REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT NAIROBI

CAUSE NO. 706 OF 2012

(Before Hon. Justice Maureen Onyango on 13.3.2015)

BANKING, INSURANCE & FINANCE UNION (KENYA)....CLAIMANT/RESPONDENT

-VERSUS-

CO-OPERATIVE BANK OF KENYA LTD.....RESPONDENT/APPLICANT

R U L I N G

The application before me for determination is the Notice of Motion dated 9th June 2014. It is filed under Section 3 & 16 of the Industrial Court Act 2011, Rule 32 of the Industrial Court (Procedure) Rules 2010 and Order 9 Rule 9 (b) of the Civil Procedure Rules 2010.

The application is filed through Ochieng Onyango, Kibet & Ohaga Advocates and seeks the review of my judgment delivered on 10th March 2014 in so far as it orders re- engagement of the grievants to the respondent (Applicant')s employment. The application is supported by the affidavit of Samuel M. Kibugi, the applicant's head of legal services and the following grounds:-

1. The respondent/applicant is aggrieved by the judgment delivered on 10th March 2014,

2. The court ordered re-engagement of the grievants by the respondent/applicant with immediate effect and in any even not later than 1st April, 2014,

3. The judgment failed to take into consideration the provisions of Section 49(4)(c) of the Employment Act, 2007 in ordering re-engagement and in particular failed to take into account *inter alia* the practicability of re-engagement and the circumstances leading to termination of the grievants' employment,

4. The judgment failed to take into consideration the provisions of Section 49(4) (d) of the Employment Act, 2007 and failed to uphold the settled common law principle that there should be no order for specific performance in a contract for service except in exceptional circumstances,

5. No exceptional circumstances were disclosed in this cause,

6. The court failed to appreciate that employment in the banking sector requires a significant level of trust and confidence between the employer and the employee over and above other areas of employment and this factor militated against ordering re-engagement,

7. The respondent/applicant remains ready, able and willing to meet a monetary judgment,

8. The foregoing reasons are sufficient for grant of review by this honourable court.

The claimant (respondent in the application) filed a Memorandum in Objection to the review on 1st July 2014. Its grounds of objection are the following:-

1. That the application is frivolous, misconceived and an abuse of the court process.

2. That the application has no basis whatsoever as the applicant has already implemented or complied with the judgment of this court in full as evidenced by the re-engagement letters herein annexed and marked *App-1* issued on 11th April 2014 before this application was brought to court. The applicant is misleading the court as there is nothing to review. The grievants have even enjoyed the just conclude Collective Bargaining Agreement salary review effective 1st March 2014.

3. That the burden of proof of reasons for termination is on the applicant and not on the respondent or court. The applicant having failed to prove the reasons for termination or circumstances leading to the termination or adherence to fair hearing as provided for under Section 41, 43, 45 and 46 of the Employment Act rendered the termination unlawful, unfair and wrongful. The remedy for re-engagement is provided for under Section 49(3)(c) of the Employment Act. The court also having considered and taken into account that the grievants were discriminated against, the termination was not valid or justified and no hearing was accorded to the grievants before or after termination, makes the order for re-engagement merited under these exceptional circumstances. It is immaterial whether, if the applicant was in a position of the judge they would have taken a different cause.

4. That the honourable judge took into consideration the provisions of Section 49(4) in ordering for re-engagement. The judge exercised her discretion judiciously. Practicability of reinstatement or re-engagement does not depend on notions of loss of trust and confidence in the employee when it is the employer's own making. The notion of loss of trust and confidence must be soundly and rationally based. The applicant failed to prove so. If the court were to adopt a general attitude that termination or dismissal of an employee destroyed the relationship of trust and confidence between employer and employee, and so made reinstatement or re-engagement impracticable, an employee who was terminated after accusation of wrong doing but latter succeeded in an application/claim in court would be denied access to the primary remedy provided by the legislation (Section 49(3) of Employment Act). It was parliament's intention that the remedy for unlawful termination should be any or all of the remedies contemplated in law, which includes; reinstatement, re-engagement, compensation and damages among others.

5. That the court has the power to review any administrative action (termination of employment) if the actions are unreasonable, unlawful and unprocedural. The remedy for re-engagement is constitutional under Article 47 of the Constitution of Kenya.

6. That the applicant has lost several other claims after this one where court has ordered reinstatement with full benefits from the date of termination and compensation. The applicant has faithfully complied with the judgments and decrees of the court.

