REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRCA NO. E067 OF 2023

ANDREW NYAMBERI OKINDO……APPELLANT

VERSUS

LAVINGTON SECURITY LIMITED……RESPONDENT

(Being an Appeal against the Ruling of Hon. B.M Cheloti (PM), in Milimani Chief Magistrate Employment Case No. MCELRC 1498 of 2021; Andrew Nyamberi Okindo -vs- Lavington Security Limited which was delivered on 17th April, 2023 at Nairobi)

JUDGMENT

1. Through the Memorandum of Appeal dated 5th May, 2023, the Appellant appeals against the ruling of the Hon. B.M Cheloti (PM) delivered on 17th April,2023.

2. The Appeal was based on the grounds that:

i. That the learned trial magistrate grossly misdirected herself by making an order to set aside a regular judgment delivered by Hon. E.M Kagoni (PM) delivered after full hearing with both parties present.

ii. That the learned trial magistrate grossly misdirected herself by failing to give directions of the application for an order that a

review of the Judgement made and delivered by Hon E.M Kagoni (PM).

iii. *That the learned trial magistrate grossly misdirected herself by ignoring the principles and law applicable on review, setting aside and/ or varying a judgment.*

iv. *That the learned trial magistrate grossly misdirected herself by making staying execution of the judgment delivered by Hon. E.M Kagoni (PM) and all consequential orders pending hearing and determination of the respondent's application FOR AN Application already determined.*

v. *That the learned trial magistrate grossly misdirected herself by granting herself an opportunity to set aside a judgment delivered by a court of competent jurisdiction.*

vi. *That the trial magistrate grossly misdirected herself by finding that the Respondent had met the threshold for setting aside of a judgment.*

vii. *That the learned trial magistrate grossly misdirected herself by failing to give a dictum on how the Respondent had met the threshold of setting aside a judgment.*

viii. *That the learned trial magistrate grossly misdirected herself by failing to illustrate whether the Respondent had met the threshold of review and/ or varying the judgment delivered by Hon. E.M Kagoni (PM).*

ix. *That the learned trial magistrate grossly misdirected herself by issuing a hearing date of 26th June, 2023 for the case to be retried which was not a prayer sought in any of the Respondent's documents.*

x. *That the learned trial magistrate grossly erred in law by not considering the pleadings and submissions before the court and delivered a per in curium decision.*

xi. *That the learned trial magistrate grossly misdirected herself by finding that the Respondent's Application was merited.*

xii. That learned trial magistrate grossly misdirected herself by failing to award costs.

3. The Appellant prayed that the Appeal be allowed with costs and the Ruling and order of the Honourable Magistrate made on the 17th April 2023, be set aside and the Honourable Court make a ruling on the orders prayed for in the lower Court.

4. The Appeal was disposed of by written submissions.

APPELLANT'S SUBMISSIONS

5. The Appellant's Advocates Kago & Company Advocates filed written submissions dated 28th February, 2025.

6. On the issue of whether the trial magistrate applied the law on setting aside a regular judgment, counsel relied on Section 7 of the Civil Procedure Act which bars courts from re-examining issues that have been conclusively determined by a court of competent jurisdiction and terms it as res judicata.

7. Counsel submitted that there ought to be judicial finality to matters and further, that the drafters of the Civil Procedure Act had this in mind when the principle of *res judicata* was

introduced into the Kenyan legal system. To hold otherwise would be to undermine the hierarchical structure of the Courts.

8. Counsel submitted that in any case, the law has made clear guidelines on circumstances that warrant or that allow for a judgment to be set aside and there is not one of them. Counsel relied on Order 45 Rule 1 and Order 36, Rule 10 on when a judgment can be reviewed and/or set aside.

9. Counsel submitted that the clear cut specifications of the law are that for a judgment to be set aside, its either the suit should have been dismissed or that one party was absent at the hearing of the case. In this case both parties were present, a full hearing was conducted and it was after submitting on the issues that the case was judgment pronounced. Counsel submitted that the Honourable Magistrate was sitting on an appeal over a court of the same rank because there was no way the same judgment could be set aside and on what law.

10. Counsel submitted that the ruling was fatally defective and ought to be overturned as the learned magistrate not

only set aside a regular judgment following a full hearing but additionally failed to apply the governing laws on setting aside and/or varying judgments, assumed appellate jurisdiction over a judgment from a court of equal stature and also issued orders inconsistent with the Respondent's pleadings and applicable legal principles.

