



**Omung'ala v Nestle Kenya Limited (Cause 195 of 2019)
[2024] KEELRC 1987 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1987 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 195 OF 2019**

**L NDOLO, J
JULY 31, 2024**

BETWEEN

LAWRENCE AKOLO OMUNG'ALA CLAIMANT

AND

NESTLE KENYA LIMITED RESPONDENT

RULING

1. By his Notice of Motion dated 7th April 2020, the Claimant pursues the following orders:
 - a. Review and/or variation of the ruling dated 22nd October 2020;
 - b. Reinstatement of his claim against the Respondent.
2. The application is supported by the Claimant's own affidavit and is premised on the following grounds:
 - a. A ruling was delivered against the Claimant on 22nd October 2020;
 - b. The effect was that the suit against the Respondent was dismissed for misjoinder;
 - c. The Claimant is aggrieved by the said decision for the following reasons:
 - i. The evidence attached to the claim marked LAO-1 indicates that he worked for the Respondent;
 - ii. The pleadings were still open and the Claimant would have presented new evidence in further lists of documents;
 - iii. The Claimant would have led oral evidence at trial confirming that the Respondent was the correct party in the suit.



- d. Tentatively, there is new evidence indicating that the Claimant worked for the Respondent that later transferred him to another organisation due to redundancy;
 - e. The Claimant is adamant that these companies are one and the same;
 - f. The Claimant was aggrieved while serving his tenure with the Respondent leading to institution of the suit;
 - g. There is an error apparent on the face of the record so far as the Court disregarded the letter of offer attached to the claim, which linked the Claimant directly to the Respondent's employment;
 - h. In the circumstances, it is only fair and in the interest of justice that the order aforesaid be reviewed to forestall irreparable loss and damage which the Claimant has continued to suffer;
 - i. There is sufficient cause for review and setting aside of the order in light of the error apparent on the face of the record;
 - j. New evidence which was discovered way after delivery of the ruling, has been brought to light by the Claimant;
 - k. No appeal has been preferred against the order sought to be reviewed;
 - l. This application has been made without unreasonable delay;
 - m. No prejudice will be occasioned on the Respondent.
3. The Respondent opposes the Claimant's application by a replying affidavit sworn by its Human Resource Business Partner, Stephen Mokaya on 13th May 2024.
 4. Mokaya states that the application is incurably defective, lacks merit and ought to be struck out. He points out that whereas the application is dated 7th April 2020, the ruling being challenged was delivered 6 months later, on 22nd October 2020.
 5. It is deponed that the application does not raise any cogent reasons to justify review of the ruling as:
 - a. It does not raise any new information that was not availed to the Court during the hearing of the Respondent's application for dismissal of the suit. The Claimant has also not demonstrated that the evidence he purports to be new could not have been, with reasonable diligence, procured and availed to the Court before the ruling was made;
 - b. Contrary to the Claimant's contention, the Court duly considered all the pleadings and documents availed to it prior to rendering its decision;
 - c. There is no error apparent on the face of the record or any other sufficient reason to warrant a review of the said ruling;
 - d. The Claimant chose not to avail any documentary evidence in response to the Respondent's application. The Claimant is the author of his own misfortune.
 6. According to the Respondent, the Claimant's application is an appeal disguised as a review application as the matters alleged to have been overlooked were duly considered by the Court in its ruling. Further, the Court observed that the Respondent's evidence that it is a separate legal entity from the Claimant's employer, was never controverted. The Respondent maintains that this Court is now functus officio.



7. The Respondent asserts that the Claimant is merely regurgitating issues that were already canvassed during the hearing of the Respondent's application.
8. The Respondent points out that despite being aggrieved by the ruling, the Claimant opted not to pursue an appeal, having withdrawn his application for extension of time to lodge an appeal, and moving this Court as an afterthought, trying to lodge an appeal through the backdoor.
9. The Respondent accuses the Claimant of undue delay in filing and prosecuting his application. In this regard, the Respondent states that from a record of the documents on the e-filing portal, the Claimant started following up on the status of the application more than 6 months after the ruling was delivered. The Respondent adds that it was not served with the application until 2024, over three years after its filing.
10. The Respondent's avers that it would be gravely prejudiced by reinstatement of the claim, which would offend the principle of finality of litigation.
11. The jurisdiction of this Court to review its own decisions is donated by Section 16 of the *Employment and Labour Relations Court Act* and Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*.
12. Rule 33(1) of the *Procedure Rules* 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.
13. In his application, the Claimant alleges that there is an error apparent on the face of the record. However, a full reading of the application reveals that the Claimant is pursuing a complete setting aside of the ruling delivered by Makau J on 22nd October 2020.
14. The purpose of review on the ground of an error on the face of the record is not to allow the Court to have a second look at its own decision but to facilitate correction of obvious errors that are apparent on the record. This position was affirmed in *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR in the following terms:

“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 & 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 similar fashion, in *Francis Njoroge v Stephen Maina Kamore* [2018] eKLR it was held that a wrong view on an issue may be a ground for appeal but certainly not a ground for review.

17. I do not need to say more on this issue as the law is well settled. The Claimant in effect invites me to interfere with a substantive decision made by my brother Judge, with whom I have coordinate jurisdiction. The only answer is that I have no power to do so.

18. Moreover, the inordinate delay in filing and prosecuting the application has not been explained and as held in *Unilever Tea (K) Limited v Richard Ombati Kiboma* [2021] eKLR delay in bringing an application for review ought to be sufficiently explained and where this is not done, then the delay becomes unreasonable and inexcusable.

19. Cumulatively, I find and hold that the Claimant’s application is without merit and proceed to dismiss it with an order that each party will bear their own costs.

20. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY JULY 2024

LINNET NDOLO

JUDGE

Appearance:

Ms. Ochieng for the Claimant

Ms. Wetende h/b Ms. Opiyo for the Respondent

