



**Tamu Millers Limited v Barasa (Appeal E009 of 2024)
[2024] KEELRC 13569 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13569 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E009 OF 2024
B ONGAYA, J
DECEMBER 19, 2024**

BETWEEN

TAMU MILLERS LIMITED APPELLANT

AND

FARIS MUNIANGI BARASA RESPONDENT

*(Being an appeal against the Ruling of the Chief Magistrate's Court
at Kajiado (Hon. Kagoni E.M, PM) delivered on 5th March 2024)*

JUDGMENT

1. The appellant filed a memorandum of appeal dated 18.03.2024 through Ahmed Maash & Company Advocates upon the following grounds:
 - i. The Learned Magistrate erred in law and fact in finding and holding that the appellant has not met the threshold for review and setting aside of judgment.
 - ii. The Learned Magistrate erred in law and fact in finding and holding that the appellant had not proved a sufficient reason to review and setting aside its judgment.
 - iii. The Honourable Magistrate erred in law and in fact in failing to determine that mistake on part of the appellant's counsel constitutes sufficient cause to review and set aside its judgment.
 - iv. The Learned Kadhi erred in law and fact by failing to consider the principles of natural justice and the appellant's right to be heard.
 - v. The Learned Kadhi erred fact by failing to consider the court file records.
 - vi. The Learned Kadhi erred in law and fact in ignoring to address the issues raised by the applicant in its notice of motion application.



2. The appellant prayed for Orders that:
 - a. The appeal be and is hereby allowed.
 - b. The Ruling of Magistrate Court at Kajiado (Hon. Kagoni E.M) delivered on 05.03.2024 in Employment Cause No. E005 of 2022 be set aside.
 - c. The Honourable Court be pleased to set aside the Judgment dated 22.12.2022.
 - d. This Honourable Court be pleased to make any further orders and directions that it may deem fit and just in the circumstance of the case.
3. From the record of appeal, the appellant filed the notice of motion application dated 17.10.2023 seeking, inter alia, for orders of stay of execution, review and setting aside of the Judgment dated 22.12.2022 delivered by Hon. B. Cheloti, SRM in Chief Magistrate's Court Kajiado ELRC Case No. E005 of 2022. The said application was premised on the grounds set out in the motion application and the supporting affidavit of one Affey Mohamed Abdi. The claimant (respondent) then filed his replying affidavit sworn on 13.01.2024 and the appellant filed a further affidavit sworn on 07.02.2024. The Hon. Court, Kagoni E.M (PM), thereafter dismissed the said motion application on 05.03.2024. The appellant was dissatisfied with the decision of Hon. Kagoni E.M (PM) delivered on 05.03.2024 and thus filed the instant appeal.
4. The application for review before the trial Court was dated 17.10.2023. It was under section 80 of the *Civil Procedure Act*; order 9 rule 9 and 10, order 45 rule 1, order 51 rule 1 of the Civil Procedure Rules 2010; and, all other enabling provision of law. The appellant prayed as follows:
 - a. (Spent).
 - b. (About change of advocates – Spent).
 - c. (Spent).
 - d. That the Honourable Court be pleased to review the Judgment dated 22.12.2022.
 - e. The Court to provide costs of the application.
5. The application was based upon the following grounds:
 - a. The judgment was delivered by the trial Court on 22.12.2022 by allowing the claimant's claim in entirety.
 - b. The respondent was not aware of delivery of the judgment and its advocates on record did not inform it. The appellant discovered that the judgment had been delivered when BetaBase Auctioneers commenced execution by serving warrants of attachment on 11.10.2023.
 - c. That there was an error apparent on the face of the judgment namely, at paragraph 9 the judgment states that Affey Mohamed Abdi, (who in the supporting affidavit stated that he was the appellant's director) recorded a witness statement dated 22.12.2023 which was not true as he had never signed the witness statement; and, the previous Advocates on record (KCN Advocates) had never asked him to sign the statement or affidavit and was only asked to come and testify on 18.08.2022 and was shocked that the trial Court had relied on the witness statement in drawing the judgment. Further, it was shocking that the trial Court had found at paragraph 12 of the Judgment that the appellant had provided no documents to show the respondent had not been its employer whereas, the appellant's advocate had never asked the



respondent to provide such documents. Thus, the mistake and incompetence of its advocates should not be visited upon the appellant.