7. The respondent prays that the application for review be dismissed with costs as it lacks merit.

On 3rd July 2014 when the application came up for hearing, the parties agreed to dispose of it by way of written submissions. Both parties subsequently filed their written submissions.

In the applicant's written submissions the applicant's sets out the issues for determination to be;

"whether the court should review its judgment delivered on 10th March 2014 and whether the court had jurisdiction to order reinstatement."

It is submitted that Section 16 of the Industrial Court Act grants the court power to review its orders in the following terms:-

> **"The court shall have power to review its judgments, awards, orders or decrees in accordance with the rules."**

It is further submitted that the Industrial Court (Procedure) Rules, 2010 provide for review in the following terms:-

> **"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**
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> d. **if the award, the judgment or ruling requires clarification; or**
>
> e. **for any other sufficient reasons."**

The applicant also submitted that Section 12(3) permits this court to make orders for reinstatement as follows:-

> i. **Interim preservation orders including injunctions in cases of urgency;**
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> ii. **A prohibitory order;**
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> iii. An order for specific performance;
>
> iv. A declaratory order;
>
> v. **An award of compensation in any circumstances contemplated under this Act or any written law;**
>
> vi. **An award of damages in any circumstances contemplated under this Act or any written law;**
>
> vii. **An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law; or**
>
> viii. **Any other appropriate relief as the court may deem fit to grant.**

The applicant also submits that Section 49(3) of the Employment Act provides for remedies for wrongful dismissal and unfair termination as follows:-

> **"3. Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to:-**
>
> a. **reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or**

b. **re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.**

4. A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following:-

a. **the wishes of the employee;**

b. **the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and**

c. **the practicability of recommending reinstatement or re-engagement;**

d. **the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances."**

The applicant submits that Section 50 of the Employment Act permits this court to order reinstatement. The Section provides as follows:-

"**In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49.**

The applicant further submits that; Paragraph 27-013, Chitty on Contracts (27th Edition) Volume 1, General Principles is emphatic as follows;

"A contract of service or employment will not, as a general rule, be specifically enforced at the suit of either party."

The applicant further submitted that in Kenya Airways Limited V Allied & Aviation Workers Union Kenya & 3 Others Civil Appeal No. 46 of 2013, **Justice Murgor, JA** quoted with approval the holding in New Zealand Education Institute V Board of Trustees of Auckland Normal Intermediate School [1994] 2ernz 414 (CA), where the New Zealand Court of Appeal stated:-

"Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is no uncommon for this court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence." *[Emphasis ours*]

Justice Murgor JA in the above case expressed herself as follows with regards to the practicability of an order of reinstatement;

"In my view, the practicability of such an order is implausible having regard to the very nature of the appellant's business. Further, reinstatement would amount to a committal to servitude and bondage on the part of the employee and employer respectively."

Justice Maraga JA in **Kenya Airways Limited Case (supra)** had this to say on reinstatement at paragraph 68:-

"Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in

keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relations against the will of one of the. That will engender friction, which is not healthy for business, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal." *(Emphasis ours)*

Justice Maraga JA in the same case whilst considering the practicability of an order of reinstatement expressed himself at paragraph 71 as follows;

> **"Practicability in these circumstances includes reasonableness, which invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned. This includes consideration of the prospective effects of the order of reinstatement, not only upon the individual employer and employee in the case but also upon the other affected employees of the same employer and perhaps upon third parties."**

The applicant submitted that it complied with the court order by re-engaging the grievants not later than 1st April 2014 but placed them on leave as it faced difficulties in re-engaging them owing to broken trust and confidence. That the banking sector requires a significant level of trust and confidence between the employer and the employee over and above other sectors of employment. That the re-engagement of the grievants has occasioned and or engendered friction between the parties, other employees and even third parties dealing with the applicant which is not healthy for the running of the banking business.

It was further submitted that the order of re-engagement has forced the applicant to continue with the personal relationship with the grievants against its will, thus amounting to committal to servitude and bondage on the part of the employee and the employer respectively. That the fact of the termination being invalid alone is not enough for the court to order re-engagement. That the court ought to have considered the practicability of the order for re-engagement given the lack of confidence and trust between the parties.

It was further submitted that no exceptional circumstances existed in this case to permit the disregarding of the settled common law principle that there should be no order for specific performance in a contract of service. The applicant referred to the decision in Mary Chemweno Kiptui V Kenya Pipeline Company Limited [2014] eKLR where the court considered the viability of re-engagement as per Section 49(4) and stated as follows:-

> **"The court is cognizant of the claimant's long service with the respondent, has been diligent and faithful and that this is one exceptional case to order specific performance. This follows an inquiry as to the precedent conditions applicable in a case where reinstatement is sought, Section 49(4) of the Employment Act."**

The applicant also referred to the Kenya Airways Limited case (supra) in which even though the Court of Appeal found that the termination of employment was unfair it still set aside the order for reinstatement on account of impracticability of the order and awarded compensatory damages in the alternative.

