



**Ochieng v Tuko Media Limited (Cause E1070 of 2021)
[2024] KEELRC 713 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 713 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1070 OF 2021**

**L NDOLO, J
APRIL 4, 2024**

BETWEEN

EDWIN OCHIENG CLAIMANT

AND

TUKO MEDIA LIMITED RESPONDENT

RULING

1. On 21st September 2023, I delivered judgment in favour of the Claimant in the sum of Kshs. 853,704 being 8 months’ salary in compensation for unlawful and unfair termination of employment.
2. Thereafter, the Respondent filed a Notice of Motion dated 17th November 2023, seeking orders to review, vacate and/or set aside the judgment dated 21st September 2023.
3. The Motion is supported by an affidavit sworn by the Respondent’s Managing Director, Julia Majale and is based on the following grounds:
 - a. That the Court rendered its judgment on 21st September 2023, in favour of the Claimant as against the Respondent, in the sum of Kshs. 853,704, being 8 months’ salary in compensation for unlawful and unfair termination of employment;
 - b. That it has recently come to the Respondent’s attention that prior to the termination of the Claimant’s employment, the Claimant had wilfully breached Clause 3.2 of his employment contract on non-competition and non-solicitation by working with one Lynn Ngugi, a former employee of the Respondent, who subsequent to leaving her position with the Respondent, started her own YouTube Channel, which was in direct competition with the Respondent, leading to a drastic drop in viewership and consequently revenue to the Respondent;
 - c. That it has also come to the Respondent’s attention that on 21st December 2021, the Claimant in a post on Facebook posted that BBC World News had featured his work. Within the BBC



feature, only two videos from Lynn Ngugi's Channel were showcased alongside her interview. One video was published on 16th September 2021 and the other on 25th September 2021;

- d. That further, immediately after termination of his employment, the Claimant continued to work with Lynn Ngugi in breach of Clause 4.1 of his employment contract;
 - e. That it was a term of the employment contract that the undertaking regarding non-competition and non-solicitation would remain in force up to the end of the restricted period plus 18 months and would extend to any territory in the world without limitation;
 - f. That it was a further term of the employment contract that in the event of breach of the aforementioned clauses, the Respondent would be entitled to damages;
 - g. That it has come to the Respondent's attention that immediately after the termination of his employment, the Claimant was mentioned as a Cameraperson/Director in the credits in a video published as early as 10th December 2021;
 - h. That later, the Claimant was mentioned as Cameraperson/Director in the credits in Lynn Ngugi's videos published on 14th December 2021, 31st December 2021, 6th January 2022 and 2nd February 2022;
 - i. That in paragraph 37 of the judgment of the Court, it was stated that in awarding compensation, the Court took into account the Claimant's averment that he was still unemployed. Taking into account the Claimant's breach of his contractual obligations prior to and after termination of his employment, it is clear that the Claimant wilfully and intentionally misled the Court, which action not only invalidates the Claimant's claim of unemployment but also undermines the basis upon which the compensation award was predicated;
 - j. That in the foregoing circumstances, it is only fair that the judgment dated 21st September 2023 be reviewed, vacated and/or set aside;
 - k. That it is in the interest of justice that the orders sought be granted as prayed;
 - l. That this Court has inherent powers to review, vacate and/or set aside its decision in order to meet the ends of justice;
 - m. That unless the Court grants the orders sought, the Respondent will suffer substantial injustice and/or prejudice.
4. The Claimant's response to the application is contained in a replying affidavit sworn on 5th December 2023. He terms the Respondent's application as a disguised counterclaim.
 5. The Claimant accuses the Respondent of peddling blatant lies, fabrications and material non-disclosure, calculated to mislead the Court and delay execution of the judgment.
 6. The Claimant points out that the employment contract annexed to the supporting affidavit sworn by Julia Majale does not relate to him but is in the name of Pauline Wanjiru Mbugua.
 7. The Claimant asserts that he is not a member of Facebook and the page on which he is alleged to have posted videos does not belong to him. He adds that the posts complained of date way past the termination of his employment by the Respondent.
 8. He states that the Respondent terminated his employment on the ground of redundancy and cannot therefore introduce misconduct at this stage.



9. In her further affidavit Julia Majale reiterates the contents of her supporting affidavit dated 17th November 2023. By the further affidavit, Majale produces the Claimant’s contract of employment dated 1st October 2016.
10. In their written submissions, both the Claimant and the Respondent rely on Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.
11. The applicable law is however Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules. Rule 33(1) provides as follows:
 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; or
 - b. on account of some mistake or error apparent on the face of the record; or
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.
12. By its application, the Respondent invites the Court to review, vacate and/or set aside the judgment dated 21st September 2023. The basis of the application is the alleged discovery of acts of breach of the employment contract by the Claimant.
13. In my understanding, the purpose of the window for review is to facilitate correction of an apparent error or omission that does not affect the substance of the judgment. It is not an opportunity for the Court to have a second look at its own decision.
14. This position was affirmed in National Bank of Kenya Limited v Ndungu Njau [1997] eKLR where it was held:

“A review may be granted whenever the court considers 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 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 a ground for review.”
15. The Court of Appeal, in its decision in Nyamogo and Nyamogo Advocates v Kogo (2001) EA 173, delivered on this issue as follows:

“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 options, 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 even



though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

16. In the present case, what the Respondent is asking for is not a review but a full retrial leading to setting aside of the judgment of the Court delivered on 21st September 2023. In fact, the Respondent seeks to change the character of the case already determined by introducing an element of breach of contract by the Claimant, which did not feature at all in the case before me.
17. With much respect, this is an abuse of the provision for review. This Court, having fully rendered itself on the dispute presented by the parties, has no power to re-open the case in the manner sought by the Respondent.
18. I therefore find the Respondent’s application dated 17th November 2023 to be devoid of merit and proceed to dismiss it with costs to the Claimant.
19. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF APRIL 2024.

LINNET NDOLO

JUDGE

Appearance:

Mr. Ndegwa for the Claimant

Mr. Mabachi for the Respondent