- d. The appellant was willing to provide documents and evidence to show that the respondent was not its employee.
 - e. There is discovery of new and important evidence which could not be produced prior to delivery of the judgment.
6. The respondent had opposed the application by filing his replying affidavit sworn on 13.01.2024. It was stated by the respondent as follows:
- a. The appellant's application dated 17.10.2023 was unmerited, misleading and deliberately malicious as it was an abuse of court process.
 - b. The application amounted to asking the trial Court to sit on appeal upon its own judgment.
 - c. The appellant's Advocate on record had acted professionally by filing a defence. Witness statement, attending the hearing and there was no established mistake on the part of appellant's counsel at all material times. It is lie that the appellant did not know whatever was happening in its suit until the hearing date.
 - d. The said director had confirmed in the supporting affidavit that he had attended at the hearing and testified.
 - e. The witness statement dated 05.07.2022 was signed by the said director who adopted it at the hearing. He adopted the statement and the trial Court made no error in reliance upon that statement in making findings in the judgment.
 - f. There is no new and important evidence shown to be discovered after judgment.
 - g. The respondent had filed and served a notice to produce the requested documents per notice dated 28.07.2022 but the appellant had failed to produce. The notice to produce was exhibit FB-2 of the replying affidavit and the appellant was asked to produce a copy of employee register; employee attendance register; employee muster roll; the copy of bank statement paying salaries; and, copy of bank statements showing payment of suppliers as was alleged for the appellant. The appellant had neglected or refused to provide the requested documents.
 - h. The court's digital system updated the parties and their advocates on every step in the suit and electronically so. The appellant was misleading to allege lack of awareness of the progress including the delivery of the judgment. Judgment was delivered in December 2022 and application filed in October 2023 after an unexplained delay of 10 months.
 - i. The application failed to meet the threshold for grant of review.
7. In the Judgment dated 22.12.2022, the Hon. B. Cheloti (SRM) made a determination that since the respondent (appellant herein) paid the claimant (respondent herein) on the instances when the transport companies did not pay him, the same established he was an employee of the respondent. The Court found in favor of the claimant as against the respondent, who it determined did not adduce any evidence to disprove that the claimant was its employee.
8. Hon. Kagoni E.M, Principal Magistrate, delivered on 05.03.2024 the ruling on the application for review subject of the instant appeal. The trial Court found as follows:



- a. The appellant’s dissatisfaction with the finding and reasoning in the judgment did not amount to an error of law or fact apparent on the face of the record and could not justify a review. The trial Court relied on the holding by Motivo J in *Bethwel Omondi Okal –Versus- Managing Director KPLC &Co [2017] eKLR*.
 - b. The record showed that the appellant’s director, the same one who swore the supporting affidavit, had testified at the hearing in reliance on his witness statement and without protestation about validity of his witness statement.
 - c. The appellant had not shown pre-trial steps its advocate on record had failed to comply with.
 - d. The applicant had failed to establish any known reasons for granting a review.
9. The appellant filed a record of appeal and parties filed submissions on the appeal. The Court has revisited the record of the trial Court and the submissions made for parties and returns as follows:
- a. It is submitted for the appellant that its previous advocate failed to provide on record the documents necessary to show parties were not in an employment relationship. As urged for the respondent, the Court finds that the respondent filed and served the notice to produce but the appellant took no steps to comply. In any event, the appellant has not exhibited the documents it might have given its advocates on record and then the advocates failed to file and serve them. That the application should be allowed upon sufficient reason or manifest injustice upon the alleged mistake by counsel will collapse as unjustified.
 - b. The alleged new evidence is not established at all. The documents on the employment relationship, if any, were in the appellant’s possession from the time the suit was filed. The director of the appellant attended the hearing. He did not request to provide the documents. A review upon new evidence not available at the hearing even after due diligence has been found untenable in the circumstances of the case. The appellant’s witness appears to run away from his witness statement on record by alleging he never signed it but which is unbelievable assertion from the record and flow of the proceedings.
 - c. Accordingly, the trial Court cannot be faulted in any material or principle respects in dismissing the application for review.
 - d. The Court finds for the respondent that the application was filed after an inordinate and unexplained delay of 10 months. The Court finds for the respondent that under the implemented judiciary digital strategy, the litigants are promptly informed about the progress of the suit. The appellant has not explained the inaction of over 10 months and the filing of the application appears to have been solely targeted to slow down the looming execution that had already exploded.
 - e. The appellant had not cited and invoked the rules of the Court as was applicable. That served as an impetus in dismissing the application. Hon. Kagoni E.M, Principal Magistrate, correctly found in the ruling thus, “Asking the Court to do then find that what DW1 did was not what he intended to do falls outside the purview of Rule 33(5) of the Employment and Labour Relations Court Rules, 2016 which provides, “(5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.” While praying for the review, the appellant never set out consequential relief sought from the trial Court if the relief was allowed. The omission suggests that indeed, the application appears to have been hatched to slow down the initiated execution of the decree and nothing more.



- f. The appeal therefore will fail, on all grounds of appeal. While making that finding the Court as well finds that, the appellant as well erroneously referred to “Kadhi” in some grounds of appeal.

In conclusion, the appeal is hereby determined with orders as follows:

1. Appeal dismissed with costs for the respondent.
2. The trial Court’s ruling delivered on 05.03.2024 upheld.
3. The Deputy Registrar to return the Court file to the Machakos Sub-Registry.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 19TH DECEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

