



REPUBLIC OF KENYA



**KENYA LAW**  
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**Delta Point Distributors Limited v Ndichu (Appeal E169 of 2021)  
[2022] KEELRC 34 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 34 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E169 OF 2021  
SC RUTTO, J  
APRIL 28, 2022**

**BETWEEN**

**DELTA POINT DISTRIBUTORS LIMITED ..... APPLICANT**

**AND**

**GEOFFREY NDICHU ..... RESPONDENT**

**RULING**

1. The instant Application which is dated 16<sup>th</sup> February, 2022 has been triggered by the orders of 24<sup>th</sup> January, 2022, through which the Court allowed the Applicant's Application dated 20<sup>th</sup> December, 2021 by granting stay of execution pending Appeal and directing that the Applicant deposit the decretal sum in a joint interest earning account within 30 days thereof.
2. The Applicant now seeks a review/variation of the said orders and has moved the Court under Order 42 Rule 6, Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 and sections 1A and 3A of the *Civil Procedure Act*. The Application prays for orders that: -
  1. Spent
  2. Spent
  3. That the Honourable Court be pleased review and/or vary the orders of 24<sup>th</sup> January, 2022 requiring the deposit of the entire decretal sum of Kshs One Million Three Hundred and Thirty Five Thousand, Two Hundred and Sixty Three Shillings and Twenty One Cents (Kshs 1,335,263.21) in a joint interest earning account in the name of the parties advocates on record within thirty (30) days and in place be pleased to allow the deposit of half the decretal amount in the sum of Kshs Six Hundred and Fifty Thousand (Kshs 650,000/=) or an alternative security in the nature of a personal guarantee by the directors to satisfy the decree pending the hearing and determination of the Appeal.



4. That costs of the Application be in the Cause.
3. The Application is premised on the grounds on the face thereof and on the supporting Affidavit of Mr. George Wachira, the Managing Director of the Applicant/ Appellant.
4. The main grounds brought forth by the Applicant in support of the Application, are that: -
  1. it has been desirous to comply with the Court's orders of 24<sup>th</sup> January, 2022 but has been unable to acquire the entire sum for purposes of deposit as security;
  2. its financial situation has been occasioned by the not so conducive business environment that has been facing the country due to the Covid 19 pandemic especially in the hospitality industry to which it belongs;
  3. its core business falls squarely in the hotel and restaurants category and its business is yet to pick up following the Government directive as to closure and lockdowns hence it is not currently financially well endowed as to easily acquire the decretal amount; and
  4. at the point of taking directions from Court, the Applicant's advocates were not well apprised of the company's current financial status and woes.
5. The Respondent opposed the Application through a Replying Affidavit dated 25<sup>th</sup> February, 2022 and avers that: -
  1. the Applicant had through the current Application, changed tune as it had stated in its Application of 20<sup>th</sup> December, 2021 that it was ready to abide by any conditions as security that the Court may deem fit to impose;
  2. the reason for the review and variation of the orders of 24<sup>th</sup> January, 2022, is an afterthought;
  3. the proposed personal guarantee by the Directors of the Applicant has not been sufficiently explained as the Application has not listed the names of the said Directors who will furnish the personal guarantee;
  4. there is no indication of which other businesses the Directors are involved in or the income they generate so as to guarantee for the due performance of the decree;
  5. the bank statement produced as evidence by the Applicant is not prima facie and conclusive evidence that its business is facing financial difficulty, given that it operates multiple bank accounts; and
  6. the orders if granted, will be prejudicial to him as he will be denied security during the pendency of the Appeal.
6. The parties agreed to dispose off the Application by way of written submissions.

### **Submissions**

7. The Applicant in its submissions, urged the Court to exercise discretion in its favour. That the insistence to deposit the decretal amount will drive it from the seat of justice by rendering the Appeal nugatory on account of its inability to comply with the terms as they are.
8. On its part, the Respondent reiterated the averments contained in the Replying Affidavit and submitted that the Application has not set out the ground of review upon which it is premised upon, under Rule 33 of the Employment and Labour Relations Court Rules. That the Respondent had



waited for three years to enjoy the fruits of his judgment hence allowing the Application would be prejudicial to it.