The applicant further associated itself with the decision of the Court of Appeal of New Zealand in Raymond Clendon Lewis V Howick College Board of Trustees [2010] NZCA 320 where it held that:-

> **"The test for practicability requires an evaluative assessment by the decision maker and the factors to be considered have been clearly identified by this court in NZEI case. We see no basis on the working of s 125 of the Employment Relations Act to import into the test a distinction between procedural and substantive grounds for unjustified dismissal. We consider that a unitary approach tot he issue of reinstatement is preferable.**

The applicant submitted that the court failed to take into account the impracticability of re-engagement

where there is an employment relationship with full trust and confidence. That the court also failed to take into consideration the provisions of Section 49(4) (c) and (d).

The applicant also relied on the decision of **Rika J** in Lawrence Onyango Oduori V Kenya Commercial Bank Limited [2014] eKLR to the effect that:-

> **"The employment relationship is dynamic and based on mutual trust and confidence. Long passage of time works against the possibility that such trust and confidence can be rebuilt. Changes in the employment place also make it impracticable for the former employee to readily fit in the previous job. The court is satisfied the prayer for reinstatement is not practicable or reasonable".**

The applicant further referred the court to the case of Kenya Chemical and Allied Workers Union V National Cement Company Limited [2014] eKLR where it was held that:-

> **"The grievants wish to be reinstated. The court does not think this is a reasonable or practicable remedy, given that it is now well over 3 years, from the date the grievants left employment. The Industrial Court has held the position, even before the advent of the ceiling of 3 years from the date of termination imposed by the Industrial Court Act 2011 in case of reinstatement, that reinstatement is not an ideal remedy where a long period of time has passed from the date of termination. Workplaces are dynamic, means of production and work systems change, and it is never easy for the Employer and the Employee to rebuild a stable employment relationship after years of disengagement. The prayer for reinstatement is declined."**

On jurisdiction the applicant referred to Section 12(3) of the Industrial Court Act which states that:-

> **In exercise of its jurisdiction under this Act, the court shall have power to make any of the following orders-**
>
> **"An order for reinstatement of any employee within three years of dismissal. Subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law."**

The applicant submitted that the grievant having been terminated 3 years before the date of judgment, the court had no jurisdiction to order reinstatement. The applicant relied on the case of Owners of Motor Vessel "Lilian S" V Caltex Oil (K) Ltd [1989] KLR1 in which the court stated that:-

> **"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decisions. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means .... If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given. ...jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

The applicant submitted that it's application meets the threshold of Rule 32(c) of the Industrial Court (Procedure) Rules 2010 as the judgment breached Sections 49(4)(c) and (d) of the Employment Act and Section 12(3)(vii) of the Industrial Court Act, that no exceptional circumstances existed to warrant an

order of specific performance and finally that the court had no jurisdiction to order reinstatement. The applicant prayed that the court reviews its judgment ordering reinstatement of the grievants and makes an order of compensatory damages as the applicant is willing and ready to meet a monetary judgment.

The claimant (respondent in the application) opposed the application. It submitted that the application is frivolous, misconceived and an abuse of the court process as there was no stay sought before compliance with the judgment. That having complied with the judgment the applicant has no basis to apply for review. That the grievants having been re-engaged can only be discharged for lawful cause from their current employment.

The claimant submitted that the grievants have legitimate expectation to be in gainful employment until retirement or termination through lawful means. That the grievants had already benefited from the collective bargaining agreement effective from 1st March 2014, that the applicant is estopped from denying that it has implemented the judgment without any problem.

