



REPUBLIC OF KENYA



**Weke t/a Golden Spot Bar & Restaurant v Lavu (Civil Appeal E177 of 2022)
[2024] KEELRC 13616 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13616 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E177 OF 2022**

JW KELI, J

DECEMBER 18, 2024

BETWEEN

KARUME WEKE T/A GOLDEN SPOT BAR & RESTAURANT APPELLANT

AND

JULIUS WILLIAM LAVU RESPONDENT

*(An appeal from the Ruling/Order of the Honourable A.N. Makau P.M.
delivered on 4th October 2022 in Nairobi CMEL NO. 1321 of 2019 Julius
William Lavu-Vs-Karume Weke T/A Golden Spot Bar & Restaurant)*

JUDGMENT

1. The appellant aggrieved by the Ruling of Honourable A. N. Makau P.M. in the above suit dated the 4th day of October 2022 in Nairobi CMEL NO. 1321 of 2019 Julius William Lavu-Vs-Karume Weke T/A Golden Spot Bar & Restaurant disallowing his application for review of the judgment and Orders of the Trial Court dated 8th May 2020 appealed to this Court vide Memorandum of Appeal dated 13th October 2022 seeking for setting aside the ruling and allowing the review on the following grounds:-
 - a. That the learned magistrate erred in law and in fact in failing to review, uplift or set aside the orders made on 8th May 2020.
 - b. That the learned magistrate erred in law and fact in finding that the new and important information not within the Appellant's knowledge at the time the decree was passed was insufficient to review, uplift or set aside the orders made on 8th May 2020.

Background to the appeal

2. Judgement was entered in favour of the respondent against the appellant herein on 8th May 2020 by Honourable A.N. Makau P.M. Execution commenced against the former place of work of Respondent/Judgment Creditor. Golden Spot Limited filed objection proceedings against the



execution stating they were a limited company and not a party to the proceedings. The appellant submits that Golden Spot Limited is based along Chaka Road same place of work of the Respondent. On the 25th May 2021, the trial court delivered a ruling in favour of the objector.

3. The appellant submits that based on new information provided by Golden Spot Limited in the objection proceedings, the appellant embarked on filing an application for review on the basis of new and important information showing there was no relationship between the appellant and the claimant's alleged employer Golden Spot limited.
4. The Appellant contended that the claimant had in his statement of claim stated he was employed as a bartender in Golden Spot Bar and Restaurant which turned out to be owned by Golden Spot Limited which company was not a party to the suit. Golden Spot Limited produced a CR12 from the Registrar of Companies clearly indicating that there was no relationship between the appellant herein and the said employer.
5. Hon. A.N. Makau PM having heard the application dated 3rd February 2022 for review of the judgment, which application was canvassed through written submissions, held that the application had not met the threshold set out in Order 45 Rule 1(b) and dismissed the same with costs(page 69).

Written submissions

6. The court directed the appeal be canvassed by way of written submissions. Only the appellant complied and filed written submissions drawn by Kiarie Kariuki & Githii Advocates and dated 17th May 2024. There was evidence of service.

Determination.

7. The issue for determination was whether the appeal was merited.
8. The appellant relied on the provisions of section 80 of the Civil Procedure Act which gives the court unfettered powers of review and Order 45 Rule 1 of the Civil Procedure Rules. Order 45 is now provided as Rule 74 of the Employment and Labour Relations Court(Procedural) Rules 2024 which are applicable in the appeal and provide for almost similar grounds of review as in Order 45 of the Civil Procedures Rules to wit:- "74. (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 a new and important matter or evidence which, despite 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."
8. The impugned Ruling by the Trial Magistrate Court was on an application for review based on discovery of new information being the CR12 by the Objector in earlier application (not in the record) which ruling was delivered on the 25th May 2021 by the Trial Magistrate Court restraining attachment of its goods. The Court finds that it was the same evidence by the objector the appellant relied on to submit that the objector owned and managed the appellant and that Karume Weke (said employer in the suit) had no relationship with the appellant. That there is no legal entity known as Golden Spot Bar & Restaurant and it was only Golden Spot Limited who operate a bar and restaurant on Chaka



road. That the appellant was wrongly sued. The appellant relied on the decision in the case of *Shanzu Investments Limited v Commissioner for Lands* where the court relied on earlier decision to wit:- In *Wangechi Kimita & another vs Mutahi Wakabiru* CA No 80 of 1985 (unreported) it was held that:-

