



**Cornel Opiko K'ambudo t/a Fabrice Lounge v Kenya Hotels & Allied Workers Union & another
(Miscellaneous Application E058 of 2021) [2022] KEELRC 1105 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1105 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS APPLICATION E058 OF 2021**

**CN BAARI, J
JUNE 16, 2022**

BETWEEN

CORNEL OPIKO K'AMBUDO T/A FABRICE LOUNGE OBJECTOR

AND

KENYA HOTELS & ALLIED WORKERS UNION 1ST RESPONDENT

YAMUKO AUCTIONEERS 2ND RESPONDENT

RULING

1. Before Court is the Applicant's motion application dated 10th December, 2021, brought pursuant to Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, and Order 40 Rules 1 & 2 of the Civil Procedure Rules.
2. The Applicant seeks that the court reviews its decision delivered on 9th December, 2021 dismissing the Objector's application of 1st September, 2021, and pray that the application be heard a fresh. The Applicant further seeks to join one Nicholas Odhiambo Midia to these proceedings.
3. The application is supported by grounds on the face of the motion and the affidavit of Cornel Opiko K'ambudo, the Applicant herein.
4. Parties canvassed the application by way of written submissions and both parties filed their submissions.
5. The crux of the application is that Counsel on record for the Applicant failed to produce material exhibits in support of this matter, on which premise, the application for objection was dismissed.
6. The Applicant further avers that there is discovery of new and important evidence which after exercise of due diligence was not within the knowledge of the Counsel and could therefore not be produced at the time of the initial proceedings. It is the Applicant's further argument that the omission by Counsel in the objection proceedings to inadvertently annex the documents, is an error apparent on the face



- of the record, and that an innocent litigant should not be made to suffer as a result of the mistake of counsel.
7. The Applicant avers that it is in the interest of justice, equity and fairness that the court looks at the evidence that has now been presented before it and review its decision dismissing the earlier application.
 8. The Respondents opposed the application vide a replying affidavit sworn by Chadwick Olotu Ng'ono on 23rd December, 2021. The Respondent contend that the application is an abuse of the court process and does not meet the threshold for review of the orders of the court and should be dismissed.
 9. It is the Respondents' position that the Applicant is also the owner of Barizi Bar and Restaurant which is the Respondent in ELRC Cause No. 151 of 2017, and which is subject of the execution proceedings and which facts, he has not disclosed to this court.
 10. The Respondent further avers that the fact that the Applicants purported partner, one Nicholas Odhiambo Midia, was not a party to the proceedings, is not sufficient ground to justify their inability to adduce evidence in support of their application and is therefore not a ground for review.
 11. The Respondents aver that the Applicant is now inventing false evidence to defeat justice and meant to mislead the court to evade paying the decree holder.
 12. The Respondents further argue that mistakes of counsel do not constitute errors on record as the applicant would wish the court to believe.
 13. The Respondents argue that the business entity known as Pap Kalondo Investnet Limited is situate in Kilindini Mombasa South as shown by the PIN certificate, and the evidence adduced before court in relation to the entity does not hold.
 14. The Respondents pray that the application be dismissed and they are allowed to proceed with the proclamation and attachment of the Objector's assets.

The Applicant's Submissions

15. It is submitted for the Applicant that the new evidence produced in the matter confirm to the court that the Applicant together with one Nicholas Odhiambo Midia are co-owners of Pap Kalondo Investment Limited under which Fabrice Lounge is registered.
16. It is further submitted for the Applicant that the court has power to review its decision in the event of discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the Applicant or could not be produced at the time the order was made.
17. It is submitted that the dismissed application was made at the spur of the moment due to imminent execution and hence the reason the Applicant did not annex the relevant evidence, and that the evidence was later received from the Applicant's business partner. The Applicant sought to rely on the holding in the case of *Rose Kaisa v Angelo Kaiza*, where the court held: "Before a review is allowed on the ground of discovery of new evidence, it must be established that the Applicant had acted with due diligence and the existence of the evidence was not within his knowledge; and if found that the Petitioner did not act with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause..."
18. The Applicant submits that the instant application was made without delay and pray that the court reviews its decision made on 9th December, 2021.



The Respondents' Submissions.