The claimant relied on the Principles set out in the judgment of **Denning L. J**. in Gombe V Gombe [1951] (1) All England Law Reports 766 at 770 as follows:-

> **"The principles as I understand it is that where one party has, by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the party has taken him at his word and acted on it, the one who gave promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made, but he must accept their legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration, but only by his word"**

The claimant further submitted that the burden of proof of reasons for termination is on the applicant and not the claimant or the court. That having failed to do so at the hearing the court was entitled to make an order of re-engagement as the circumstances of the case merited such remedy. It is further submitted that the court took into consideration the provisions of Section 94(4) in ordering re-engagement and exercised its discretion judiciously. The claimant further submitted that practicality of reinstatement or re-engagement does not depend on notions of loss of trust and confidence based on the employers notion but on sound rational and concrete evidence. That the applicant did not tender evidence of loss of trust. That parliament's intention was to provide the remedy as contemplated in Section 49(3) of the Employment Act. The claimant submitted that the applicant had in the past complied with orders of reinstatement as is evident from Cause No. 732 of 2010; Catherine Njoki Chege V Cooperative Bank of Kenya Limited which the applicant has cited in its submissions herein. The claimant further relied on Cause No. 9 of 2012; Bifu V Kipsigis Teachers SACCO Limited where similar orders were made by this court.

The claimant further submitted that in HC Misc. Application No. 308 of 2009 **Odunga J** upheld the remedy of reinstatement for violation of Article 41 of the Constitution.

The claimant also relied on the decision of the Court of Appeal in Telkom Kenya Ltd V Paul Ngotwa in which **Justice Maraga** stated as follows:-

> **"As pointed the Industrial Court ordered reinstatement. In his submissions, counsel for the appellant stated that the remedy of reinstatement should not be readily granted. We partly agree with him on that. A personal employee or an employee of a small firm who has been dismissed or whose services have been terminated should not be imposed on his employer. That would be casting such employer into servitude which is against public policy. We, however, do not agree with the said submissions by the counsel for the appellant where the employer, like in this case is a large organization. In large organizations where the sacked employee is not the immediate junior and/or does not, on a day to day basis, deal with the officer he has clashed with, or where he can be redeployed to another department, and especially so in a country like ours where employment opportunities are very hard to come by, reinstatement is the most efficacious remedy. Before ordering it however the court must**

consider the employee's antecedents and age".

The claimant further submitted that the court had discretion to order reinstatement in this case as the case was concluded inside 3 years but it is the court that took time before delivery of judgment which was done after three years, that the court took this into account when it ordered re-engagement and not reinstatement from date of dismissal. The claimant relied further on the decision of the Supreme Court of Appeal of South Africa in Republican Press V CEPPWAWU [2007] SCA 121 [RSA] when it stated that there is nothing wrong with reinstatement outside twelve months where the delay was not occasioned by the claimant as the law envisages a perfect situation where the disputes are settled within twelve months. In the case, the court stated as follows:-

> **"That is not to suggest that an order for reinstatement or re-employment may not be made whenever there has been delay, nor that such an order may not be made more than 12 months after dismissal. It means only that the remedies were probably provided for in the Act in the belief that they would be applied soon after the dismissal had occurred, and that is a material fact to be borne in mind in assessing whether any alleged impracticability of implementing such an order is reasonable or not".**

The claimant prayed that the application be dismissed with costs.

Having considered the pleadings, the submissions and the authorities quoted by the parties, the issues I have to determine are the following:-

1. Whether this application meets the threshold for review under Section 16 of Industrial Court Act and Rule 32 of Industrial Court Procedure Rules.

2. Whether this court had jurisdiction to order re-engagement of the grievants three years after termination.

3. Whether the order is not practical for the applicant to implement the court order due to lack of confidence and trust.

4. Whether the applicant is entitled to the orders sought.

1. **Whether the application meets the threshold for review.**

Review of court decision is provided for under Section 16 of the Industrial Court Act, 2011 and Rule 32 of the Industrial Court (Procedure) Rules 2010 as follows:-

> **"16. The court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules".**
>
> **"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."**

The applicant seeks review on the grounds that the judgment breached the provisions of Section 49(4)(c) and (d) and further that there is sufficient grounds for grant of an order for review. The applicant thus relied on Rule 32(1) (c) and (e).

From the foregoing the claimant meets the threshold for review as envisaged in Section 16 of the Industrial Court Act and Rule 32 of the Industrial Court (Procedure) Rules.

2. **Whether this court had jurisdiction to order re-engagement.**

The applicant submitted that by virtue of Section 12(3)(vii) this court has no jurisdiction to order reinstatement. The applicant argues the court should have downed its tools as was pronounced by **Nyarangi J** in the "Lililan S" Case to the effect that **"jurisdiction is everything. Without it, a court has no power to make one more step**". A court of law downs a tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

I find this argument misplaced. This court had jurisdiction to hear this case and grant the order sought in the Memorandum of Claim. The issue of jurisdiction as discussed in the "Lilian S" Case is therefore not applicable to this case. The only aspect of jurisdiction urged by the applicant is in the order that was made by the court by virtue of the fact that at the time of the judgment more than 3 years had lapsed from the date of termination of the grievants' employment.

Be that as it may, the argument is still not applicable as what was ordered is re-engagement which is not limited to 3 years by Section 12(3)(vii). Section 49(3) of the Employment Act is very specific about reinstatement and re-engagement. They are not the same remedy. Section 12(3)(vii) does not limit a remedy of re-engagement to 3 years from the date of termination. The limitation applies in the case of reinstatement where an employee is treated as if he did not leave employment as opposed to re-engagement where the employee is engaged as a new employee but on the same or similar terms.

I also think that the argument put forward by the claimant that the lapse of 3 years does not disentitle an employee to the right to reinstatement where delay is in the delivery of judgment has merit. I however find it inapplicable in this case as what was granted here is a re-engagement and not a reinstatement.

For this reason I find the argument of want of jurisdiction by the applicant without merit.

3. **Whether the order for re-engagement is not practicable and inconsistent with Section 49(4)(c) and (d).**

The applicant has argued that the order for re-engagement is inconsistent with Section 49(4)(c) and (d) as the grievant's duties, being specific functionalities in a bank, require full trust and confidence. It is further argued that it is not practical in the circumstances and would amount to a committal to servitude and bondage on the part of the employee and employer respectively.

The claimant on the other hand argues that this argument has no merit as the applicant has already complied with the court order and re-engaged the claimants.

In the judgment delivered on 10th March 2014, I made a specific finding that the respondent (applicant herein) failed to prove breach of trust and confidence in the evidence adduced in court. Having made that finding, I find no merit in the argument of loss of trust and confidence in the application herein.

The argument that re-engagement would amount to committal of the applicant and the grievants to servitude and bondage would also not apply in this case as the applicant is an inanimate body and therefore not capable of being held in servitude. Further, the respondent is a large organization and the nature of the work performed by the grievants based on the evidence adduced during the hearing, is such that they do not work in close proximity with any person. No evidence was adduced at the hearing to prove that reinstatement of the grievants would subject any employee of the applicant to servitude in spite of the fact that reinstatement was the only remedy sought in this case by the claimant. No offer was made

for payment of damages in the event that the court found the termination of employment to be unfair. The nature of the charges for which the grievants were terminated were also not connected with a disagreement with any employee of the applicant that would make it uncomfortable for any employee of the applicant to work with the grievants.

In the case of Telcom Kenya Ltd V Paul Ngotwa (supra) the Court of Appeal stated that reinstatement would not cast the employer into servitude where it is a large organization where the employee seeking reinstatement did not clash with the immediate supervisor or where the employee can be redeployed to another department, especially in a country like ours where employment opportunities are very hard to come by as it would be the most efficacious remedy.

I find the case of Kenya Airways (supra) to be distinguishable from this one as the facts are not similar. The Kenya Airways case involved redundancy of a seizable number of employees due to the financial performance of their employer which would have made it difficult to accommodate the financial burden of reinstatement. The employees in that case were not terminated for alleged misconduct as in this case.

The applicant further submitted that re-engagement is inconsistent with Section 49(4)(c) and (d). I think the approach taken by the applicant of isolating the two grounds is imbalanced. The court must consider all the other grounds, especially those grounds that consider the interests of the employee such as 49(4)(a) (b) and (g) which the court has to balance with the interests of the employer.

Further, as submitted for the claimant, parliament did not enact the provisions for reinstatement and re-engagement in vain. They were intended to be applied in appropriate circumstances, as in the present case, after considering all relevant issues.

I find this ground insufficient to cause the review of the judgment.

4. **Whether the applicant is entitled to the orders sought.**

The applicant prayed that the court reviews its decision and substitutes it with an award of monetary damages. This would not be possible in the present case as the grievants did not pray for or proffer any evidence on damages and neither did the applicant. Again as urged by the claimant and admitted by the applicant, the grievants have already been re-engaged with effect from 1st April 2014. This application was filed after the re-engagement. The grievants have been in employment since then. Granting the prayers of the applicant would result in a fresh termination of their employment as the court cannot undo that which has already happened. Review would only be considered in a situation where the re-engagement was stayed and there were valid grounds for review. The applicant had the opportunity to seek a stay of the judgment but did not do so before the window period had lapsed.

The upshot is that I find no merit in the application for review of judgment and dismiss the application with costs.

Orders accordingly.

Dated and delivered in Nairobi this 13th day of March, 2015.

MAUREEN ONYANGO

JUDGE

In the presence of:

.... for claimant(s)

.... for respondent(s)