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 for the Civil Procedure Act. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.” Cited in same decision was earlier decision in *Yusuf –vs- Nokrach*, (1971) EA 104, where the late Chanan Singh J held that “any other sufficient reason” as set out in Order 44 Rule 1 means sufficient reason analogous to those in the rule.” The Court finds that interpretation of the ground of sufficient reason is not settled but subsequent decisions seem to take position in *Yusuf v Nokrach*. Justice Mativo (as he then was in HC) in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] KEHC 6379 (KLR) cited with approval Supreme Court of India decision in *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608 where the court stated:- “the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilizing it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule” I do uphold the decision by Justice Mativo to apply in the instant case.

9. The Trial Magistrate Court noted that the impact of the alleged discovery was not clearly stated in the application and that it had not stated the subsequent orders to issue in the event the application was allowed. In the affidavit in support of the impugned ruling the deponent stated the claimant had filed suit claiming he was a bartender at the objector premises yet he filed proceedings against the appellant who was not related to the objector.
10. In paragraphs 8,9, and 10 of the judgment dated 8th May 2020 the Trial Magistrate Court noted on the defence of the applicant not being the employer, the claimant had produced a recommendation letter with the respondent’s letterhead and signed by a manager known as R.O Ojjo which was not challenged by the respondent. The trial court observed that the respondent’s defence was mere denials. That the claimant had stated his employer was Karume Weke who trades as Golden Spot Bar and Restaurant where he worked as a bartender. That the respondent/applicant did not explain why the claimant would have stated he was working there.
11. The appellant claims the employer of the claimant was Golden Spot Bar Limited from the objection proceedings. They alleged discovery of new evidence of CR12. Rule 74(1) of ELRC(Procedural) 2024 Rules provides:- “a)if there is discovery of a new and important matter or evidence which, despite 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;’
12. This Court noted that there was a denial of the employment relationship from the word go and a letter of recommendation under the appellant’s letterhead was produced by the claimant in the suit. The



letter was signed by RO. Ojjo. The Court finds the reasons for review do not meet the threshold of Rule 74(1) (ELRC (Procedural) Rules 2024 to the extent that despite of exercise of due diligence the CR12 or knowledge of ownership of the said Bar and Restaurant was not within the knowledge of the Appellant. Whenever there is an allegation of misjoinder of defendants the law allows for taking out third-party proceedings. That appellant failed to exercise that option. The court upholds the decision relied on by the Trial Magistrate Court in Republic v Advocates Disciplinary Tribunal Exparte Apollo Mboya (2019)e KLR where Justice Mativo set out principles of review and relevant to this appeal thus:

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- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.' In the instant case the CR12 was produced in subsequent proceedings post judgment by a third party and the appellant did not satisfy the court that the said CR12 was not within its knowledge despite exercise of due diligence and hence could not have been produced the same during the trial. The court finds contrary to the submissions by the appellant that the objector was the employer, the same was not pleaded in defence. It is trite submissions are not pleadings.

13. The Court holds that the application for review before Trial Magistrate Court was not merited and upholds the Ruling of Hon. A.N Makau PM dated 4th October 2022 in Nairobi CMEL No. 1321 of 2019 Julius William Lavu-Vs-Karume Weke T/A Golden Spot Bar & Restaurant. The appeal is dismissed for lack of merit. The respondent having not filed submissions the court makes no order as to costs in the appeal.

14. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18th DAY OF DECEMBER, 2024.

JEMIMAH KELL,

JUDGE.

In the Presence of:

Court Assistant: Caleb

Appellant : - Githii Ms

Respondent: Absent

