



**Mini Bakeries (Mombasa) Limited v Mwangunya (Civil Appeal
E092 of 2022) [2024] KEELRC 2534 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2534 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CIVIL APPEAL E092 OF 2022**

**AK NZEI, J
OCTOBER 18, 2024**

**BETWEEN
MINI BAKERIES (MOMBASA) LIMITED APPELLANT
AND
MICHAEL MWAGOSHA MWANGUNYA RESPONDENT**

RULING

1. This court delivered its Judgment on the appeal herein on 19th October, 2023 and stated as follows:-

“7. The record of appeal herein, which includes the trial court’s proceedings, shows that the trial court DID NOT hold any trial. What I see on record is that on 5th July 2022, counsel for both parties appeared before the trial court and told the court that they had agreed that parties would rely on pleadings and on submissions. The court ordered parties to file submissions, and thereupon delivered a Judgment, awarding the Respondent Kshs.205,184/= as follows:-

- a. One month salaryKshs.23,296/=.
- b. Three (3) months’ salary as compensation for unfair termination of employment.....Kshs.69,888/=.
- c. Leave payKshs.18,184/=.
- d. Unpaid salariesKshs.93,184/=.

8. Costs of the suit.

9. ...

10. ...



11. ...
12. ...
13. As already stated in this Judgment, there was NO trial in the Subordinate court. No evidence was adduced in proof of the allegations made in the Respondent's Memorandum of claim. This despite the fact that the Appellant had denied the Respondent's allegations, and had put him to strict proof thereof. Indeed, the Respondent did not plead to his employment matters as basic as his basic salary, only mentioning the word "salary" in the prayers/reliefs sought in the suit. In the absence of evidence, and in view of denial of liability by the Appellant, it is not clear how the trial court arrived at a finding that termination of the Respondent's employment was unfair, and how the sum awarded was computed/arrived at. There is absolutely nothing on record for this court to re-evaluate or to scrutinize.
14. It is to be noted that filed Witness Statements are not evidence. They are unsubstantiated statements of fact, just like the pleadings, and do not become evidence/a party's testimony until the statements are adopted on oath by a witness, who must be the author of that statement. Further, evidence cannot be substituted with submissions, written or oral. Submissions are meant to firm up or to buttress a party's already presented case, as each party tries to convince the court that their case carries more weight, and that scales of justice in the case should tilt in their favour.
15. Any Judgment that is not founded on pleadings as proved by evidence is founded on quick sand and cannot stand.
16. ...

2. This court rendered itself as follows:-

- “17. In view of the foregoing, there can never be anything like determination of a case based on pleadings and submissions. Determination of a suit based on pleadings, filed Witness Statements (without calling the witnesses to testify) and legal arguments (submissions) can only be a mistrial. Enough said on that.
18. It is my finding that the lower court's Judgment is not a valid Judgment. The same is hereby set aside. I will, however, not dismiss the lower court's suit. A fresh trial is hereby ordered before a Magistrate at Mariakani Principal Magistrate's court other than Honourable D. W. Mburu. The trial shall be on priority basis.
19. Each party to bear its own costs of the appeal.”

3. On 24th November 2023, the Appellant filed a Notice of Motion dated 23rd November 2023 seeking the following orders:-

- a. That the Judgment delivered on 19th October 2023 be reviewed.
- b. That upon review, the court be pleased to consider the appeal on merit and determine it either way.



- c. That costs of the application be on the appeal.
4. The application, expressed to be brought under Section 16 of the *Employment and Labour Relations Court Act* and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016, is the application before me for determination, and is based on the supporting affidavit of Nancy Gacheru sworn on 23rd November 2023. It is stated in the said supporting affidavit:-
 - a. That referral of the matter to Mariakani must be an error because the matter originated in Mombasa and none of the parties reside or work in Mariakani.
 - b. That the basis for setting aside the Judgment of the trial court was that the trial court had relied on Witness Statements and documents without calling any witnesses.
 - c. That the trial court did that because the parties, by a consent recorded before it on 5th July 2022, requested that the trial be conducted in that manner. That the consent is sanctioned by Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016.
 - d. That the finding in the Judgment that “there can never be anything like determination of a case based on pleadings and submissions” was a patent error of law which should be review.”
 5. The application is opposed by the Respondent.
 6. In making the aforesaid finding, which the Appellant now refers to as a “patent error of law,” this court considered the provisions of Rule 15(1) of the Employment and Labour Relations Court (Procedure) Rules 2016. The court stated as follows at paragraph 16 of its said Judgment:-
 - “16. Indeed Rule 15(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 is clear on the fact that in cases filed in this court, evidence can only be adduced orally or by affidavits. The Rule Provides as follows:-
 - “15(1) The parties to a suit shall, within fourteen days after the close of pleadings or such other period as the court on application directs, move the court to hold a scheduling conference to ascertain:-
 - a. Points of agreement and disagreement.
 - b. The possibility of alternative dispute resolution or any other form of settlement.
 - c. Whether evidence is to be oral or by affidavit.
 - d. Whether legal arguments shall be written or oral, or both;
 - e. The estimated length of the hearing; and
 - f. Any other matters the court may deem necessary.”
 7. This court’s said finding was founded in law, and the court’s reasoning in arriving at the same is set out in its Judgment in issue, part of which is reproduced in this Ruling. If the Appellant was dissatisfied with the court’s said finding, it ought to have appealed to a higher court.



8. Rule 21 of this court's said Rules (now repealed) provided as follows:-

“The court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.”

9. It is to be noted that the foregoing rule, which the Appellant cited in support of its application herein, refers to affidavits but not Witness Statements. Affidavits are Statements on oath. They are evidence, and a court of law can safely rely on them and documents referred to therein or thereto annexed in determining a dispute. This was not the case in the suit before the trial court. What had been filed in the said suit were pleadings and Witness Statements, which I have already stated were unsubstantiated statements of fact. This court still holds the same view, and cannot sit in appeal over its own decision.

10. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 (now repealed) provided 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 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. As to what amounts to a mistake or an error apparent on the face of the record, the Court of Appeal stated as follows in the Case of National Bank of Kenya Limited –vs- Ndungu Njau (1997) eKLR:-

“A review may be granted whenever the court considers that 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 of review.

In the instant case, the matter in dispute had been fully canvassed before the Learned Judge. He made a conscious decision on the matter in controversy. . . .

An issue that has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

12. This court's Judgment sought to be reviewed, which the court made consciously upon considering matters of both law and fact, is not and cannot be referred to as a mistake or error apparent on the face of the record; and cannot be the subject of a review.



13. The only point that qualifies for review is the place of the fresh trial which I ordered. Although the primary suit was filed and concluded at the Chief Magistrate’s Court at Mombasa, the Memorandum of claim filed by the Respondent in the said court was titled “In the Principal Magistrate’s Court at Mariakani.” In making the Order for fresh trial, this court Ordered that the fresh trial be at the Principal Magistrate’s Court at Mariakani. This is an error which is apparent on the face of the record, and is hereby corrected.
14. The Notice of Motion dated 23rd November 2023 partly succeeds, to the extent that the fresh trial ordered in this court’s Judgment delivered on 19th October 2023 shall be at the Chief Magistrate’s Court at Mombasa, before a Magistrate other than Honourable D. W. Mburu. The trial shall be on priority basis as ordered.
15. Each party shall bear its own costs of the application.
16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

