



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Union of Commercial Food and Allied Workers v Bhumi Distributors Limited
(Cause E004 of 2023) [2025] KEELRC 421 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 421 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E004 OF 2023
MA ONYANGO, J
FEBRUARY 13, 2025**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

BHUMI DISTRIBUTORS LIMITED RESPONDENT

RULING

1. Judgment in this claim was delivered on 21st December, 2023. The court entered judgment against the Respondent/Applicant herein in the following terms:
 - a. The Respondent is hereby ordered to sign a recognition agreement with the Claimant within 30 day from today.
 - b. The Respondent is hereby ordered to deduct and remit union dues from employees who have acknowledged their membership through signing the check off forms.
 - c. Parties are directed to commence collective bargaining in the manner provided in the law upon signing recognition agreement.
 - d. Respondent to pay the Claimant costs of the Claim which I assess at Kshs. 100,000 to include reasonable costs and disbursements.
2. On the 24th January, 2024 the Respondent/Applicant filed a Notice of Motion application dated 24th January 2024 brought by the Respondent under section 1A, 3 and 3A of the *Civil Procedure Act*, section 16 of the *Employment and Labour Relations Court Act* and Rule 33(1), (2), (3), (4) and (5) of the Employment and Labour Relations Court (Procedure) Rules, 2016. It seeks the following orders:
 - i. Spent



- ii. Spent
 - iii. That this honourable court be pleased to review, vacate, vary and or set aside its judgment of 21st December 2023.
 - iv. That the case be reopened and directions be given on the evidence which at the time was not brought into the consideration of this honourable court prior to judgment be so considered.
3. On 31st January, 2024 the Respondent/Applicant filed a second Notice of Motion also dated 24th January, 2024 in which it sought orders as follows:
- a. That service of this application be dispensed with and application be heard exparte in the 1st instance.
 - b. That there be stay of execution of the judgment herein pending the hearing and determination of this application.
 - c. That this honorable court be pleased to review, vacate, vary and or set aside its judgment of 21st December 2023.
 - d. That the case be reopened and directions be given on the evidence which at the time was not brought into the consideration of this honorable court prior to judgment be so considered.
4. The Application filed on 24th January (which for purposes of this ruling I will henceforth refer to as the first application) was filed under certificate of urgency and directions were given for disposal of the same on 25th January, 2024. It was heard and ruling delivered on 28th June 2024 in the following terms:
18. There is no averment by the Respondent that the evidence sought to be adduced was not available at the time the Respondent filed its defence or at any time during the pendency of the suit.
 19. The court has further noted that at the time of filing the instant application the Respondent had filed a Notice of Appeal dated 21st December, 2023 which to the knowledge of this court has not been withdrawn.
 20. There is further an application on record dated 24th January 2024, the same date as the instant application, but filed on 31st January, 2021, in which the Respondent seeks stay of execution pending appeal. Rule 33 provides that a review is only available in a judgment or order in which no appeal has been preferred.
 21. It is for the foregoing reasons that the application herein has to fail. I accordingly dismiss the same with costs to the Claimant.
5. On 12th July, 2024 the Respondent approached the court registry and fixed the second application dated 24th January, 2024 and filed on 31st January 2024, for hearing.
6. The Claimant filed a Notice of Preliminary Objection against the second application. In the Preliminary Objection dated 20th September, 2024 the Claimant raised the following two grounds of objection:
- i. Under section 80 of the *Civil Procedure Act* and Order 45 of the Civil procedure Rules, upon filing a Review Application the Respondent squandered their right of Appeal rendering the stay orders being sought unnecessary and in vain.



- ii. The Honourable Court is functus officio in this matter such that any orders of stay now ought to be placed before the Court of Appeal for consideration.
7. Consequently, the Claimant prayed for the Respondents application dated 24th January and filed on 31st January, 2024 to be struck out with costs.
8. Both parties filed submissions which I have considered.

Analysis and Determination

9. Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules which the Claimant relied on in the Notice of Preliminary Objection provide as follows:

80. Review

Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

[Order 45, rule 1.]

Application for review of decree or order.

- (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.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

10. Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (now rule 74 in the Employment and Labour Relations Court (Procedure) Rules, 2024) provides for review as follows:

33.



- (1) 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—
 - (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.

11. It is clear from the above provisions that a party who has a right of appeal but who has instead opted to apply for review, loses the right of appeal. The second application filed on 31st January, 2024 by the applicant was automatically extinguished upon the respondent/applicant opting to proceed with the hearing of the first application for review. There is therefore no valid application before the court for determination.
12. From the foregoing it is clear that the Respondent/Applicant has no right of appeal, having opted for review of the judgment herein. The Respondent/Applicant further has no application before court to prosecute as the second application was automatically extinguished by the first application.
13. The application herein is therefore not only made in bad faith, it is also bad in law and vexatious. It is for striking out, which I hereby do with costs assessed at Kshs. 50,000.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 13TH DAY OF FEBRUARY 2025

MAUREEN ONYANGO

JUDGE

