



**Kiteke v Unigroup Transporters (Appeal 64 of 2016)
[2023] KEELRC 222 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 222 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 64 OF 2016
AK NZEI, J
JANUARY 26, 2023**

BETWEEN

JOSEPH KINYAE KITEKE APPELLANT

AND

UNIGROUP TRANSPORTERS RESPONDENT

*(Being an appeal on the whole of the ruling delivered by Hon. M.L. Nabibya
at Mombasa on 26th August 2021 in ELRC MCC No. 458 of 2018)*

RULING

1. The application before me is the appellant's Notice of Motion dated August 26, 2022. The appellant seeks the following orders:-
 - a. that the court be pleased to review the judgment delivered on June 28, 2022 by honourable this court.
 - b. that costs of the application be in the appeal.
2. The application is supported by an affidavit sworn by the appellant/applicant on August 26, 2022. It is deponed in the said affidavit:-
 - a. that the court's findings as contained in the judgment delivered on July 28, 2022 was based on work injury suit No. Mombasa CM's No. 246 of 2018, which is completely different from Mombasa CM ELR Case No. 458 of 2019, which is a claim for terminal dues.
 - b. that documents (Pleadings) on the work injury claim were included in the record of appeal filed herein as they were annexures to an affidavit supporting an application that formed part of the record.



- c. that the appeal herein emanates from Mombasa CM-ELR Case No. 458 of 2019, which is an employment claim and that the Court’s finding that the appeal emanates from a work injury claim is an error that is apparent on the face of the record, hence the prayer for review.
 - d. that the appellant/applicant stands to suffer substantial loss if the prayer for review is not granted as this court’s judgment in issue strikes out the appellant’s claim for terminal dues, leaving him with no other legal avenue to seek recourse against his former employer.
3. When the application came up for hearing on September 14, 2022, Counsel for the respondent informed the court that the respondent would not be filing response to the application, and would leave the court to decide on the same. Counsel pointed out that the memorandum of claim filed in the trial court had not been included in the record of appeal, but had now been annexed to the appellant/applicant’s supporting affidavit filed herein. That the appeal herein arose from an interlocutory application.
 4. Counsel for both parties filed written submissions, which I have considered.
 5. The cost caused by an appellant’s failure to file a complete and correct record of appeal can be enormous in terms of both time and other resources; time being the greatest of them all. It is not an easy task for a court to write a full judgment and to write it again after a successful application for a review and setting aside of the initial judgment. Failure by an appellant to include in his record of appeal copies of the pleadings filed in the trial court or including in the record of appeal pleadings on different suits and leaving out pleadings filed in the proceedings appealed from is a major legal transgression that denies the appellate court an opportunity to fully consider the legal foundation of the appeal under consideration. Indeed, Rule 8(4) of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#) provides as follows:-
 - “(4) a memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.”
 6. Rule 2 of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#) defines “pleadings” as:-

“Includes the statement in writing of the claim or demand of an Applicant, petition, judicial review application and the defence by a respondent thereto, the reply of an applicant to any defence or a counter-claim of a respondent.”
 7. The appellant’s record of appeal filed herein on October 22, 2021 does not comply with Rule 8(4) of this court’s rules. It only contains the memorandum of appeal, the respondent’s application dated June 3, 2021 filed in the trial court, the appellant’s response to that application, both parties’ submissions on the application, the trial court’s Ruling dated August 26, 2021 and typed copies of the proceedings taken by and/or conducted before the trial court. Copies of the memorandum of claim and response thereto filed in the trial court (in Mombasa CM ELR Case No. 458 of 2019) were not included in the record of appeal.
 8. What the appellant included in his record of appeal herein is a copy of a plaint/claim filed by him against the respondent herein in Mombasa CMCC NO. 246 of 2018; which is a work injury claim. It is this plaint that this court noted and considered in its judgment delivered on July 28, 2022. The appellant/applicant has, in the application under consideration, stated that this amounted to an error that is apparent on the face of the record, and has urged the Court to review its aforesaid judgment herein.



9. The *Blacks Law Dictionary* defines “apparent” as
“that which is obvious, evident or manifest.”
10. The Court of Appeal stated as follows in the case of *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243:-
“In *Nyamogo & Nyamogo v Kago* [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefinites inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear error apparent on the face of record would be made out. An error which has to be established by long drawn process of reasoning or on the 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 or wrong view, is certainly no ground for a review although it may be for an appeal.”
11. This court’s power to review its own decrees or orders is enshrined in Rule 33(1) of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#), which provides:-
“33.
(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;
(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.”
12. Rule 33(5) provides that 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. The word “suit” as defined in Rule 2 of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#) includes an appeal.
13. It is my finding that there is an error that is apparent on the face of the record, and I hereby review and set aside this court’s judgment delivered on July 28, 2022. The appellant’s Notice of Motion dated August 26, 2022 is allowed in those terms. I make no order as to costs of the application.



14. In the interest of justice, I grant leave to the Appellant to file a supplementary record of appeal. A complete and correct supplementary record of appeal shall be filed and served within fourteen days of this Ruling.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF JANUARY 2023

AGNES KITIKU NZEI

JUDGE

Order

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

Appearance:

Ms Magina for Appellant/Applicant

Mr. Murithi Respondent

