REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO.1238 OF 2012

(Before D.K.N Marete)

DANIEL OKOTH…….…..CLAIMANT

Versus

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS……...RESPONDENT

R U L I N G

This is an application dated 3rd February,2014 in which the applicant seeks the following orders of court;

1. *The court be pleased to certify urgent and hear this application ex-parte at the first instance.*
2. *The Honourable court be pleased to review its judgement made on 20/12/2013.*
3. *In the alternative this Honourable court do review and set aside its Judgment made on 20/12/2013 and the cause be heard afresh.*
4. *The court be pleased to stay execution of the decree in the counter-claim passed on 20/12/2013 till the hearing and determination of this application.*
5. *Cost of this Application be provided for.*

and is grounded as follows;

1. *The Claimant is aggrieved by the Judgment of this Honourable court made on 20/12/2013.*
2. *There is an error apparent on the face of the record.*
3. *This application has been filed without undue delay.*
4. *It is the interest of justice that the Judgment made on 20/12/2013 be reviewed and set aside.*
5. *The Claimant stands to suffer substantial loss and damage unless stay of execution of the decree in the counter-claim made on 20/12/2013 is granted.*

The application is supported by the affidavit of the claimant/applicant sworn on the same date.

The respondent in opposition to the application for review of judgment makes and files grounds of opposition dated 3rd March, 2014 as follows;

1. *THAT the claimant is guilty of unreasonable delay in filing his application for review of the judgment since the subject judgment was delivered on 20th December, 2013 yet the claimant filed the subject application on 6th February 2014, which was delay of 48 days.*

2. *THAT the claimant is guilty of unreasonable delay in serving the subject application upon the respondent since the claimant filed the subject application on 6th February 2014 yet he served it upon the respondent on 21st February 2014, which was a delay of 15 days and points to bad faith.*

3. *THAT the observation by this Honourable Court, in the subject judgment, that the claimant's written submissions were not traceable at the time of the writing of the judgment does not constitute an error apparent on the face of the record, as claimed by the claimant, since written submissions do not stand alone but they merely elucidate a party's pleadings, in this case the claimant's statement of claim dated 9th July 2012 and claimant's reply to response to statement of claim and response to counter claim dated and filed on 22nd October, 2012.*

4. *THAT if the claimant is aggrieved by the subject judgment (dismissal of the claimant's suit and award of 60 per cent of the respondent's counter-claim), then the proper remedy available to the claimant is to lodge an appeal against the subject judgment since the claimant is questioning the substance and merits of the judgment by praying that the subject judgment be set aside and suit be heard afresh.*

5. *THAT the claimant has not provided this Honourable Court with a sufficient reason to empower this Honourable Court to exercise its discretion to review its subject judgment.*

The matter came to court severally until the 4th March, 2014 when the parties agreed to dispose off the matter by way of written submissions. The claimant in his skeleton written submissions submits that the application is grounded on Rule 32(1) (b) (c) (d) (e), (2), (3), (4), (5), (6) and (7) of the Industrial Court Procedure Rules, 2010 and the grounds as herein above set out in the introduction to this ruling.

The gist of the application is that in drawing the judgment, the judge did not consider the claimants written submissions and also his response to defence and defence to the counter-claim the same having been filed and served but were missing from the record of court. This therefore constitutes an error which ought to be remedied by a review based on the contents of the missing pleadings of the claimant. This court is endowed with the discretion to review the judgement, bearing in mind these circumstances.

The claimant further argues and submits that on the issue of entry of judgment in favour of the respondent in the counter-claim, the court did not take into account his defence to the counter-claim as this was not traceable. These errors now render the judgment not meritorious and therefore the quest for review of the same.

The respondent in opposition to the application on the other hand cites the issue for determination as whether the claimant/applicant has demonstrated grounds for review falling within the purview of Rule 32 of the Industrial Court (Procedure) Rules, 2010. This provides the following grounds that may be relied upon by aggrieved person to apply for review of a judgment; Rule 32 (1) demonstrates this as follows;

Rule 32 (1)

a. *If there is a discovery of new and important matter or evidenced 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, judgment or ruling requires clarification; or*

e. *For any other sufficient reasons.*

She opposes the argument of an error on the face of the record and submits that this is not the position as the circumstances and facts of this case point a different scenario. She submits as follows;

> *"What is an error apparent on the face of the record? In ACIT v. Saurashtra Kutch Stock Exchange Ltd (copy attached), the Supreme Court of India grappled with the meaning of "mistake apparent from record." it noted that: "it was however, conceded in all leading cases that it is very difficult to define and "error apparent on the face of the record." precisely, scientifically and with certainty... no error can be said to be apparent on the face of the record if it is not manifest or self evident and requires an examination or argument to establish it … an error apparent on the face of the record cannot be defined exhaustively there being an element of indefiniteness inherent in its very nature and must be left to be determined judicially on the facts of each case … a patent, manifest and self evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record... An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not... An error apparent on the face of the record means an error which strikes on mere looking and does not need long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no court would permit it to remain on record..." (emphasis added)*

The respondent submits that the fact that the claimants written submissions could not be traced does not constitute an error on the face of the record. No error would arise when these submissions were not on record. Again, a record of the judgement is not indicative of the courts finding that the claimant did not file a response to the counter-claim. This, to the respondent only meant that the claimants alleged defence to the counter-claim and even generally lacked substance and was therefore dismissed. She also rubbishes the call for early trial as this is not based on concrete factual or legal basis.

> *"In conclusion, the respondent submits that the claimant's proper remedy, if he was genuinely aggrieved by the judgment, would have been to file an appeal against the judgment. This is because he appears aggrieved by the substance of the judgment and only a court exercising its appellate jurisdiction would be best forum to reopen this cause. Therefore, the claimant's desire that this honourable court should re-hear this cause would be akin to the claimant attempting to have a second bite of the cherry. Thus, this honourable court should dismiss the claimant's delayed and afterthought application for review with costs."*

I associate with the pleadings and submissions of the respondent. The application does not appropriately ground itself on the provisions of Rule 32 of the Industrial Court Procedure Rule, 2010, or at all. It is not in any way based on or related to Rule 32 (5), - *any other sufficient ground*. The grounds cited by the applicant do not comply with the golden rule of an error on the face of the record as submitted by the claimant/applicant.

The absence of the written submissions by the claimant is not of itself an error on face of the record as submitted by their respondent. Again, all intimations of the court not accessing the claimant defence and the defence to counter-claim is a misconception of the provisions of the judgment. This was intended to highlight the fact that the claimant did not come out of his way to support his case and defend the counter-claim.

I am therefore inclined to dismiss this application with costs to the respondent.

Dated and signed this 20th day of February 2015.

D.K.Njagi Marete

JUDGE

Delivered, signed and dated in open court this 25th day of February 2015.

Monica W. Mbaru

JUDGE

Appearances

1. Mr. Ndege instructed by S.Ndege & Company Advocates for the Claimant/Application.

2. Mr. Oduor holding brief for Okelo for instructed by Gad, Keter & Okello Associates for the Respondent