



**Peter v Volcan Holdings Limited (Cause 1080 of 2015)  
[2024] KEELRC 1986 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1986 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1080 OF 2015**

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

**BETWEEN**

**KADAGY M. PETER ..... CLAIMANT**

**AND**

**VOLCAN HOLDINGS LIMITED ..... RESPONDENT**

**RULING**

1. By its Notice of Motion dated 28<sup>th</sup> November 2022, the Respondent seeks orders to review and set aside the judgment dated 8<sup>th</sup> April 2019 and delivered on 31<sup>st</sup> May 2019, as well as all other consequential decrees and proceedings. The Respondent further pursues a *de novo* hearing of the claim.
2. The application is supported by an affidavit sworn by the Respondent's Human Resource Officer, Clement Ndunga, and is based on the following grounds:
  - a. Hearing of the matter proceeded *ex parte* as unopposed on a mistaken belief that the Respondent had failed to file a Reply to the Statement of Claim;
  - b. However, the record reflects that the Respondent had filed a Reply to the Statement of Claim on 9<sup>th</sup> May 2016;
  - c. It is therefore an error apparent on the record that the hearing of the matter proceeded *ex parte* as unopposed on a mistaken belief that the Respondent failed to file Reply to the Statement of Claim;
  - d. In the circumstances, the judgment dated 8<sup>th</sup> April 2019 and delivered on 31<sup>st</sup> May 2019 and all the proceedings emanating therefrom, including the notice to show cause dated 23<sup>rd</sup> September 2022, are irregular because they were obtained *ex parte* without service on the Respondent;



- e. Further, the purported execution is irregular because the Claimant did not give the Respondent 10 days' notice of entry of judgment as required by Order 22 Rule 6 of the Civil Procedure Rules;
  - f. Consequently, the interest of justice dictates that the judgment, the notice to show cause and the consequential proceedings be reviewed and set aside unconditionally as of right, and the hearing of the matter commences *de novo*;
  - g. In any event, the Respondent has a good defence as shown by the Reply to the Claim filed on 9<sup>th</sup> May 2016, and the Court should exercise its discretion to set aside the judgment and proceedings herein to give the Respondent an opportunity to be heard on merit.
3. The Respondent bases its application on Rule 33(1) of the [Employment and Labour Relations Court \(Procedure\) Rules](#) which 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.
  4. The Respondent takes issue with the conclusion made by Nzioki wa Makau J that it did not enter appearance and did not defend the suit. On this ground, the Respondent asks me to set aside the judgment by my brother Judge and order a fresh hearing of the claim.
  5. The parameters for review were restated in [National Bank of Kenya Limited v Ndungu Njau](#) [1997] eKLR as follows:
 

“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.”
  6. Again, as stated in [Francis Njoroge v Stephen Maina Kamore](#) [2018] eKLR a wrong view on an issue may be a ground for appeal but certainly not a ground for review.
  7. The application brought by the Respondent in this case, was motivated by an allegation that the trial Judge reached an erroneous conclusion regarding its defence to the claim. This is not an issue to be cured by an application for review. What the Respondent ought to have done was to file an appeal before the Court of Appeal.
  8. The Respondent's application dated 28<sup>th</sup> November 2022 is therefore disallowed with costs to the Claimant.



9. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY JULY 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Ms. Nyamwega for the Claimant

Mr. Masila for the Respondent

