**Mwambu v Twiga Food Ltd (Petition E003 of 2023)**
**[2024] KEHC 1622 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1622 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**PETITION E003 OF 2023**

**OA SEWE, J**

**FEBRUARY 8, 2024**

**IN THE MATTER OF A PETITION UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010 FOR THE ENFORCEMENT OF THE FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 28, 31, AND 40 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**BETWEEN**

**AMOS MWAMBU ..... PETITIONER**

**AND**

**TWIGA FOOD LTD ..... RESPONDENT**

**RULING**

(1) The Notice of Motion dated 16th October 2023 was filed by the respondent, Twiga Foods Limited, pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 45 Rule 1(1) of the *Civil Procedure Rules*, for orders that:

(a) The Court be pleased to review its ruling dated 19th September 2023 and find that it lacks jurisdiction to handle this Petition;

(b) Costs of the application be provided for.

2. The application is premised on the grounds that the use of the petitioner's images and photographs occurred while the petitioner and the respondent were till in an employer/employee relationship; and therefore the cause of action arose while the petitioner was still an employee of the respondent. Thus, it was the contention of the respondent that the dispute as presented is an employment dispute.

3. The application was supported by the affidavit sworn by the respondent's Head of Legal & Compliance, Mr. Daniel Ngugi, in which it was averred that there is sufficient cause to warrant review of the ruling dated 19th September 2023, in that the petitioner's photographs and images in question were used when the petitioner was still an employee of the respondent. The respondent further averred that the respondent's actions were governed by the employee social media policy at the time.

4. Hence, the respondent averred that, at the time the ruling was made, the respondent had not availed any evidence to its advocates as it was undergoing a funding round and had substantively restructured; and therefore the information availed is new and important and was not within the respondent's knowledge or could not be produced at the time. Thus, the respondent pointed out that the petitioner's employment was terminated on 30th November 2022, whereas the subject photographs were published by the respondent on 5th October 2022. Accordingly, the respondent prayed that the application be allowed and the orders sought granted.

5. The petitioner opposed the application vide his Replying Affidavit sworn on 2nd November 2023. In his view, the application does not raise any issue that warrants the Court to review its ruling in this matter as the reasons given by the respondent amount, in effect, to grounds of appeal from the decision of the Court. He further deposed that the issue of jurisdiction was dealt with conclusively by the Court and to rule otherwise would be tantamount to the Court sitting on appeal in respect of its own decision. He therefore prayed for the dismissal of the application.

6. The application was canvassed by way of written submissions, pursuant to the directions given herein on 23rd October 2023. Thus, in the respondent filed written submissions dated 4th January 2024, the respondent proposed one issue for determination, namely, whether its application has met the threshold for the grant of an order of review. It reiterated its stance that the use of the petitioner's images and photographs occurred while the petitioner was its employee; and that it was relying on the provisions of the employment contract and particularly the provisions of the Social Media & Marketing Policy. Hence, it was the submission of the respondent that the Court shall be called upon to adjudicate matters pertaining to the employment relationship between the parties.

7. On the authority of Shanzu Investments Limited v Commissioner for Lands, Civil Appeal No. 100 of 1993, the respondent submitted that sufficient cause has been shown by it to warrant review; namely the employer/employee relationship was in existence when the cause of action arose. Thus, the Court was urged to find that the dispute falls squarely within the jurisdiction of the Employment and Labour Relations Court and ought to be transferred there for hearing and determination.

8. On his part, the petitioner relied on Section 80 of the *Civil Procedure Act*, Order 45 Rule 1(b) of the *Civil Procedure Rules* and National Bank of Kenya v Ndungu Njau to buttress his submission that the applicant has not disclosed a single ground to warrant review. According to the petitioner, the respondent believes that it was the successful party in connection with the Preliminary Objection the subject of the ruling dated 19th September 2023. Hence, he argued that the application is akin to asking the Court to sit on appeal over its decision and to reverse the same on the ground that the decision is erroneous; and is therefore untenable. In this regard, the petitioner relied on Omote & Another v Ogutu (Civil Appeal E005 of 2021) [2022] KEHC 16441 (KLR) (19 December 2022) (Ruling); and

*Grace Akinyi v Gladys Kemunto Obiri & Another [2016]* eKLR. He accordingly urged for the dismissal of the application.

9. The application was brought Order 45 Rule 1(1) of the *Civil Procedure Rules*. It states:

> (1) Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed,
>
> and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

10. It was therefore incumbent upon the respondent to satisfy the Court that it had filed its application without unreasonable delay; and that:

> (a) there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at the material time; or
>
> (b) there is some mistake or error apparent on the face of the record; or
>
> (c) that there is any other sufficient reason for review.

