



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS**  
**COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 496 OF 2014**

**ANNASTACIA WANGUI WAWERU.....CLAIMANT/RESPONDENT**

**VERSUS**

**MAMBA GROUP OF HOTELS..... RESPONDENT/APPLICANT**

**RULING**

1. The application before me is the Respondent's Notice of Motion application dated 16<sup>th</sup> December 2015. The Respondent seeks through the motion expressed to be brought under Section 16 of the Industrial Court Act and Rule 32 of the Industrial Court (Procedure) Rules 2010, for a review of the Judgment of this Court given on the 29<sup>th</sup> September 2015. The Application for review is supported by Memorandum and a supporting affidavit of Isaac Maina Ihomba sworn on 16<sup>th</sup> December 2015. The Memoranda seeks to have the judgment of the Hon. Nzioka wa Makau stated to be defective to be set aside as the judgment was based on a non-existent entity. The memoranda was to the effect that the entity was incorporated 3 days after institution of suit herein. Attached to the Memorandum was the certificate of incorporation as well as the CR12 from Registrar of Companies indicating the entity in dispute was incorporated on 21<sup>st</sup> March 2014. The affidavit in support was on similar lines.
2. The Claimant/Respondent opposed the application at the hearing though no affidavit or grounds in opposition were filed or if filed, none were on the Court file.
3. Mr. Ndegwa urged the application and submitted that the Respondent/Applicant sought review of the judgment of 29<sup>th</sup> September 2015 and stated that the judgment was defective as the claim was based on a non-existent entity. He submitted that the Respondent was incorporated 3 days after the suit was filed. He submitted that the incorporation was on 21<sup>st</sup> March 2014 and he invited the Court to look at the CR12, the certificate of incorporation and the memorandum of claim filed herein. He submitted that the judgment of the court was defective, erroneous and bad in law. He prayed for the judgment be set aside and the claim be dismissed with costs plus the costs of the application. He submitted that the reply by the Claimant/Respondent does not dispute when the Respondent/Applicant was formed. He thus urged the Court to intervene by vacating the judgment.

4. The Claimant/Respondent opposed the application through her counsel Ms Betty Rashid. She submitted that the Respondent/Applicant purports that the company was registered on 21<sup>st</sup> March 2014. She submitted that the statement of claim was filed on 26<sup>th</sup> March 2014 and that clearly, by the time of filing, the company was in existence. She submitted that the company was operating in the name and style of Mamba Group of Hotels as far back as 12<sup>th</sup> August 2013 and that it had not regularised its name. She submitted that the Claimant was given money to bank in August 2013 a year before the suit and that it was obvious from the Respondent/Applicant's submissions that they were in existence from August 2013 and had employed the Claimant from as far back. She submitted that they held themselves out as the Claimant's employer and explicitly stated that in their response and in statements before this Court. She stated that they admitted in the response to claim that the Claimant was their employee and they cannot now claim that they incorporated the company after they dismissed her. She submitted that the letter of recommendation used was issued by the company. She submitted that in matters of review, a review is only brought on discovery of a new matter and that with due respect, the fact of registration in March 2014 cannot be said to be a new matter. She submitted that it was always in their knowledge and no reasonable grounds exist for review. She stated that under the Labour Relations Act one is an employer if they hold themselves out as such. She submitted that the application was brought as a delaying tactic and should be dismissed with costs.
5. In a brief reprise, Mr. Ndegwa submitted that the documents in question speak of Mamba Group of Hotels Limited and that there is a distinct difference between Mamba Group of Hotels and Mamba Group of Hotels Limited. He submitted that there cannot be any contract between the Respondent and the Claimant. He urged the application be granted as prayed.
6. In matters review, the Industrial Court (Procedure) Rules 2010 are instructive. Rule 32 provides as follows:-

*32. (1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—*

*(a) if there is a 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; or*

*(b) on account of some mistake or error apparent on the face of the record; or*

*(c) on account of the award, judgment or ruling being in breach of any written law; or*

*(d) if the award, the judgment or ruling requires clarification; or*

*(e) for any other sufficient reasons.*

*(2) An application for review of a decree or order of the Court under subparagraphs (b),(c), (d), or (e), shall be made to the judge who passed the decree, or made the order sought to be reviewed.*

*(3) A party seeking review of a Court decree or order of the Court shall apply to the Court in Form 6 set out in the First Schedule.*

*(4) An application under paragraph (3) shall be accompanied by a memorandum supporting the application and the Court shall proceed to hear the parties in accordance with section 26 of the Act.*

*(5) The Court shall, upon hearing an application for review, deliver a ruling allowing the application or dismissing the application.*

*(6) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.*

*(7) An order made for a review of a decree or order shall not be subject to further review.*

7. The suit, as is seen on the first line of the judgment was filed on 26<sup>th</sup> March 2014. This was after the incorporation of the company on 21<sup>st</sup> March 2014. Clearly, the company was in existence at the time of filing suit. The suit cannot be said to be against a non-existent entity. The Claimant was stated to be an employee of the Respondent and in the defence filed on 24<sup>th</sup> April 2014, the Respondent admits the Claimant was its employee and accused her of being part of the conspiracy to rob the Respondent by stage managing her own shooting and attempted robbery from her person. The Respondent attached as proof of her carelessness, a letter dated 18<sup>th</sup> August 2013 in which the Claimant was accused of loss of Kshs. 90,000/- on 12<sup>th</sup> August 2013. It was signed by Mr. Isaac Maina Director.
8. The application before Court was unnecessary and a total waste of judicial time. As seen above, a review should only lie if there is discovery of new and important matter or evidence which, 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. In any event, the after the delivery of the decision on 29<sup>th</sup> September 2015, the Respondent did not exercise due diligence. The application was made on 16<sup>th</sup> December 2015 over 2½ months after the decision. The fact of registration was within the knowledge of the Respondent from the time the suit was filed. There was nothing the application turned on that was significant to warrant any of the orders sought being granted. The judgment was neither erroneous, defective or otherwise deficient.
9. As an aside, counsel is reminded to always ascertain who the presiding judge in the matter and not make the mistakes a first year law student may be prone to make. I have never been named Nzioka.
10. Application dismissed with costs to the Claimant/Respondent.

Orders accordingly.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of May 2016**

**Nzioki wa Makau**

**JUDGE**