19. It is submitted for the Respondents that the application does not meet the threshold for grant of injunctive orders. The Respondent sought to rely on the case of *Soman v Najib Mubiru* HCCA No. 234 of 2005 where the court held as follows:

“The question to determine is whether at the date of attachment, the judgment debtor was in possession of the property. If the judgment debtor was in possession, the inquiry will proceed no further. It has to be determined whether the objector held property on his/her own account or in trust for some other person.”
20. It is further submitted that the Applicant has not denied that he was the sole proprietor of Barizi Bar and Restaurant that is the judgment debtor in cause No. 151 of 2017 and further that it had in possession the proclaimed property that have been attached by the Respondent. They south to rely on the case of *Joseph Mutenga v Photo Focus (U) Ltd* (1996) for the holding that what the court needs to investigate is not the ownership of the property being attached but to determine that applicant was in possession of attached property on his own account and not on account of the judgment debtor or some other persons.
21. The Respondents submit that the Applicant is the judgment debtor and was the one in possession of the proclaimed goods as the proprietor of both Barizi Bar and Restaurant as well as Fabrice Lounge.

Determination

22. I have considered the application, the grounds and the affidavit in support thereof, the Respondents' replying affidavit and the submissions by both parties. The issue for determination is whether the Applicant has established grounds for review.
23. Section 16 of the *Employment and Labour Relations Court Act*, empowers this court to review its judgments, awards, orders or decrees in accordance with the *Employment and Labour Relations Court (Procedure) Rules*, 2016.
24. Rule 33 (1) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 states:

“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.”
25. The Applicant seeks review on the basis of discovery of new and material evidence which was not within the knowledge of his counsel and could therefore not be produced at the time of initial proceedings. It is the Applicant's case that the exhibits now placed before court were in possession of his business partner and who was not available at the time the application that was dismissed was filed.



26. The applicant further contend that the court did not consider evidence that was not on record and which could have made the court rule otherwise.
27. It is the Applicant’s further argument that the omission by Counsel in the objection proceedings to inadvertently annex the documents, is an error apparent on the face of the record, and that an innocent litigant should not be made to suffer as a result of the mistake of counsel.
28. In the opinion of this court, the fact that the Applicant could not obtain evidence for reason of unavailability of his business partner, does not satisfy the requirement of Rule 33 (1) (a) of the *Employment and Labour Relations Court (Procedure) Rules*. The evidence was certainly within the knowledge of the Applicant and was only not produced for reason that the business partner was absent or due to the urgency with which the application was filed. The evidence said to be a new discovery was always within the knowledge of the Applicant and no due diligence was required to establish that his co-owner had the documents now before court.
29. On the issue that the omission by Counsel in the objection proceedings to annex the documents, is an error apparent on the face of the record, this court is guided by the holding in the case of *National Bank of Kenya Ltd vs Ndungu Njau* (1997) eKLR where the court stated thus:
- “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.....”
30. Failure to annex documents to an application is not an error apparent on the face of the record or an error or omission on the part of the court. The court could not rely on evidence that was not on record.
31. The Applicant is simply seeking to have a second bite at the cherry as his application is an attempt at producing new evidence after his application has been heard and determined, and which prayer does not fall within the four corners of the grounds on which a court can be called upon to review its decision.
32. Suffice it to say that although the evidence now before court and which is the subject of this application indicates that the Objector is one of the registered proprietors of Fabrice lounge, he has not proved that he is not the proprietor of Barizi Bar and Restaurant. The issue in objector proceedings is for the applicant to show that he was in possession of attached property on his own account, and not on account of the judgment debtor or some other persons. The Applicant has still not discharged this burden. He has not provided evidence to demonstrate that he held the proclaimed goods on his own account and not on account of the judgment debtor- Barizi Bar and Restaurant. (See *Grace Wanjiru Mbugua v Philip Karumi Matu* (2009) eKLR)
33. For the reasons foregone, I find and hold that the Applicant’s application dated 10th December, 2021, lacks merit and is hereby dismissed with costs to the Respondents.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16TH DAY OF JUNE, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Objector/Applicant

Mr. E. Ngame present for the Respondent



Ms. Christine Omollo-C/A

