



**Kayaa v Tushirikiane Enterprises Limited (Appeal E004 of 2024)
[2024] KEELRC 1945 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1945 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E004 OF 2024**

**M MBARŪ, J
JULY 25, 2024**

BETWEEN

ESTHER DAMA KAYAA APPELLANT

AND

TUSHIRIKIANE ENTERPRISES LIMITED RESPONDENT

RULING

1. The appellant filed an application dated 10 June 2024 under the provisions of Rule 33 of the [*Employment and Labour Relations Court \(Procedure\) Rules*](#) seeking orders;
 1. Spent.
 2. Spent.
 3. The court be pleased to review its judgment delivered on 16 May 2024 and determine the same on the basis that there was an inadvertent human error in filing the record of appeal as the applicant/appellant has been mapped in Malindi ELRC Appeal Case No.E010 of 2024 which had the same case parties and the parties herein the respondent included had filed documents in Malindi ELRC Appeal Case No.E010 of 2024 and proceeded to determine the appeal on its merits.
 4. Or in the alternative, the court to proceed to review its judgment delivered on 16 May 2024 and determine the same on the basis that there was an inadvertent human error of the record of appeal as the applicant/appellant has been mapped in Malindi ELRC Appeal Case No. E010 of 2024 which had the same parties and the parties herein the respondent included had filed the documents in Malindi ELRC Appeal Case No.E010 of 2024 and consolidated both cases Malindi ELRC Appeal No. E004 of 2024 and Malindi ELRC Appeal Case No.E010 of 2024 with similar parties and thereafter proceed to determine the appeal on its merits.



5. Costs for this application be provided for.
2. The application is supported by the affidavit of the appellant who aver that judgment herein was delivered on 16 May 2024 and the court held that there was no record of an appeal filed and when the appellant's advocate attended court on 13 March 2024 he confirmed that the Record had been filed which was not the case. The appeal was dismissed with costs to the respondent. There was an inadvertent human error on the part of the appellant during the mapping of the appeal which was registered under Malindi ELRC Appeal No.E010 of 2024 which had the same parties as herein as Malindi ELRC Appeal No.E004 of 2024. Human error should be forgivable as man in his nature is fallible and mistakes of advocates should not be visited upon the client.
3. In the Supporting Affidavit, the appellant aver that judgment herein was delivered on 16 May 2024 and the same was dismissed due to the inadvertent mistake of failing to file the Record of Appeal herein. All the Records had been filed under Malindi ELRC Appeal No.E010 of 2024 and the appellant honestly believed that there was a proper Record of Appeal herein. No prejudice will be suffered by the respondent if the order sought is allowed with costs.
4. In reply, the respondent filed the Replying Affidavit of Lewa Mwangovya and the managing director that the present application is frivolous and an abuse of the court process. The appellant's allegations that there was an employment relationship between the parties are not correct and her work was ad hoc and not in the exclusive control of the respondent, all the due allowances were paid in full and for a given task. There was no agreement produced to prove employment and the claim and the appeal were corrected assessed and dismissed. The application herein should also be dismissed with costs.
5. Both parties attended court and made oral submissions.

Determination

6. The application herein is filed on the foundation of Rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules](#) (the Court Rules). The appellant is seeking that the judgment herein delivered on 16 May 2024 be reviewed based on the inadvertent error in filing the Record of Appeal under Malindi ELRC Appeal No.E010 of 2024 instead of filing the same under this file. In the alternative, the appellant is seeking that both appeals be consolidated and be heard together on the merits.
7. Indeed, under Rule 33 of the [Court Rules](#), a party is allowed the opportunity to seek a review of court orders once issued. The SUBPARAMeters of such a review are that;
 - (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.
8. An applicant must demonstrate that there is discovery of a new matter which was not within their knowledge when the order sought to be reviewed was issued. There must be a mistake or error apparent on the face of the record. There is a need for clarification that there exists sufficient cause to justify the issuance of the order of review.
9. Is there discovery of new matters that were not within the knowledge of the appellant while filing Malindi ELRC Appeal No.E010 of 2024 when this appeal had already been filed?



10. The Memorandum of Appeal herein was filed on 18 February 2024. There is a physical record to this effect.
11. Through notice dated 29 February 2024, the court invited parties to attend before the Judge on 13 March 2024 at Mombasa to take hearing directions.
12. On the due date, 13 March 2024 the appellant attended court under this file while the respondent remained absent. The appeal was admitted and directions were issued that it would be heard orally in open court at Malindi on 24 April 2024. The court directed the appellant to serve the respondent a Hearing Notice for 24 April 2024.
13. In his Affidavit of Service dated 20 March 2024, Gift Mwangunya avers that he served the respondent with a Hearing Notice to attend court physically on 24 April 2024.
14. Both parties attended as directed. The appellant was represented by the advocate in open court while the respondent was online unable to attend due to work engagements. The appellant's advocate requested that judgment be issued based on the filed records and the Replying Affidavit of the respondent. Judgment was reserved for 16 May 2024.

