



**Kenya Union of Commercial Food and Allied Workers v Bhumi Distributors Limited  
(Cause E0004 of 2013) [2024] KEELRC 1676 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1676 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE E0004 OF 2013  
MA ONYANGO, J  
JUNE 28, 2024**

**BETWEEN**

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

**AND**

**BHUMI DISTRIBUTORS LIMITED ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 24<sup>th</sup> January 2024 brought by the Respondent under section 1A & 3 and 3A *Civil Procedure Act*, section 16 *Employment and Labour Relations Court Act*, Rule 33(1)(2)(3)(4) and (5) *Employment and Labour Relations Court Rules*. 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 21<sup>st</sup> 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.
2. The grounds upon which the application is made are contained on the face of the application to wit: that there exists sufficient grounds for review of the judgement of 21<sup>st</sup> December 2023; that it is only fair and just that the evidence of the Respondent be considered in determining the issues on record; that the prevailing circumstances and position on the ground is different from those envisaged in the said judgement; that the Respondent evidence in these proceeding is unchallenged.



3. In the supporting affidavit sworn on 24<sup>th</sup> January 2024, by Keyur Kumar Shah, the Respondent manager, it is contended that the prevailing circumstances on the ground is that all administrative functions of the Respondent are dealt with from the Respondent headquarters which are in Mombasa. He states that Eldoret branch of the Respondent consist of mere employees who cannot make any decision as demanded in the letter from the Claimant dated 10<sup>th</sup> January 2024. That the Claimant has placed the Eldoret Branch manager in an awkward position despite advising the Claimant to deal with the headquarters. That the Respondent currently has employees in the various branches and these employees cannot be treated differently in the organization and have to be treated similarly; that is the Claimant is to recognized, he has to meet the threshold of recognition by recruiting more employees. The Respondent avers that the evidence now supports the position that the Claimant has no members that we seek to review, vary and or set aside the judgment of this court. It is the Respondent's case that if the judgment is left to stand it will lead to an acrimonious situation and eventual collapse of the Respondent's business.
4. The application is opposed. The Claimant filed a Replying Affidavit dated 6<sup>th</sup> February 2024 sworn by its General Secretary, Bonface Kavuvi. The deponent contends that the judgment issued by this court on 21<sup>st</sup> December 2023 does aggrieve, injure the Respondent in any way since it just orders the Respondent to comply with the law.
5. It is further deposed that on 20<sup>th</sup> June 2023, the Respondent had sought leave to file additional documents but as at the time of filing the submissions, they had not bothered to file the said documents. It is averred that the Respondent cannot claim that their evidence was not considered in determining the issues on record thus cannot claim they have given uncontroverted evidence. That the Respondent are bringing in new evidence that was not produced in court before judgement was delivered on 21<sup>st</sup> December 2023 yet they fully participated in the matter till the end. That the claimant's letter dated 10<sup>th</sup> January 2024 was just to comply with paragraph 24(a) of the Judgment issued on 21<sup>st</sup> December 2024. That the Respondent had enough time to defend their case but failed to do so. That equity dictates that he who comes to equity must come with clean hands. That section 48 of the *Labour Relations Act* provides the authority to the employer to deduct union subscription from the employees in mandatory terms, hence it is not upon the employer to elect whether or not to comply. That the Respondent, has continued harassing and victimizing the Claimant's members because of their affiliation to the Claimant's union in direct violation of the orders of this court.
6. The Claimant states that the orders issued on 21<sup>st</sup> December 2023 are not in any way prejudicial since it does not prevent he Respondent from carrying out administrative duties.
7. The application was canvassed through written submissions.
8. In its submissions dated 1<sup>st</sup> March 2024, the Respondent contends that it is a limited liability company with several branches which are administratively managed from one centre point which is in Mombasa and not Eldoret; that the registered office of the Respondent is in Mombasa and this is where any form of contract like a collective bargaining agreement may be entered.
9. According to the Respondent, these are facts which entail the re-opening of the case and consideration under section 16 of the Employment and *Labour Relations Act*.

### **Determination**

10. Rule 33 of the *Employment and Labour Relations Court (Procedure) rules*, 2016 (Court Rules) 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. Courts have the discretion to allow review on three grounds; where there is discovery of new and important matter of evidence, where there is an apparent error on the face of the record and where there is sufficient reason to do so. The application for review must be made without undue delay. The Respondent herein has pleaded that there is evidence which was not before court which warrants this court to exercise its discretion and review the judgment delivered on 21<sup>st</sup> December 2023.
12. According to the Respondent, the new evidence is that the Respondent is a limited liability company with several branches which are administratively managed from one centre point which is in Mombasa and not in Eldoret.
13. The evidence produced by the Respondent in support of its contention that its head office is in Mombasa are Single Business Permits for Mombasa dated 14<sup>th</sup> March, 2023, Single Business Permit for Nairobi dated 23<sup>rd</sup> January, 2023, Single Business Permit for Uasin Gishu dated 2<sup>nd</sup> February, 2023 and Trading Licence for County Government of Kisumu dated 11<sup>th</sup> January, 2023. The Respondent's Memorandum of Response to the Claim herein dated 14<sup>th</sup> April, 2023 was filed on 25<sup>th</sup> May 2023. The Applicant has not stated the reasons why the business permits were not filed.
14. Further, the permits do not show that the Respondent's headquarters are in Mombasa. There is further no evidence that the businesses in the different cities/towns are managed as one entity.
15. Further, the Respondent applied for leave to file further documents which it did not file.
16. A review of judgment can only be granted on the grounds set out in rule 33 as set out above. Review on grounds of new documents may only be granted "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".
17. 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.
18. The court has further noted that at the time of filing the instant application the Respondent had filed a Notice of Appeal dated 21<sup>st</sup> December, 2023 which to the knowledge of this court has not been withdrawn.
19. There is further an application on record dated 24<sup>th</sup> January 2024, the same date as the instant application, but filed on 31<sup>st</sup> 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.

20. It is for the foregoing reasons that the application herein has to fail. I accordingly dismiss the same with costs to the Claimant.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 28<sup>TH</sup> DAY OF JUNE, 2024**

**MAUREEN ONYANGO**

**JUDGE**