11. Granted that the ruling sought to be reviewed was delivered on 19th September 2023, I entertain no doubt that the instant application was brought without undue delay. The ruling was in respect of a Preliminary Objection raised by the respondent as to the jurisdiction of the Court and the conclusion I reached was thus:

> " What the petitioner herein complains of appear to have nothing to do with his contract of employment save for the fact that the photographs in issue were taken while he was in the course of his employment with the respondent. I consequently agree with counsel for the petitioner that the authorities relied on by the respondent in support of the Preliminary Objection are indeed distinguishable...In the result, I find no merit in the respondent's Preliminary Objection. The same is hereby dismissed with costs."

12. The respondent now contends that it has evidence to show that the photographs were taken while the petitioner was its employee; and therefore the proper forum for the hearing and determination of this dispute is the Employment and Labour Relations Court. On that account, the respondent seeks that the ruling dated 19th September 2023 be reviewed and a decision be made that this Court lacks the jurisdiction to hear and determine the Petition. It is plain then that the respondent is not saying that there has been discovery of new and important matter or evidence which after due diligence, was not within its knowledge or could not be produced by it at the time when the ruling was made, or that there is some mistake or error apparent on the face of the record. Its contention is that there is sufficient reason for review in that the petitioner was in fact its employee when the photographs were taken. In essence, the respondent's assertion is that the Court arrived at the wrong decision in the ruling dated 19th September 2023.

13. It is now trite that, where that is the case, the merit of the decision of the Court is under challenge, the best course for a party to take is to file an appeal, for, as a wrong view is no ground for review. In Nyamogo & Nyamogo Advocates v Kago [2001] 1 EA 173 the Court of Appeal made this point thus:

> " ... There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."

14. Similarly, in *National Bank of Kenya Limited v Ndungu Njau [1997]* eKLR, the Court of Appeal had the following to say in connection with an application for review:

> " ... 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 a statute or other provision of law cannot be ground for review."

15. The Court of Appeal further stated that:

> " ...the learned Judge ... made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the Learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."

16. In the more recent case of *Pancras T. Swai v Kenya Breweries Limited [2014]* eKLR, the Court of Appeal restated its viewpoint thus:

> " It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus [sic] officio and have no appellate jurisdiction...The power to review decisions on appeal is vested in appellate courts..."

17. Moreover, in *Julius Ochieng Oloo & another v Lilian Wanjiku Gitonga [2019]* eKLR, the Court of Appeal had occasion to consider whether the question of jurisdiction would be a valid ground for review. Here is what the Court had to say:

> [10] That said the question before us is whether lack of jurisdiction by the court against which review was being sought albeit introduced late could have been a ground for review as

envisioned under Order 45 of the Civil Procedure Rules; and further, whether the ratio decidendi by the learned Judge is erroneous in law. The grounds for review as envisaged under the said order are limited to;

(a) Discovery of new and important matters or evidence which was not within the knowledge of the applicant or which could not be produced by him at the time when the decree or order was made;

(b) a mistake or error on the face of the record; or c) some other sufficient reason.

Supplemental to the above is that the application must be brought without unreasonable delay.

(11) It follows that lack of jurisdiction by the court making the ruling/order is not an error apparent on the face of the record, but rather an error of judgment that goes to the merit of the decision. Such an error can only be corrected by an appellate court.

18. The same conclusion was arrived at in the persuasive decision of *Patrick Miano v Mathira Coffee Farmers Housing Cooperative Society Ltd [2017]* eKLR, thus:

> " Even if the appellant's argument that the trial court lacked jurisdiction was to be accepted as plausible and therefore it either misapprehended the law or misdirected itself in that regard when it proceeded to hear and determine the dispute before it, that cannot be a ground for review. As always, a difference of opinion on the interpretation of the law or a legal principle cannot be a ground for review. I have previously stated elsewhere (HCCC No. 12 of 2014(Nyeri) Ecobank Ltd versus David Njoroge Njogu and Ann Wanjiru Njogu) that where a party aggrieved by an order or a decree is of the conviction that the order or the decree was based on a misapprehension of the law, the correct course would be to appeal against that decree or order rather than file a review application which, in my humble view, puts the judge or the magistrate who made it in a somewhat awkward position of explaining or defending the order or the decree..." (see also Manjula Dhirajlal Soni v Dukes Investments International Limited & 2 others [2018] eKLR)

19. In the result, it is my finding that, the issue of jurisdiction having been determined by the Court, that decision can only be reversed on appeal but not by way of review. Accordingly, the respondent's application dated 16th October 2023, lacks merit and is hereby dismissed with an order that the costs thereof to be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 8TH DAY OF FEBRUARY 2024**

**OLGA SEWE**

**JUDGE**