No Record of Appeal was filed.

15. Under Malindi ELRC Appeal No.E010 of 2024, there is no Memorandum of Appeal save, a replication of records which should have been filed herein including the Record of Appeal, written submissions and all targeted under Malindi ELRC Appeal No.E004 of 2024. There is no appeal filed under Malindi ELRC Appeal No.E010 of 2024. The purpose of such a file registered as an appeal is not stated.
16. To urge the court to consolidate both files and hear the appeal on the merits is left bare. It will not serve any useful purpose of sufficient reason.
17. This too does not aid the case that there is discovery of a new matter that was not within the knowledge of the appellant at the time of filing Malindi ELRC Appeal No.E010 of 2024.
18. The appellant herein was in court for the hearing of the appeal and properly guided by the court. If indeed there was any appeal filed under Malindi ELRC Appeal No.E010 of 2024, such fact would have been apparent at the time of lodging the appeal and service upon the respondent. There is no material evidence that there exists a valid appeal under Malindi ELRC Appeal No.E010 of 2024.
19. In *Nyamogo & Nyamogo v Kogo* (2001) EA 174 the court defined what constitutes an error apparent on the face of the record and held that;

... an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid-down principle of law is indeed applicable in the matter before us.



20. In the case of *Zablon Mokuua v Solomon M. Choti & 3 others* [2016] eKLR the court in addressing a similar matter held that;
- ... [an error apparent on the record] must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may conceivably be two opinions.
21. In the case of *Omote & another v Ogotu* (Civil Appeal E005 of 2021) [2022] KEHC, the court gave a distinction between the process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review with “an erroneous order/decision cannot be corrected in the guise of exercise of the power of review.
22. In this case, there is an admission of an inadvertent mistake of an advocate. This is not an error apparent on the face of the record correctable under the review provisions of Rule 33 of the Court Rules. To apply such reasoning would negate the very purpose of this rule. This is sorely intended to correct errors and mistakes apparent on the face of the record but not to correct the inadvertent mistake of an advocate. The appropriate remedy for such inadvertent mistake would be to seek the setting aside of the orders issued which is not the case here. See *Mbogo v Shab* [1968] EA 93 where the court held that;
- ...the discretion to set aside a judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.
23. To move the court under the motions of Rule 33 of the *Court Rules* would be to seek to be bound by its conditionality.
24. The Court of Appeal in the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR held that;
- ... Order 45 does not excuse every error or mistake even if it is inadvertent, it excuses those mistakes and allows a party to introduce documents which could not be found even after the exercise of due diligence. ...
25. Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. It excuses those mistakes and allows a party to introduce documents on which it could not lay its hands even after the exercise of due diligence. There was no response to the replying affidavit in so far as it accused the respondent of lack of diligence. The discretion of the law to grant an order of review cannot be used to help a party who has shown a lack of diligence. It is also instructive to note that the respondent misled the High Court about when and how it realised it was mistaken. Mr Mundia disposed in an affidavit in support of the application that he noted that there was a problem when he read the sentiments of the court in SUBPARA graph 9 of the ruling in which the Judge found that there was no agreement signed by the client in accordance with section 45(1) of the *Advocates Act*. It was quite clear therefore that the respondent having found out why the Judge decided against it went back to the drawing board and fished out evidence that would bolster its case. This was too late in the day as the horse had already bolted from the stable. The respondent’s explanation about how it realised there was a problem was therefore designed to mislead the court and the learned Judge failed to see through this trick. Had he considered this fact, I do not doubt at all, that he would not have allowed the application.
26. Similarly in this case, until judgment was delivered on 16 May 2024, the appellant held two files under Malindi ELRC Appeal No.E004 of 2024 and Malindi ELRC Appeal No.E010 of 2024. This



realization only arose from the analysis of the judgment herein. When the appellant found out why the court decided against the appeal, this application was filed.

27. A review application cannot be used to seal loopholes. The appeal is addressed on the merits and going back on it under the provisions of Rule 33 of the Court Rules would be to visit great injustice upon the respondent.
28. The court finds no good cause to review the judgment herein delivered on 16 May 2024. The application dated 12 June 2024 is without merit and is hereby dismissed. Costs of ksh.10, 000 awarded to the Respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25 DAY OF JULY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

