



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT
AT MOMBASA
CAUSE NO. 13 OF 2014
OSCAR MACKAZI CHIRO.....CLAIMANT
VERSUS
POLY PROPYLENE BAGS.....RESPONDENT
RULING

Introduction

1) The Respondent in the main suit has brought the application dated 17.6.2015 seeking for the review and setting aside of this Court's judgment dated 8.5.2015 with respect to the award of Ksh 106,808 for service pay. The grounds upon which the review is sought are that :

- a) **There is a mistake or error apparent on the face of the record, and**
- b) **The judgment is in breach of the law, that is to say, section 36 (6) of the Employment Act (E A)**

The claimant has opposed the application by the Replying Affidavit sworn on 12.8.2015 and prayed for the Application to be dismissed. The application was disposed of by written submissions.

Applicant's Submissions

2) It was submitted for the applicant that the claimant never pleaded or alleged that his NSSF contributions were never remitted after deductions and as such by the Court awarding Ksh 106,808 as service pay due to non remittance of NSSF between 2008 and 2012 was mistake or an error apparent on the record. She relied on **C.A.CA. No 211 of 1996 National Bank of Kenya Ltd vs Ndngu Njau [1997] eKLR** where the Court of Appeal observed that :

“Review may be granted whenever he 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 established. It will not be a sufficient ground for review that another Judge could have taken a different view of 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. Misconstructing a statute or other provision of law cannot be a ground for review”.

3) In addition to the foregoing, the applicant submitted that the impugned judgment was in breach of

section 36 (6) of the E A which disqualified the claimant as a contributor to NSSF from claiming service pay. She maintained that she remitted all the claimants NSSF contributions until the time he retired. She annexed a statement printed out from NSSF records to support the foregoing allegation. In her opinion she submitted that her application meets the threshold for the order of review to issue as prayed.

Claimant's Submissions

4) The claimant relied on his Replying affidavit to oppose the application. He urged that application be dismissed with costs because there is no evidence that the applicant is a member of the Federation of Kenya's Employment (FKE) to warrant the representation herein by the said FKE. In addition, the claimant submitted that he raised the issues of non-remittance of NSSF dues in his pleadings, witness statements and submissions and that is what prompted the Court to make the award of Kshs 106,808 as service pay. In his view section 36 (6) of the E. A does not exist.

Analysis and Determination

5) After careful consideration of the pleadings, the impugned judgment, the Application herein, the memorandum in support, the Replying affidavit and the oral submissions, I find that the only portion of the judgment being faulted is the award of Kshs 106,808 for service pay. The issues for determination are :

- a) **Whether the Application is competent in law.**
- b) **Whether the award of Kshs. 106,808 is a mistake or apparent error on the record.**
- c) **Whether the award of Kshs 106,808 is in breach of section 36 (6) of the E A.**

Competence of the Application

6) The application was filed by a different counsel after the impugned judgment. No leave was sought and granted before the application was brought. That rendered the application by FKE incompetent for all purposes under order 9 Rule 9 of the Civil Procedure Rules.

Mistake or error application on record

7) The Court Observed on page 3 of the impugned judgment that the claimant had not specifically pleaded for service pay. However I observed that he gave facts to show that he intended to get service pay. I cited the Court's wide jurisdiction under section 12 (3) (viii) of Employment and Labour Relations Court Act in awarding the Kshs 106,808 as service pay. In any event, the Respondent pleaded in paragraph 5 of her defence that :

“5 The respondent avers and maintains that the claimant was a Registered National Social Security Fund Member and is therefore not entitled to benefit from the fund but not from the Respondent.”

8) The claimant responded to the said pleading in the defence by submitting that the respondent never remitted NSSF contributions for his benefit and urged the Court to award service pay under section 35 (5) of the E A. He cited the decision by **Rikaj in ICC 871 of 2012 Elija Kipkoros Tonui vs Ngara Opticians [2014] eKLR** where it was held that mere membership to NSSF without regular remittance of NSSF contributions is not a bar to the employees' right to service pay.

9) The foregoing rival pleading and submissions by the two parties amounted to an invitation to the Court to make a determination on the issue whether pleaded by the claimant or not. Hence the Court considered the NSSF statement filed by the Respondent on 13.2.2015 out of time and without leave, which showed that from November 2008, no NSSF remittance was made despite the fact that the claimant was deducted NSSF dues every month until his retirement. There was there for no NSSF statement filed by the defence

showing that NSSF contributions were regularly remitted for the claimant from 2008 to July 2012 when he retired. In view of the foregoing the Court awarded service pay for the 4 years at the rate of 15 days for each completed year of service. After considering all the material before me I find with due respect no mistake or error was made on the record.

10) The Court acted consciously and interpreted the law, facts, pleadings and evidence before it to arrive at that award. If I made an error of judgment in my evaluation of the materials placed before the Court, then the correct thing for the respondent was not to seek review but rather file appeal in line with the **National Bank of Kenya** cases aforesaid.

11) As regards breach of section 36(6) of the Employment Act, I agree with the claimant that such provision does not exist in law and as such it was not infringed. However if the applicant intended to cite section 35 (6) of the Employment Act, then I find no merit in her contentions in view of the decision by Rika J in the **Elijah Kipkoros Tonui case**, aforesaid and which I entirely concur with. An employer who remits no NSSF dues to the Fund for the employees benefits is not shielded from claiming for service pay under section 35 (5) of the Employment Act.

Disposition

12) For the reasons stated above the application for review dated 17.6.2015 is dismissed for being incompetent and bereft of merits. Costs to the claimant.

Signed, Dated and Delivered at Mombasa this 15th day of July 2016.

ONESMUS MAKAU

JUDGE