



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1349 OF 2010

ANNE KIRUMBA RIUNGUCLAIMANT

VERSUS

TELKOM KENYA LIMITED RESPONDENT

RULING

1. The respondent, Telkom Kenya Limited filed application dated 22nd May 2015 through Notice of Motion under the provisions of section 1A, 1B, 3A and 80 of the Civil Procedure Act, order 45 Rule 1 of the Civil Procedure Rules. The respondent is seeking for orders that;

1. *Spent.*
2. *This court be pleased to review, vary and/or set aside the order made on 19th May 2015 and allow the respondent's application dated 15th December, 2014.*
3. *There be stay of execution pending the inter parties hearing and determination of this application.*
4. *Costs of the suit and application are provided for.*

2. The application is supported by the annexed affidavit of **Robert Irungu** and on the grounds that on 15th December 2014 the respondent filed an application seeking interim injunction restraining the claimant from proclaiming and selling the respondent's motor vehicle registration number KAT 667X pursuant to the warrants of attachment and sale and a release of the vehicle. On 19th May 2015 the court delivered a ruling disallowing the application on the grounds that the respondent had not complied with the provisions of section 49(2) of the Employment Act having not produced any evidence by way of affidavit to show that the statutory deductions were paid. On the face of the ruling, it is clear that in arriving at this finding, the court failed to consider the crucial evidence contained in the supplementary Affidavit filed on 22nd January 2015 by the respondent. the court misapprehended the nature of the respondent's application when it held that the respondent was inviting it to revisit its judgment delivered on 20th March 2014, yet the application was hinged on a new set of facts and circumstances. In view of the foregoing it is clear that there is an error apparent on the face of the record, there is a discovery of new and important evidence that should be considered as evidence and there is sufficient reason to review the orders of the court. Unless the orders sought are granted, the claimant will proceed to sell the motor vehicle to the detriment of the respondent.

3. In the affidavit of Robert Irungu, he avers that on 15th December 2014 the respondent filed an application seeking an injunction to issue against the claimant from proclaiming motor vehicle registration number KAT 667X and selling it pursuant to the warrants of attachment and sale pending the hearing and determination of the application. The respondent also sought the release of the vehicle. On 22nd January 2015 the respondent was granted leave to file a Supplementary Affidavit and on 26th

January 2015 the respondent was allowed to file an Amended Notice of Motion which was done on 12th February 2015. On 19th May 2015, the court dismissed the application and held that there was no compliance with section 49(2) of the Employment Act by failing to produce evidence by affidavit to show that the statutory deduction with respect to the claimant's compensation were paid. The court misapprehended the nature of the application when it held that the respondent was inviting the court to look at the judgement herein but the court failed to look at the Supplementary Affidavit filed on 22nd January 2015. The court thus failed to consider crucial evidence in the ruling delivered on 19th May 2015 thus the application for review as herein.

4. In response the claimant filed Grounds of Opposition on 2nd June 2015. The claimant states that the application is an abuse of the court process as the application is *res Judicata*, application for review lacks merit as no new material or sufficient cause has been established to warrant the review. The Supplementary Affidavit of Caroline Ndindi was not part of the court record while hearing of the matter and cannot form a basis for review as it was not filed with the leave of the court and thus not admissible to form the basis of the court ruling. The application should be dismissed with costs.

Submissions

5. On the respondent filed their written submissions. the respondent thus submitted that there is a mistake or error apparent on the face of the record that warrant the court to review its ruling of 19th May 2015 as the court failed to consider the Supplementary Affidavit filed on 22nd January 2015 in its ruling that confirmed compliance with remittances to KRA. This is a confirmation that statutory deduction due under section 49(2) of the Employment act have been remitted with regard to the claimant.

6. The respondent also submitted that there are sufficient reasons to apply for review. The respondent obtained a letter dated 22nd January 2015 from KRA confirming that indeed statutory deduction were remitted on account of the claimant and this is sufficient proof of such payments the court however disagreed and held that such letter is not evidence of payment. Authenticity of the letter was not challenged. There is the fore sufficient reasons to review the ruling herein.

7. Further submissions are that there is discovery of new and important matter or evidence to warrant a review of the court ruling. The respondent has attached a bundle of documents being P9 From, KRA pay slip, cheque deposit from KCB Moi Avenue and PAYE computation form. These records were in the possession of the respondent who felt the letter and schedule from KRA dated 22nd January 2015 was sufficient evidence to prove that statutory deduction were paid as a Certificate of Tax it is only issued where tax is remitted by an individual but in cases of a large corporate entity such as the respondent, the same is submitted in a schedule such as the letter dated 22nd January 2015. There was due diligence in getting such confirmation. The respondent has relied on the cases of **Multiple hauliers East Africa Limited versus Attorney General & 9 others [2015] eKLR; Pancreas T Swai versus Kenya Breweries Limited [2014] EKRL; and Patel versus E. A. Cargo Handling Services Ltd (1974) EA 75.**

8. An application for the review of the orders of the court is regulated by Rule 32 of the Industrial Court (Procedure) Rules. Under the Rule, the required memoranda are set out. A review of the orders of the court is also regulated under Section 26 of the Labour Institutions Act as read together with Industrial Court Act, Section 16. See **Bernard Nyanyuki Nyakina & 301 Others versus Polysack Limited, Cause No.1461 of 2012.**

9. A Court can review a judgement where a new and important matter of evidence is produced that was not possible to be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. Therefore the criteria for the court to apply in an application for review are;

Discovery of new and important matter or evidence;

There is an error or Mistake apparent on the face of the record; or

For any other sufficient reason.

10. The Court reading of these principles that apply in an application for review only apply where the aggrieved party has not preferred an appeal as a good ground for appeal in not necessarily a good ground for review. In an application for review, the error or omission must be self-evident and it is not sufficient to say neither that the Court would have taken another view nor that the judge proceeded on an incorrect exposition of the law and therefore reached an erroneous conclusion of the law. Therefore a misconstruction of the law or other provisions of the law is not a good reason for a review.

11. The orders sought to be reviewed herein related to a ruling delivered on 19th May 2015 that dismissed the respondent's application dated 15th December 2014. The dismissed application related to the respondent seeking for injunction against the claimant following a proclamation of respondent property on the grounds that application for stay had been declined and the same is now pending before the Court of Appeal. It is trite that an application for review does not operate parallel, concurrently or consecutively to an application for stay of execution and the moment this court made a decision with regard to stay of execution it became *factus officio*. To now be invited as herein where an application for stay of execution has been addressed and the same is pending before the Court of Appeal, to review, revise or for any reason interfere with the orders so far made would be to negate the very principles upon which stay of execution if granted or denied and defeat what I before the Court of Appeal.

12. The orders herein sought are therefore declined. Respondent shall meet the costs of the claimant.

Delivered in open Court dated and signed in Nairobi on this 25th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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