different from what the Misc. Civil Application No. 44 of 2020 was seeking.
 - c. That it is in light of the above that I am seeking that the ruling dated 18th March 2022 delivered electronically on 21st March 2022 be reviewed and set aside and the application date 6th May, 2021 be heard on merit.

3. The respondent filed a Replying Affidavit through its counsel Anne Halwenge Odwa who deponed inter alia that:

- a. That I am an advocate of the High Court of Kenya practicing as such in the firm of M/s. Nyairo and Company Advocates who have the conduct of this matter for and on behalf of the Respondent hence competent to swear this affidavit.
- b. That I have read and understood the contents of the application dated 8/4/2022 and I now wish to respond as hereunder:
- c. That the application is a mere after thought lacks merit and ought to be dismissed.
- d. That the applicant has not satisfied the conditions for grant of the orders being sought.



- e. That there is no error apparent on the face of the record to warrant the review of the order made by the Court 18/3/2022.
 - f. That the issue of whether or not the Applicant's application dated 6/5/2021 was res judicata was already dealt with conclusively by the court in its ruling of 18/3/2022 after analyzing both parties' position on the matter. As such, there is nothing new that has been raised in this application to warrant a review this Court's ruling of 18/3/2022.
 - g. That the contrary to the Applicants position that the issues in the application dated 6/5/2021 are different from the ones raised in Eldoret CM Misc. application No. 44 of 2020 the bottom line is that both applications sought an order compelling the respondent to settle the award of compensation made by the Director of Occupational, Health and Safety on 5/8/2016 which issue this court cannot revisit afresh, having been dealt with in Eldoret CM Misc. Application No. 44 of 2020.
 - h. That it is evident that the Applicant's intention is to have this Court sit on its own appeal in so far as he want this court to re-evaluate its finding on whether or not this application is res judicata which this court has no jurisdiction to do.
4. This court in its Ruling delivered on 18th March, 2022, sought to be reviewed and or set aside, noted that the issue in the application dated 6th May, 2021 which gave rise to the Ruling of 18th March, 2022 were somewhat similar to those raised before the Lower Court and in respect of which that Court rendered its Ruling on 19th January, 2021 dismissing the same as statute barred. This Court becoming cognisant of this fact observed that if the applicant was not satisfied with the Ruling of the Lower Court the only recourse would be to appeal to this Court and not bring a fresh application before the Court seeking similar orders as the application dismissed by the Lower Court.
5. In the present application the applicant contends that the Court was misled because the application before the Lower Court and the one before it did not seek similar orders. Stopping there, if the applicant felt the Court made an error in reaching that conclusion then this is a decisional error which can only be challenged on appeal to the Court of Appeal. It does not in the Courts view fall within the ambit of review powers of the Court.
6. Second, the Court has looked at the application that was filed in the Lower Court and the one dated 6th May, 2021 in respect of which the Court gave its Ruling on 18th March, 2022 and reproduces the orders sought in both applications as follows. In respect of the application before this Court dated 6th May, 2021, the prayers were as follows:
- “That the Director of Occupational Health award of compensation made on 5th August, 2016 be deemed legitimate and order settlement of the award of Ksh.540,943/= thereof or give any other direction leading to settlement of the award failure of which execution issue.”
7. In the application dated 2nd March, 2020 before the Lower Court the prayers were as follows:
- i. The assessment made by the Uasin Gishu County Health and Safety and Occupation officer on behalf of the director of occupational health and safety on 5th August, 2016 as an order of this Court honourable (sic)
 - ii. That the respondent be compelled to pay the applicant compensation assessed and or compel payment of amounts.
 - iii. That in default of the above execution to issue.



8. The prayers in both applications though may not be worded similarly but it does not take any amount of gleaning or analysis to see that the consequences are the same if the orders sought were to be granted. That is to say, it will amount to adoption of the assessment by the Uasin Gishu County Health and Safety Occupation Officer as an order of the Court hence execution proceedings in default of payment of the assessed amount. No matter how much counsel for the applicant wants the Court to look at them differently their similarity and consequences are quite outstanding. From the foregoing the Court is not persuaded that its Ruling delivered on 18th March, 2022 merits review. If the applicant is dissatisfied with the ruling like it would seem, the only recourse would be to Appeal.
9. The application dated 8th April, 2022 is therefore found without merit and is hereby dismissed with costs.
10. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF NOVEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

