



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 725 OF 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 10<sup>th</sup> July, 2017)**

**PETER MUTUA MWANZIA .....CLAIMANT**

VERSUS

**MINI BAKERIES (NAIROBI)..... RESPONDENT**

**RULING**

1. There are two Applications before Court. The 1<sup>st</sup> is the Notice of Motion application dated 7/12/2016. This application is an application filed by the Respondent herein for stay of execution pending appeal. The application was filed through a Notice of Motion filed under Section 17 of Industrial Court Act No. 20 of 2011, Order 16(1), (2) and (5) of the Industrial Court (Procedure) Rules 2010 and all enabling provisions of law.
2. The Application is supported by the affidavit of one Thomas Mwaura the Advocate for Respondent who has conduct of this matter and on the grounds that they have filed a Notice of Appeal and if execution is allowed to proceed, their appeal will be rendered nugatory.
3. They also aver that the appeal has overwhelming chances of success and that they have not delayed in filing this application following delivery of this Court's judgment on 24/10/2016.
4. The Respondent did not file any reply to this application.
5. The other application is the Notice of Motion filed in Court on 10/4/2017 by the Claimant Applicant herein seeking orders for review of this Court's judgment dated 24<sup>th</sup> October 2016.
6. The Claimant asks Court to include compensation of 12 months for unlawful and unfair dismissal of the Claimant. This application is brought through a Notice of Motion dated 6<sup>th</sup> April 2017 and brought under Section 12, 16 of the Employment and Labour Relations Court Act, 2011 and the inherent powers of the Court, Rule 32 of Employment and Labour Relations Court (Procedure) Rules 2010 and all other enabling provisions of the law.
7. The Applicant avers that despite the Court finding that the Claimant had been unfairly dismissed, no award of damages was made which is an error apparent on the face of the record and they ask the Court to correct its judgment and include compensation for unfair and unjust termination which is 12 months salary totaling 283,608/=.

8. This 2<sup>nd</sup> application is opposed by the Respondents who filed their grounds of opposition dated 3/5/2017.

9. They submit that the judgment they seek to review is already a subject of an appeal, that there is no error or mistake apparent in the judgment and that the application for review has not been made within reasonable time the judgment having been delivered on 24<sup>th</sup> October 2016.

10. They also oppose this application because the Claimant has already been awarded compensation in form of service pay for 13 years and 1 months salary in lieu of notice.

11. They contend that Notice of Motion is defective and they ask this Court to dismiss this application.

12. On the 1<sup>st</sup> application for stay, Order 42 rule 6(2) of the Civil Procedure Rules provide as follows:

**“(2) No order for stay of execution shall be made under subrule (1) unless:**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

13. The guiding principle in allowing stay would therefore be 3 fold as above. The Respondent Applicant filed this application on 7/12/2016, the judgment having been delivered on 24.10.2016. This was 1 ½ months thereof. There was some delay in filing the application, one month being a reasonable period within which to file such an application. I will however take it that though there was a delay, it is not inordinate.

14. On the issue of security, the Respondent has not offered to deposit any form of security before Court to enable Court consider the application. They have however indicated that they are willing to offer any form of security as ordered by Court.

15. On the issue of the appeal being rendered nugatory, the Applicant has stated that their appeal will be rendered nugatory if the application for stay is not granted and that they stand to suffer substantial loss. They have however not demonstrated the substantial loss they stand to lose other than just stating so.

16. They however state that because the Claimant has no job, they are unlikely to recover any moneys that can be paid out to him if the application is not allowed.

17. Having considered the submissions above, and considering the acceptance by the Applicants to provide any security as may be ordered by the Court and on consideration of the Claimant's current jobless situation, I will allow stay on condition that the Respondent Applicant releases ½ the decretal sum to the Claimant and deposits the other ½ in a joint interest earning account held in the joint names of the Counsels on record within 30 days.

18. On the second application for review, I note that Rule 33 of the Employment and Labour Relations Court Rules provide as follows:

**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.*

**2. 2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station...”.**

19. Review will therefore be granted in the instances stated above – error on the record, discovery of new evidence and where judgment or ruling requires clarification or for sufficient cause. The Applicant contends that there is an error on record because damages were not awarded by Court despite a finding of unlawful termination.

20. In my view this is not an error that can be corrected through review given the substantial omission. It is my view that because this matter is already a subject of an Appeal, this issue should be canvassed within the appeal as a cross-appeal and to ask this Court to review the “omission” would be tantamount to asking this Court to sit on appeal on its own judgment.

21. I decline to grant orders for review in the circumstances.

22. Costs in then cause.

Read in open Court this **10<sup>th</sup> day of July, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Omenga holding brief for Nyabena for the Claimant – Present

Khisa for the Respondent – Present