### **Analysis and determination**

9. The sole issue for determination is whether the Application is merited.
10. As stated herein, the Application seeks a review of the Court's orders of 24<sup>th</sup> January, 2022, hence is brought under Order 45 Rule 1 of the Civil Procedure Rules which provide as follows;

“ Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from 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 decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
11. This provision has also been echoed under Rule 33(1) of this Court's Rules as follows: -

“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. Applying the foregoing provision to the instant Application, the Applicant was bound to prove that there is 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 at the time when the decree was passed or the order made; or that there was a mistake or error apparent on the face of the record; or that the order requires clarification; or there exists another sufficient reason.
13. The main ground upon which the Application is premised, is the alleged financial situation of the Applicant. To support this assertion, the Applicant has annexed its bank statement for the period commencing 1<sup>st</sup> January, 2022 until 10<sup>th</sup> February, 2022. By all means, this does not constitute new evidence that was not within the knowledge of the Applicant. As a matter of fact, it is difficult to comprehend how the Applicant was not aware of the company's financial institution at the time it made the initial Application.
14. To this end, there is no discovery of any new and important matter or evidence. There is also no any mistake or error apparent on the face of the record and there is no clarification sought as regards the orders sought to be reviewed. Therefore, the remaining ground for consideration, is whether the Applicant has advanced sufficient reason to warrant review of the court's orders.
15. The Respondent has averred that the Applicant's bank statement for the period between 1<sup>st</sup> January, 2022 till 10<sup>th</sup> February, 2022, is not conclusive evidence of its financial situation. The Respondent



stated that having served previously as the Applicant's Operations Manager, he is aware that it has multiple bank accounts.

16. Indeed, it is probable that the Applicant operates many bank accounts hence there was need for more evidence to prove its actual financial situation.
17. In this case, the most appropriate evidence to demonstrate the actual financial position of the Applicant's business was through its audited financial accounts for the immediate past financial period. Granted, it may be factual that the Applicant's business is yet to pick up following the lockdown period associated with the Covid 19 pandemic. But a single bank statement cannot act as conclusive evidence to confirm that issue.
18. The Applicant's audited financial accounts would have been the best evidence to prove the actual financial position of the company. In this regard, I find that the Applicant has not adduced sufficient reason and attendant evidence to justify review of the Court's orders.
19. In the case of *Arun C Sharma vs Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 Others* [2014] eKLR, the Court held that: -

“The Court should always remember that both the Applicants and the Respondent have rights. The Applicant has a right to his appeal and the prospects that it shall not be reduced to pious aspiration or a barren result if they pay out the decretal sum to a person who may not make a refund. The Respondent, on the other hand, has a right to the fruits of its judgment which should not be taken away; and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the Applicant.”
20. As such since the enjoyment of the Respondent's Judgment has been put on hold pending Appeal, the security by the Applicant ought to be suitable and adequate as to grant him a sense of security during the pendency of the said Appeal. In this case, I find that the proposed security of Kshs 650,000/= as not being adequate and suitable in terms of Order 42 Rule 6 of the Civil Procedure Rules. Besides, the Applicant has not provided the names and the number of directors who are to act as personal guarantees. There is also no evidence that such directors will be in a financial position to guarantee the due performance of the decree in the event the Appeal does not succeed.
21. In my view, the Applicant has not given any proper reason to justify the review and/ or varying of the order of 24<sup>th</sup> January, 2022.
22. The upshot of the foregoing is that the Application dated 16<sup>th</sup> February, 2022 July, 2014 is dismissed, thereby affirming the orders of 24<sup>th</sup> January, 2022. Be that as it may, and in the interest of justice, I will extend the time for compliance with the orders of 24<sup>th</sup> January, 2022 by another 30 days from today and in default thereof, the stay of execution shall automatically lapse.
23. Costs to abide the outcome of the Appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**



Mr. Omondi for the Applicant

Mr. Mugwe for the Respondent

Court Assistant Barille Sora

## **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

