



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KERICHO**

**APPEAL NO. 4 OF 2018**

**UNILEVER TEA (K) LIMITED.....APPELLANT**

**VERSUS**

**RICHARD OMBATI KIBOMA.....RESPONDENT**

**RULING**

1. The Application herein is the Appellant's Notice of Motion dated 20.9.2021 brought under Rule 33 of the Employment and Labour Relations Court Procedure Rules and Article 159 of the Constitution of Kenya. It seeks the following orders: -

- a. THAT this Court be pleased to review/set aside and or vary its judgement delivered on the 29<sup>th</sup> June 2018.
- b. THAT necessary directions do issue.
- c. THAT costs of this application be provided for.

2. The Application is premised on the grounds set out on the body of the motion and the Supporting Affidavits sworn by the appellant's Legal Counsel Ms. Winnie Ochieng on 20.9.2021. The appellant's case is that the appeal was struck out vide the judgment delivered on 29.6.2018 on grounds that there was no evidence that the respondent was ever served despite the fact there was affidavit of service on record; that the decretal sum was deposited pending appeal but the respondent cannot be traced for directions on the same; that the judgment ought to be set aside and the appeal be determined on merits; and that the application has been made without determination.

3. The appellant was unable to serve the respondent and on 14.10.2021, the court gave the appellant leave to serve the respondent by substituted method. On 9.11.2021 the appellant's counsel told the court that the respondent was served and failed to oppose the application. Consequently, he urged the court to allow the application.

**Issues for determination and analysis**

4. I have carefully considered the material presented to me by the appellant. The main issue for determination is whether the appellant has met the legal threshold for granting the review order sought.

5. The relevant law to consider is Rule 33 of the ELRC Procedure Rules 2016 which provides that:

**“(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 an 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 reasons.”**

6. In this case, the first hurdle to jump is whether the application for review was made without unreasonable delay. It is admitted that the impugned judgement was delivered on 29.6.2018 and the application herein was filed on 29.9.2021. The time taken to bring the application was in excess of three years. The said delay has not been explained by the applicant save that it was busy pursuing the respondent for directions on the decretal sum that was deposited as security. The explanation given is not plausible. In the circumstances I find and hold that the delay in making the application was unreasonable delay and not excusable.

7. The second question to answer is whether the applicant has laid any of the said grounds set out under Rule 33 above to warrant the review order sought. My careful reading of the application does not set out the precise reason upon which the review is sought. Only in the supporting affidavit that the applicant mentions discovery of new evidence and apparent error apparent on the face of the record. There is no proof that the alleged new evidence was not within the knowledge of the applicant at the time when the impugned judgment was passed.

8. On the other hand the alleged error apparent on the face of the record was in fact a decision on the merits of the judgment. The argument by the applicant is that the trial court relied on the wrong affidavit of service (evidence) and thereby made an erroneous decision. That argument is best suited for an appeal and not review.

9. I gather support from the case of **National Bank of Kenya v Ndungu Njau [1997] eKLR** where the court expressed itself as follows concerning an error or omission apparent on the face of record:

**“A review may be granted whenever the court considers that it is necessary to correct an 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. It will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of the law cannot be a ground for review.”**

10. Again in the **Nyamogo and Nyamogo v Kogo [2001] EA 174** case cited by both parties, the Court of Appeal held that:

**“An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the 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 case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”**

11. In conclusion, I find that besides the application being brought after an unreasonable delay, the application is without merits and it is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021**

**ONESMUS N MAKAU**

**JUDGE**

**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> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**