11. Counsel submitted that the premise was based on decided cases that judgments delivered after a full hearing is final and binding unless set aside on valid grounds such as fraud, illegality or lack of jurisdiction. Counsel relied on the cases of **Shah v Mbogo [1967] EA 116 and Kenya Commercial Bank v Specialised Engineering Co. Ltd [1982] KLR** on when a judgment can be set aside which are exceptional circumstances.

12. On the issue of whether the suit met the threshold for retrial counsel submitted that the Respondent in its application prayed for order for stay of execution as well as for the Court to review, set aside and/or vary the judgment by Honourable Kagoni. That nowhere in its application did the

Respondent pray for a re-trial which meant that the Appellant also did not submit on why the same ought not to happen as the same was not sought.

13. Additionally, counsel submitted that the Honourable Court did not give any reason for the same which was to ensure transparency and fairness. Its importance has been stressed in case law for instance **Mbogo & another v Shah [1968] EA 9**, **Kenya Revenue Authority v Menginya Salim Murgan [2017] eKLR**.

14. On the issue of whether the suit amounted to a review counsel submitted that the law on review is really quite clear. Counsel relied on Order 45 Rule 1 of the Civil Procedure Rules, which lays down the grounds to be used for review as error apparent on the face of the record, discovery of new evidence and any sufficient reason. The application ought to have been brought without inordinate delay.

15. Counsel submitted that the Respondent disagreed with the formulae used by the Honourable Court to calculate the awards for leave, public holidays and overtime. The

Appellant on the other hand stated that this needed to have been raised in appeal and not as review. That the Appellant quoted the case of **Executive Committee Chelimo Plot Owners Welfare Group & 288 others v Langat Joel & 4 others (sued as the Management Committee of Chelimo Squatter Group) [2018] eKLR** which referred to the cases of **Mamogo & Nyamogo v Kogo (2001) EA 1 and Another V Mungala (2005) eKLR** as well as the case of **Shade Manufacturers & Hote[illegible]ah Mwanu Mutuu & 3 others [2022] eKLR** which explained the difference between an erroneous decision and an error apparent on the face of the record and most importantly, that it cannot be an error on the face of the record if another view is possible.

16. Counsel submitted that the Respondent relied on the law used in the calculations- the Protection of Wages (Protective services Order) 1998 instead of the Regulation of Wages (General) (Amendment) Order, 2018 and more importantly so, the formulae used by the Appellant to calculate the dues awarded to him.

17. Counsel submitted that there was no introduction of new evidence by the Respondent or even any other sufficient cause for review. That the Appellant also pointed out the fact that these formulae argued by the Respondent were not brought out in their Defence pleading or even submissions prior to the judgment being delivered.

18. Counsel submitted that aside from the discussed threshold for review, Order 45 does not grant any other relief, especially not setting aside the judgment and/or even ordering for a retrial. For this, he prayed that the ruling be set aside.

RESPONDENT'S SUBMISSIONS

19. The Respondent's Advocates Kwamboka Tarus & Associates Advocates filed written submissions dated 7th July, 2025.

20. Counsel submitted that the Appellant throughout his submissions has attempted to make assertions to the effect that the Honourable Trial court erred in clothing herself with appellate powers on a decision of a court of equal status.

Counsel submitted that the position was erroneous and the true position was that the trial Honourable Court being the presiding magistrate, the previous court having been transferred rightly exercised her powers as the trial court and not appellate court.

21. Counsel submitted that the Respondent reiterates its submissions in support of the Application dated 20th December 2022, the Grounds in support and the Supporting Affidavit thereto as forming part of its submissions herein.

22. Counsel submitted that the grounds of the Respondent's Application at the trial court was on errors in calculations on various items under the reliefs granted by the trial court which the Respondent sought to be reviewed.

23. Counsel relied on Section 16 of the Employment and Labour Relations Court Act which grants the trial court power to review its Orders, Judgments and/or decrees. Counsel relied on the Employment and Labour Relations Court (Procedure) Rules, Rule 74 which provides that 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 on some conditions.

24. Counsel submitted that the highlighted Section 16 of the Employment and Labour relations Court Act and Rule 74 of the Employment and Labour Relations Court (Procedure) Rules grants the honourable trial court wide powers and discretion in terms of review of its decisions. Counsel relied on the Court of Appeal decision in **JMK v MWM & another [2018] KECA** [illegible] on exercise of review jurisdiction by the trial court.

