REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NUMBER **E251** OF 2024

DEVKAN ENTERPRISES LTD……..……...……APPELLANT

-VERSUS-

MOSES WACHIRA MUTHONDEKI……...…….RESPONDENT

(Being an appeal from judgment and decree in Small Claims Court at Ruiru

(Hon. J.K. Tawai RM) claim number E215 of 2024 dated 15-07-2024)

RULING

Honourable Lady Justice F. Muchemi delivered judgment in this matter on 12th June 2025 in which she dismissed the appeal. Pursuant to the provision of the law that appeals to this court from the Small Claims Court Act are limited to matters of law only, the Honourable Judge identified only two issues which were based on matters of law and found no merits in the same. Among the issues the Honourable Judge found to be falling under matters of facts and which she avoided addressing was ground 5 of the memorandum of appeal which stated that; *'The learned Adjudicator erred in law by misapplying the doctrine of vicarious liability.'*

Following the aforestated judgment, the appellant filed a notice of motion dated 2nd July 2025 which is the subject of this ruling in which it prayed for the following orders;

1. *Spent.*
2. *Spent.*
3. *The Honorable Court be pleased to review and set aside its judgment delivered on 12th June, 2025.*

4. *The Court do find that the ground No. 5 of the memorandum of appeal relating to misapplication of the principle of vicarious liability is a matter of law properly falling within the jurisdiction of the High Court and consider it on review.*

5. *The costs of this application be provided for.*

The application was supported by affidavit of Rajan Shah sworn on 2nd July 2025. In this affidavit which is a replica of the grounds on which the application is based, the deponent avers that the Honourable Judge erroneously classified the ground touching on vicarious liability as a matter of fact whereas it should be a matter of law. It is averred further that vicarious liability is a legal rather than a factual concept and therefore the Judge fell into an error in classifying it as a matter of fact. The appellant calls this an error apparent on the face of the record hence this application.

The application was opposed through an affidavit sworn by Carol Wanjiku Kimachia the advocate for the respondent on 7th August 2025. Carol depones that the application is vexatious, lacks merits and an abuse of the court process. She adds that the application is an afterthought as it was brought with unreasonable delay and that the appellant has not demonstrated that there is sufficient cause to warrant review of the court's judgment.

I have read the notice of motion, the supporting affidavit, the replying affidavit and the submissions of the appellant dated 22nd August 2025. The respondent did not file any submissions despite having been duly notified of this court's directions on filing of submissions.

Grounds for review have been well settled in numerous judicial pronouncements. They include discovery of new and important matter or evidence which was not within the knowledge of the applicant at the time the decree or order sought to be reviewed was passed or could not be produced despite exercises of due diligence by the applicant, a mistake, error apparent on the face of the record and any other sufficient reason. In this matter, the appellant is pursuing review on grounds that there is an error apparent on the face of the record and that there is sufficient reason to justify the orders sought.

The appellant has submitted that classifying the issue of vicarious liability as a matter of fact by the Judge was an error apparent on the face of the record and in support of this position, it has cited several authorities which defines what an error apparent on the face of the record means.

What constitutes an error apparent on the face of the record is not novel. It has been a subject of many cases and the courts have been firm in defining the boundaries of review based on the said ground. The courts have consistently held that an error apparent on the face of the record is that which is too obvious that it does not need to attract any deep or broad legal arguments or evaluations. It may be a slip of the pen, misdescription of an obvious issue or that involving correction of a refraction to align with the court's mind. It cannot extend to issues which goes to the Judge's interpretation of the law or the position the court has taken on a certain issue. In ***Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others [2021] KEHC 4068 (KLR),*** it was held that;

> *'As was observed in Abasi Belinda v Fredrick Kangwamu and another "a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal." A review lies only for patent error where without any elaborate argument one could point to*

the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.'

In this matter, the Honourable Judge was clear that in her judgment, the issue of vicarious liability was a matter of fact. That is a clear position my senior sister took and it is not for me to decide whether she was right or wrong. That is a clear case of an appeal as it seeks to change a clear holding of a Judge of concurrent jurisdiction. To me, not even the Honourable Judge can change that position in this judgment. It is a matter that can only be handled by a court of higher ranking. The appellant's attempt to categorise it as an error apparent on the face of the record is misplaced and misleading.

The appellant has submitted that there is a sufficient reason to review the judgment. However, when it comes to substantiation of that ground, the appellant reverts to its argument that the court made an error in taking the position that the issue of vicarious liability was an issue of fact. It has cited the Court of Appeal in ***Pancras T. Swai v Kenya Breweries Limited [2014] KECA 883 (KLR)*** thus;

'As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.'

In the opinion of this court, the above position taken by the Court of Appeal does give the court powers to review its decision in a manner that would amount

to changing a position it has already taken. In my view, the holding of the Court of Appeal above could refer to circumstances that may fall outside the purview of error apparent on the face of the record, new evidence or matter or mistake but that which would not compromise or change the decision of the Judge or give it a meaning which was not intended. What the appellant is seeking is to have a result that will change the position or meaning intended by the Judge.

The conclusion of the above is that, I find no merits in the notice of motion dated 2-07-2025 and the same is hereby dismissed with costs to the respondent.

Dated signed and delivered at Nairobi this **27th** day of **February** 2026.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Orwenyo holding brief for Mr. Chemoiwa for the appellant and Miss Waithaka for the respondent.