



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 565 OF 2013

BERNARD LIDWAGA SHIVACHI CLAIMANT

VERSUS

REGAL PHARMACEUTICALS LTD RESPONDENT

M/S Kiiru for claimant/applicant

Mr. Amutallah for respondent

RULING

1. The application seeks review of the judgment of the court delivered on 25th November 2016.
2. The grounds for review are set out as follows;
 - a) That there are apparent errors or mistakes on the face of the record with respect to the judgment of court delivered on 25th November 2016.
 - b) That the learned Judge in his judgment, misdirected himself by finding that the fact that the claimant alleged that he was employed as a casual employee, between the period dating 20th August 2001 until 9th June 2008, the same qualified the latter to be a permanent employee. The court's attention is invited to the case of **Rashid Odhiambo Alogoh & 245 others Vs. HACO Industries Limited (2007) 3KLR**.
 - c) That as a result of the above wrongful finding, the court proceeded to make an award in the sum of Kshs.382,515.50/=, in favour of the claimant, under a claim for continuous injury, pursuant to section 90 of the Employment Act.
 - d) That should the claimant have claimed continuous injury, the said claim ought to fail, as the same would be statute barred. The claimant would have been required to file suit, within 12 months after the discontinuity of the injury. In the instant case, the continuous injury, if any, ceased at the expiry of the fixed term contract ending December 2008. All other contracts after the expiry of the 2008 contract negate the principal of continuous employment, as they amount to distinct employment periods.
 - e) That the learned Judge misdirected himself by finding that the fact that the claimant alleged that he was employed as a casual employee, between the period dating 20th August 2001 until 9th June 2008, the same qualified the latter to be a permanent employee and therefore awarded terminal benefits as tabulated in the judgment.

3. The application is opposed vide a replying affidavit of the claimant sworn on 22nd February 2017 and filed on 23rd February 2017.

4. The nub of the opposition is that the application does not disclose any grounds of review but is inviting the court to sit on an appeal on its own decision.

Determination

5. The finding by the court that the claimant was not a casual but a permanent employee from 20th August 2001 to 9th June 2008 is a finding of fact and law and cannot be classified as an error on the face of the record.

6. Similarly, the finding by the court that the claim constituted continuous injury within the meaning of section 90 of the Employment Act, 2007 and therefore was not time barred is one of law.

7. The court of Appeal at Nairobi, per G. B. Kariuki, Kiage & Mohammed JJA in **Civil Appeal No. 275 of 2010** between **Pancreas T. Swai Vs. Kenya Breweries Ltd. [2014] eKLR** stated as follows citing the case of **National Bank of Kenya Ltd. Vs. Ndung'u Njau Civil appeal No. 211 of 1996** (unreported);

“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 considered. It will not be a sufficient ground for review that another Judge could have taken a different view on 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 law. Misconstruing a statute or other provision of law cannot be ground for review.”

8. In the present matter I made a conscious decision of the issues raised and the applicant wants me to sit on appeal on my own decision. Accordingly, the application is dismissed with costs.

Dated and delivered at Nairobi this 21st day of July, 2017.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE