



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 252 OF 2010**

**TODD MICHAEL DICK.....CLAIMANT**

**- VERSUS -**

**MOBILE TELECOMMUNICATIONS COMPANY (MTC)**

**INTERNATIONAL S.P. T/A ZAIN.....1ST RESPONDENT**

**CABINET SECRETARY OF THE MINISTRY OF LABOUR,**

**SOCIAL SERVICES AND SECURITY.....2ND RESPONDENT**

**PRINCIPAL SECRETARY OF THE MINISTRY OF LABOUR**

**SOCIAL SERVICES AND SECURITY.....3RD RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 18th October, 2019)**

**RULING**

The 2nd and 3rd respondents filed an application on 23.05.2019 through the Attorney General. The application was by the notice of motion under Article 156, 159, 164, 206(3), 221, 222 and 50(1) of the Constitution of Kenya and Rule 32 of the Industrial Court Rules and any other enabling statute. The substantive prayer is for the Court to be pleased to set aside or review the orders issued on 19.03.2019 and for costs of the application to be provided for. The application is supported with the affidavit of Peter K. Tum, the Principal Secretary, State Department for Labour. The application is based upon the following grounds:

- a) On 19.03.2019 the Court ordered that the 1st and 2nd respondents to release the shortfall computed at the interest rate as directed by the Honourable Deputy Registrar.
- b) The orders were made under circumstance that the claimant concealed or misrepresented material facts. In particular the role of the Deputy Registrar was to determine the dollar exchange rate and which the deputy registrar determined as 95.4306 as per the ruling given on 24.07.2018. The deputy registrar did not state the party to be refunded the shortfall and therefore the order of 19.03.2019 was misdirected. The order of 19.03.2019 should therefore be reviewed.

The claimant opposed the application by filing on 12.07.2019 the replying affidavit of Tessy Marienga Advocate through Lumumba & Lumumba Advocates. The grounds of opposition are as follows:

- a) It was misconceived that in prayer 2 of the application the applicants prayed for stay of execution pending appeal but no appeal had been preferred against the orders given by the Court on 19.03.2019. Review and appeal could not be pursued by the applicants concurrently.
- b) The alleged misrepresentation or concealment of facts by the claimant prior to obtaining orders of 19.03.2019 has not been demonstrated or established.
- c) The order by the Court on 19.03.2019 was made after the applicants had failed to attend the hearing and upon review of the case the Court ordered the 2nd and 3rd respondents to settle outstanding balance as per the exchange rate ruled upon by the Deputy Registrar.

d) The application is irregular as it raises no issue for determination.

e) The applicants attended when the Deputy Registrar ruled on the exchange rate and were given 30 days for stay of execution.

The Court has considered the parties' respective positions and finds as follows.

1) As urged for the claimant the applicants have failed to establish and to demonstrate the material that amounted to concealment or misrepresentation by the claimant prior to obtaining the orders of 19.03.2019.

2) As submitted for the respondent the order of 19.03.2019 was that the outstanding balance be settled by the 2nd and 3rd respondents (the applicants) as per the exchange rate determined by the Deputy Registrar. The Court has revisited the order as drafted by Court and as extracted and observes that order 1 thereof states "**interest rate**" instead of "**exchange rate**" and the review would be allowed to the extent that the error is corrected and the order reflects "**exchange rate**" accordingly.

3) Except as found in (2) above, the application will fail and in view of finding (2) above, each party will bear own costs of the application. The Court returns that the applicants have not established a valid ground for review as prayed for and in view of the prescribed justifications for allowing a review. Thus the orders as prayed for the 2nd and 3rd respondents in the application will fail.

4) Needless to state it here, it is settled law that a party may not pursue a review and appeal concurrently and with respect to the same order. Thus, the claimant's case in that regard is upheld.

In conclusion the application filed for the 2nd and 3rd respondents and dated 20.05.2019 is hereby determined with orders:

1) Review is hereby allowed to the extent that the word "**interest**" in order 1 given on 19.03.2019 is hereby deleted and substituted with the word "**exchange**".

2) Each party to bear own costs of the application.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 18th October, 2019**.

**BYRAM ONGAYA**

**JUDGE**