



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 871 OF 2012

ELIJAH KIPKOROS TONUJ.....CLAIMANT/DECREE HOLDER

VERSUS

NGARA OPTICIANS T/A BRIGHT EYES LIMITED.....RESPONDENT/JUDGMENT

-DEBTOR APPLICANT

RULING

1. The application before me is the Judgement-Debtor/Applicant's Notice of Motion Application dated 19th November 2014. The Application seeks the review of the Award of Justice Rika made on 28th January 2014. The Application was supported by the Affidavit of Anil Vara sworn on 18th November 2014. The main thrust of the Application is that the Respondent was desirous of being heard but was not due to inadvertence on the part of its counsel then on record.
2. The Application is opposed and the Claimant/Respondent filed Grounds of Opposition on 24th November 2014. The Claimant/Respondent states that a similar application by the Respondent/Judgment Debtor was dismissed and there are no grounds to warrant a review.
3. The Respondent Judgment-Debtor/Applicant filed written submissions on 10th December 2014. In the submissions the Applicant submitted that the Respondent had been sued by the Claimant and the case proceeded ex-parte in July 2013 and an award given in January 2014 wherein the Claimant was awarded inter alia service pay of Kshs. 403,840/- and annual leave of Kshs. 22,615/- plus costs of the suit. The Respondent relied on the cases of **Paviwa Limited v Co-operative Bank of Kenya [2004] eKLR**, **Paul Asin t/a Asin Supermarket v Peter Mukembi** and **Fred Masambaka v Babs Security Services [2014] eKLR**. These decisions relate to the factors to consider in granting a review as well as the provisions of Section 35 of the Employment Act regarding statutory dues and the effect thereof on service pay. These decisions have been considered in coming to the decision. Additionally the Respondent had sought, by way of an application dated 11th February 2014, a stay of execution and setting aside of the judgment and leave to defend the Claim on merits. The Application was dismissed on the grounds that there was no evidence that there was inadvertence on part of counsel. The Respondent submitted that the issues were whether there are sufficient grounds for review and whether there was delay in making the application for review.
4. Rule 32 of the Industrial Court (Procedure) Rules 2010 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.

5. The Rule above makes it plain that a party seeking review must have met set criteria which is enumerated in the Rule and sub-rules. The party seeking the review must be in possession of material which shows that 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 award or decree was passed or the order made; or that the review is sought on account of some mistake or error apparent on the face of the record; or that it is sought on account of the award, judgment or ruling being in breach of any written law; or where the award, judgment or ruling requires clarification; or where there is any other sufficient reason or reasons. There is no evidence that the Respondent was not in possession of the material that it seeks to have reconsidered by the Court relating to NSSF dues. There was no reason as to why the Respondent did not bring to the fore the material that it now portends to hold.
6. The facts of this case are that the Claimant now holds a decree of the Court in pursuance of the decision by Rika J. made on 28th January 2014. The Respondent had not participated in the suit to a large extent though duly served. The Respondent made an application on 11th February 2014 seeking inter alia stay of execution, setting aside of the award herein and leave to defend the suit on merit. That Application was dismissed by Rika J. on 18th March 2014. The applicant had not annexed proof of the inadvertence in diarising the case hence the dismissal of the application.
7. The Review sought in the instant case is seeking the same same orders. The Application is thus *res judicata*. *Res judicata* is Latin for a matter already judged. *Res judicata* is a rule of law that

once a competent Court makes a determination on an issue between the parties in a suit on the matters litigated upon in that suit, it is not open for any of the parties to litigate upon those matters again. The advocates then on record had occasion to seek the setting aside of the decision and they did so without success. The present Application is an abuse of the Court process. It is not proper to litigate matters over and over again. The Review now sought is unmerited, not provided for in law and is not fit for grant. It cannot be entertained because the matters raised in the instant Application for Review are not within the purview of the provisions of Rule 32 of the Industrial Court (Procedure) Rules 2010. Nothing new has arisen from the previous decision of the Court on 18th March 2014 to warrant a review. Whereas a party aggrieved by a decision of the Court may seek setting aside or review or even appeal, there must be merit thereto.

8. I find no merit in the Review Application herein and dismiss it with costs to the Claimant.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of January 2015

Nzioki wa Makau

JUDGE