



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 2396 OF 2012

CHARLES ADOKO OKODA.....CLAIMANT

VERSUS

PRESTIGE SACCO LIMITED.....RESPONDENT

RULING

1. Before the Court are two applications. The first is the Respondent's notice of motion dated 8th September 2015 for stay of execution and setting aside of the judgment (stay and setting-aside application) and the Claimant's review application dated 7th December 2015 and filed on 9th December 2015 (the review application). The Respondent asserted that the Claimant was bent on enriching himself as he had been paid the salary for August 2012 and therefore the award of the sum of Kshs. 12,920/- being salary for the month of August 2012 was incorrect and should be set aside. The Respondent stated that the decretal sum had been settled and the Claimant should be restrained from executing to recover the sum of Kshs. 12,920/- already paid. On his part, the Claimant sought review on grounds that in the judgement of the Court, there was a mistake or error apparent on the face of the record, the judgment requires clarification and that there are sufficient reasons to review the award. The Claimant opposed the Respondent's stay and setting-aside application and filed grounds of opposition dated 11th January 2016 on 15th January 2016. The Claimant's opposition was to the effect that the Respondent had sought relief relying on the Civil Procedure Rules 2010 whereas there were rules to move this Court and that the Respondent was on a fishing mission after the Court's judgment. The Respondent on its part filed a statement of grounds of opposition to the review application on 22nd March 2016. The main thrust of the grounds filed by the Respondent in respect of the review application was that the Court was now *functus officio* having pronounced itself on the issues the Claimant was raising in his review application.

2. The parties opted to file submissions so as to permit the Court render a ruling in respect of the two applications. The Claimant's submissions were to the effect that the Respondent's stay application is incurably defective and bad in law. The Claimant submitted that the application is brought under provisions of the Civil Procedure Act and the Civil Procedure Rules and that these provisions of the law are inapplicable in the Employment and Labour Relations Court which has its own rules and procedures. The Claimant asserted that the Respondent never raised the issue of the payment of the August 2012 salary either in pleadings or the testimony adduced in Court. The Claimant submitted that the annexures the Respondent had attached had been in the Respondent's possession since November 2012 when the Claimant's memorandum of claim was filed. In support of his review application, the Claimant submitted that there was discovery of new and important evidence that was not available during the hearing but has since been discovered. The Claimant submitted that there were errors as the Court did not determine whether the withdrawal of the termination letter was lawful or not. The Claimant also asserted that there

was an error on the face of the record as the findings by the Court in respect of the letter of notice to show cause was not subjected to investigations by an expert in handwritings. The Claimant thus sought the review as prayed in his review application.

3. The Respondent on its part submitted that the Court heard the case and did not find merit in the Claimant's case save that the Claimant was entitled to receive the salary for the days worked in August 2012 save for statutory deductions. The Respondent stated that a decree was extracted and it was taken aback to have auctioneers attempt to attach for an amount that the Respondent had already paid. The Respondent submitted that the Constitution of Kenya under Article 159(2)(d) required courts to exercise judicial authority without undue regard to procedural technicalities. It was submitted that the Court should in keeping with the furtherance of the objectives of the Employment and Labour Relations Act. The Respondent asserted that though the court may have been moved under the wrong provisions of statute, the court should look at the substance and not the form. The Respondent submitted that the Court can order a stay of execution as the Claimant had received the sum for days worked in August 2012. The Respondent asserted that if the Claimant was honest he would admit receipt of the money. Reference was made to the annexures attached to the supporting affidavit in the Respondent's application and it was stated that the annexures show the preparation of the sum and the payment thereof to the Claimant. The Respondent submitted that its application was neither speculative nor scandalous but conclusively informative so as to enable the Court reach a justiciable determination based on the facts adduced. The Respondent submitted in opposition to the review memorandum by stating that the Claimant had framed the review orders in such a way as to re-open a matter and issues already addressed at trial where the Claimant had been accorded a chance to substantiate his claim failed to do so and is belatedly trying to introduce matters he ought to have introduced at trial. The Respondent asserted that the Claimant seeks to introduce new evidence pertaining to his employment. The Respondent submitted that the letter sought to be introduced is another attempt to hoodwink the Court as the letter could not be from the SACCO staff addressed to the Chairman who thereafter signs it himself. The Respondent submits that the memorandum is misconceived and an abuse of the Court process as the Court has become *functus officio*. The Respondent urged the Court to find that there was nothing to warrant a review and dismiss the memorandum of review.

4. I will deal with the review application first. In order to appreciate the review application, a look at the Rules of the Court would aid the litigants. The Industrial Court (Procedure) Rules 2010 provide as follows under Rule 32:-

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.

5. In seeking review, the Claimant asserts that there is new evidence that has emerged. The evidence adverted to is the purported letter addressed to the Chairman of the SACCO. The letter clearly is an attempt to hoodwink the Court as the letter could not be from the SACCO staff addressed to the Chairman who thereafter signs it himself!! The Claimant's new found evidence is of dubious provenance. It cannot be addressed to the Chairman by SACCO staff and be signed by the Chairman. The review seeks orders that could best have been raised before the Court of Appeal. This Court cannot sit on appeal over its own judgment. The review application therefore hopelessly fails and is dismissed.

6. The application by the Respondent seeks the Court to order stay of execution and a finding that the salary for August 2012 had been paid. The Court was invited to look at the copy of cheque allegedly prepared and issued to the Claimant who ought to have banked it. This document was in the possession of the Respondent. It ought to have been adduced as evidence in the trial. We cannot have trials by instalment. A party ought to bring before the Court all the evidence it requires to either prove or disprove the case. It should not wait until the Court is *functus officio* and then seek to introduce evidence that ought to have been part of the trial. In any event, the Court is unable to ascertain the fact of the payment and the only inference is that no payment was made. The application for stay also hopelessly fails and is dismissed. As both parties were unsuccessful, the Court will order that each party bears their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of July 2016

Nzioki wa Makau

JUDGE