25. Counsel submitted that guided by the above statutory provisions and rules, the Honourable trial court was rightly guided in determining the Application for review dated 20th December 2022. Counsel invited the Honourable Court to agree with it and the cited authority that the Trial magistrate in setting aside the judgment dated and delivered on 20th June 2022 as the Respondent had raised such sufficient grounds to warrant the honourable court exercise it powers of review.

26. Counsel further submitted that the instant Appeal was premature as the Appellant did not allow the trial court an opportunity to fully review its decision by substituting the Judgement, correcting the highlighted errors or issuing further directions before proceeding to this appellate court. That the court should find that the appeal lacks merit and dismiss it with costs to the Respondent.

DE[illegible]N

27. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence of the trial court on both points of law and facts and form with its own findings and conclusions as was held in **[illegible]manyara & 2 others v Attorney General [201[illegible]** where the Court of Appeal stated that: -

"[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

28. In this case, the Ruling of the trial court was that the execution of Judgment delivered on 24th June, 2022 and all consequential orders be stayed pending the hearing and

determination of the application and that the Judgment delivered on 24th June, 2022 be set aside. The Appellant being aggrieved by the Ruling of the trial court appealed the whole of the ruling raising 12 grounds.

29. In the opinion of the Court, the issue for determination is whether the trial court was justified in staying the execution of the judgment setting aside the same and reopening the matter for a retrial.

30. The application dated 20th October,2022 sought for stay of execution pending hearing of the application and basically review of the Ruling delivered on 24th June,2022. The first prayer of stay was dealt with at interlocutory stage since it was pending hearing of the application which was heard by the Applicant filing their Replying affidavit sworn on 9th January 2023. Parties filed their respective submissions and what was pending before the trial court was to determine the review application.

31. To the contrary the court went on to stay execution of judgment pending hearing of application which was already heard and set aside the judgment. The court went on to

reopen the mater for a retrial which was already determined and court became *functus officio*. The court could only entertain the issue of review which it had jurisdiction over. Dealing with the issue of stay which was already dealt with by a court of concurrent jurisdiction and was therefore res judicata was done without jurisdiction.

32. The trial court instead of confining itself to the review of the judgment went on to purport to make a regular judgment where parties were heard and delivered on merit. This court appreciates that there should be an end to litigation and the trial court did not have jurisdiction to set aside a judgment delivered by a court of concurrent jurisdiction. The power to set aside judgment of a trial court is a function of this court exercising its appellate jurisdiction.

33. This court finds that the trial court erred in staying and setting aside a judgment of a court of coordinate jurisdiction when all it was called upon was to review the said judgment.

34. This court will therefore deal with the issue of whether the review application was merited in the spirit of dispensing justice timeously and judiciously.

35. The Employment and Labour Relations Court (Procedure) Rules provide under rule 74(1) that:

> *(1) A person who is aggrieved by a decree or order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed may, within a 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 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;*
>
> *(d) for any other sufficient reason.*

36. The application for review before the trial court was that there was an error apparent on record wherein the honourable court awarded more than the actual tabulation; the formula adopted by the Claimant and tabulations thereto was not existent. In **Zablon Mokua V Solomon M. Choti & 3 others [2016] eKLR** while relying on court of

Appeal decisions held that: - The Court of Appeal had the following to say in an application for review in the case of **National Bank of Kenya Ltd vs Ndungu Njau.**

"*A review may be granted whenever the court 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 an elaborate argument to be established. It will not be a sufficient ground for review that another court 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. A misconstruction of a statute or other provision of law cannot be a ground for review.*

37. From the above proposition and the fact that the Respondent argued on the error in the calculations- the Protection of Wages (Protection services) Order) 1998 instead of the Regulation of Wages (General) (Amendment) Order, 2018 and more importantly so the formulae used by the Appellant to calculate the dues awarded to him, it is clear that the error should be self-evident, that misconstruing the law is not a ground for review. It therefore follows that the Respondent did not meet the grounds for review and the only avenue for it was to appeal the judgment if it was aggrieved.

38. In the upshot the Appeal is found merited and is hereby allowed with costs to the Appellant while

dismissing the Respondent's application dated 20th December, 2022 seeking review of the trial court Judgment dated 24th June, 2022.

39. It is so ordered.

Dated at Nairobi this 6th day of February 2026

Delivered virtually this 6th day of February, 2026

Abuodha Nelson Jorum

Presiding Judge Division