



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 230 OF 2012

MERCY MWENDE KIVINDU.....CLAIMANT/RESPONDENT

VERSUS?

S. M. ANJICHI AS THE SECRETARY &
EXECUTIVE DIRECTOR OF KENYA

INSTITUTE OF BANKERS.....RESPONDENT/APPLICANT

RULING

1. The Claimant seeks review of the decision of Onyango J. made on 26th January 2015. In the review application made on 19th March 2015, the Respondent/Applicant sought a review of the decision of the Hon. Lady Justice Maureen Onyango who awarded the Claimant/Respondent leave for 5 years and 4 months as well as 5 months salary compensation. The Respondent/Applicant's position was that termination having occurred in 2011 and the Claimant having come to Court in 2012 the Claimant could only claim entitlements 3 years prior to 2011. The Respondent/Applicant sought review of the decision on account of the breach of written law.
2. The Claimant/Respondent was opposed and filed a Replying Affidavit on 8th April 2015. The Claimant/Respondent deposed that the Respondent/Applicant's motion was unmerited as the underlying prayer for review is frivolous as it fails to meet the test for grounds of review under Rule 32 of the Industrial Court Procedure Rules (2010).
3. The parties opted to canvass the application under the provisions of Rule 21 of the Rules of this Court. The Respondent /Applicant filed submissions on 23rd April 2015 and supplementary submissions on 2nd June 2015. The Claimant filed submissions on 25th May 2015.
4. The gravamen of the submissions by the Respondent/Applicant is that the Court erred in awarding relief beyond the statutory limit of 3 years under Section 90 of the Employment Act. The Claimant/Respondent submitted that there was no error and the award was sound.
5. The Employment & Labour Relations Court has the mandate to determine the rights of parties in the employment arena. The law on limitation has been the subject of many applications and difference in opinion abounds.

6. In matters review, the Industrial Court (Procedure) Rules 2010 guide this Court. Rule 32 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.

7. In the case of **National Bank of Kenya v Ndungu Njau [1997] eKLR** the Court of Appeal held that

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. (emphasis mine)

8. The review sought is one that squarely places the issue within the bounds of **National Bank v Ndungu Njau**. I probably would have taken a different view of the matter had it been before me. The fact that my learned sister held as she did is not a ground for review. The matters canvassed are for the Court of Appeal and not this Court. I thus hold that the application for review is unmerited and I dismiss it but make no order as to costs. The decretal sum be paid within 14 days as the Respondent/Applicant abdicated his right to appeal by seeking a review.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of July 2015

Nzioki wa Makau

JUDGE