



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1612 OF 2010**

**(Before Hon. Justice Maureen Onyango on 26.1.2015)**

**KENYA NATIONAL PRIVATE, SECURITY WORKERS UNION .....CLAIMANT**

**-VERSUS-**

**THOMAS OCHIENG ALLOYCE .....RESPONDENT**

**R U L I N G**

The application before me for determination is a notice of motion dated 21st August 2013 filed by the claimant Kenya National Private Security Workers Union under Section 26 of the Labour Institutions Act and all other enabling provisions of Law. The application seeks the following orders:-

1. **That this application be certified urgent and service be dispensed with in the first instance.**
2. **That taxation of costs awarded on 11th day of January, 2011 be stayed pending the hearing and determination of this application.**
3. **That this honourable court do review and set aside the orders dismissing this cause with costs made on 11th January, 2011.**
4. **That costs of this application be borne by the respondent.**

The application is grounded on the following:-

1. **That on 11th day of January, 2011 this court dismissed this Cause with costs to the respondent.**
2. **That the respondent has sought to tax the costs on 26th August, 2013.**
3. **That the dismissal of the Cause and the attendant order for costs was a mistake.**
4. **That the dismissal of the Cause was pursuant to a lie by the respondent that Nairobi HC Miscellaneous Application Number 335 of 2010 involving the same parties was still pending for hearing in the High Court.**

The application is supported by the affidavit of Isaac G. M. Andabwa, the National General Secretary of the claimant. He depones that this case was dismissed with costs to the respondent on 11th January 2011 on grounds that the applicant was pursuing a similar claim in Nairobi HC. Misc. Application No. 335 of 2010 which was allegedly pending for hearing. That unknown to the court there was no suit pending as at 23rd December 2011 when the applicant commenced this case. That the case lapsed on 8th December 2011 when the orders granted to the applicant to commence proceedings for prerogative remedy expired. That the respondent herein lied to the court about the existence of High Court Misc. No 335 of 2010. That had the court been aware of the true position, it would not have dismissed the case and awarded

costs to the respondent herein.

Mr. Andabwa filed a supplementary affidavit sworn on 26th August 2013 in which he attached annexures that had been omitted in his earlier affidavit.

The respondent filed a replying affidavit erroneously titled as supporting affidavit sworn and filed on 6th September 2013. He deponed in the affidavit that the applicant had not established any grounds for review of the orders made on 11th January 2011, that the applicant had not explained the inordinate delay of 2 years in filing this application and that the application was an afterthought filed only after he demanded payment of costs awarded to him by court. The respondent further deponed that the ruling in which the High Court ruled that it was not properly seized of the matter in High Court Misc. No. 335 of 2010 was made on 7th March 2011 long after the ruling of this court on 11th January 2011. He deponed also that the court rightly exercised its discretion in dismissing the claimant's case and awarding costs to the respondent. He further deponed that the applicant's assertion that the court would not have dismissed the case and awarded costs to the respondent had it been aware about the facts of High Court Misc. No. 335 of 2010 is speculative.

The application which was filed under certificate was first heard by Justice Mbaru on 23rd August 2013 when she granted orders of stay of taxation until 6th September 2013.

According to Section 16 of the Industrial Court Act 2011, this court has powers to review its orders. Rule 32 of the Industrial Court (Procedure) Rules provides for review of this court's decisions in the following circumstances:-

- "(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".**

The applicant's ground for review of application is that the court was not aware about the fact that High Court Misc. App. No. 335 of 2010 had lapsed. The applicant further pleaded that had this fact been within the knowledge of the court it would not have dismissed the case.

The fact of High Court Miscellaneous Application lapsing was within the applicant's knowledge but he did not raise it at the time of hearing. Order 32 only permits the discovery of new and important facts that were not within the knowledge of the applicant, or that the applicant could not produce at the time when the decree was passed. This is not the case with the present application. The applicant further submitted that the court was mistaken. This cannot be true as the court decided based on the facts before it. It did not make a mistake and neither was the court mistaken. The court clearly stated in the ruling that the claimant filed the proceedings without disclosing the existence of the proceedings in the High Court and the orders already issued by the High Court. The court also pointed out in the ruling that the affidavit sworn by Mr. Andabwa was faulty and offended Order 6 of the Civil Procedure Rules. The reasons for dismissal was non disclosure of the existence of the High Court case and the orders that had been issued by the High Court. These are true facts that the court was aware about when it made the orders. The fact that the orders issued by the High Court had lapsed were not the basis of the ruling. The applicant has not denied that it was guilty of non disclosure.

The applicant has also not explained why it delayed in making the application for review until the respondent filed the bill of costs for taxation. I agree with the respondent's contention that this

application is an afterthought. It was filed only after the respondent filed his bill of costs and the same had been fixed for hearing. Again the argument by the applicant that the orders of the High Court lapsed and there was no valid case or orders were not the basis of the court's decision to dismiss the applicant's case. In any event, the orders were in place until 7th March 2011 when the High Court made the said orders. That it was not properly seized of the case.

For the foregoing reasons, I find no merit in this application and dismiss it with costs. I further direct that this matter be placed before the Deputy Registrar within 7 days from the date of this ruling for purposes of fixing a date for taxation. I further order that the Deputy Registrar includes the respondent's costs of this application in the taxation.

Orders accordingly.

**Dated and delivered in Nairobi this 26th day of January, 2015**

**MAUREEN ONYANGO**

**JUDGE**

*In the presence of:*

..... for claimant(s)

..... for respondent(s)