REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1488 OF 2010

RAHAB WOTHAYA ESIROMO & 7 OTHERS…….....…….....CLAIMANT

VERSUS

BLUESHIELD INSURANCE COMPANY LIMITED..…..…….1ST RESPONDENT

SHIELD ASSURANCE COMPANY LIMITED.....…….…….2ND RESPONDENT

STATUTORY MANAGER BLUE SHIELD INSURANCE COMPANY LIMITED (UNDER STATUTORY MANAGEMENT) …….....…… 3RD RESPONDENT

PRUDENTIAL PLC …….....…….....…… INTENDED 4TH RESPONDENT

RULING

Judgment in this case was delivered on 29th April, 2013 as follows:-

"In summary therefore the court awards as per consent judgment and in addition thereto the following:-

1. ***Rahab Wothaya Esiromo - Kshs.1,275,120/=***
2. ***Joseph Kamau Ruoya - Nil***
3. ***Simon Maina Chege - Kshs.1,902,560/=***
4. ***David Muiru Njoroge - Kshs.828,000/=***
5. ***Laban Mwangi Chege - Kshs.730,000/=***
6. ***Michael Gikonyo Kinyanjui - Nil***
7. ***Norbert Omanyo Wabwire - kshs.1,799,160/=***
8. ***Stephen Wambugu Waweru - Kshs.1,771,000/=***

The counter claims by 1st Respondent against Simon Kamau Ruoya, Simon Maina Chege, Stephen Wambugu Waweru and Michael Gikonyo Kinyanjui are dismissed.

As already agreed in the consent judgment costs will be agreed by the parties and if not agreed will be taxed.

The Court further directs that the money deposited in court be released to the claimants' Counsel. Any balance is to be recovered from the 1st and 2nd Respondents as part of the debt to

be paid by the Statutory Manager, the 3rd Respondents herein in accordance with the law under which the Receiver Manager has been appointed."

On 1st October 2014 the Claimants filed the instant application under certificate of urgency seeking the following orders.

1. ***THAT this application be certified as urgent and be heard on a priority basis.***
2. ***THAT pending the hearing and determination of this application this honourable court be pleased to order that the PRUDENTIAL PLC be made a party alongside the second respondent to these proceedings and be bound by all orders issued in this suit.***
3. ***THAT pending the hearing and determination of this application this honourable court be pleased to order that the judgment delivered herein be reviewed by stating that the claimants are awarded interest.***
4. ***THAT pending the hearing and determination of this application this honourable court be pleased to order the PRUDENTIAL PLC be made a party alongside the second respondent to these proceedings and be bound by all orders issued in this suit.***
5. ***THAT this honourable court be pleased to order that the judgment delivered herein be reviewed by stating that the claimants are awarded interest.***
6. ***THAT costs of this application be provided for and be paid by the respondents.***

The application is supported by the grounds on the face thereof and the affidavit of **DAVID KIRIMI**, counsel for the Claimants sworn on 1st October 2014. On 10th November 2014 Mr. Kirimi filed a supplementary affidavit sworn on the same day.

In response to the application, John Keah swore an affidavit on behalf of the 3rd Respondent while Cosima Wetende advocate instructed by Kaplan & Stratton Advocates swore a replying affidavit on behalf of the intended 4th Respondent. Both replying affidavits oppose the application.

On 10th November, 2014 the parties agreed to dispose of the application by way of written submissions. In the written submissions filed on behalf of the Claimants, it is submitted that Prudential PLC should be enjoined as a 4th Respondent based on a paid advertisement carried in Business Daily Newspaper which states ***"Prudential PLC one of the world's leading insurance companies, is delighted to announce that it is entering Kenya's Life Insurance market with the acquisition of shield Assurance***".

Relying **on Hon. Justice Rika's** decision in **NAIROBI INDUSTRIAL CAUSE NO. 868 OF 2006 TRANSPORT & ALLIED WORKERS UNION V KENYA BUS SERVICE LIMITED** it was submitted for the Claimants that in employment law legal separation counts for nothing. In that case the court stated:-

"In employment law, legal separation of the Respondent and the objector as argued by the objector, counts for nothing. The court is satisfied the respondent and the objector are part of the same economic enterprise, with common business objectives and indeed represented by the same firm of advocates or network of advocates".

On the prayer for review of the judgment to include interest it was argued for the Claimants that the Claimants prayed for interest and there was no indication from any party that the Claimants will not get interest. That having found that the termination of the Claimants' employment was unfair and having awarded them compensation they are ultimately entitled to interest. It was further submitted that this court is clothed with jurisdiction under Section 12 of Industrial Court Act to make the reliefs sought. That **Rule 28 of the Industrial Court (Procedure) Rules** also provides for interest.

The Claimants also relied on **Section 26 of the Civil Procedure Act and the case of BANK OF BARODA (K) LIMITED V ALTEC SYSTEMS LIMITED (2013) eKLR** in which the court awarded interest at court rates from date of filing suit. It was submitted that it would be grossly unfair to deny the Claimants interest as they have not enjoyed their terminal benefits more than four years after termination

of their employment.

In the submissions filed on behalf of the 1st and 3rd Respondents opposing the application, they argue that the court became *functus officio* upon pronouncement of judgment in this case on 29th April 2013 and no longer has jurisdiction to make further orders.

The 1st and 3rd Respondents also argued that there is inordinate delay in filing the application for review on grounds that there was a mistake in the judgment. They further argue that the Claimants have not given any reasonable explanation or justification for the delay, that the Claimants' counsel was present in court when judgment was delivered and never raised any objection, that the Claimants thereafter filed a bill of costs which was heard and a ruling delivered on 18th September, 2014 in the presence of counsel for the Claimants who again raised no objection. That counsel for the Claimants opposed the application for stay of execution before the Deputy Registrar, that Counsel for the Claimants also opposed an application for review filed by the 2nd respondent on 8th July 2013 on grounds that there was inordinate delay only two months after delivery of judgment and the same standard must be used in the present application.

On the application for review of judgement to provide for interest the 1st and 3rd respondents submitted that the provisions for interest in both Industrial Court Act and Civil Procedure Act are permissive, using the word "MAY" thus leaving it to the discretion of the court to decide whether or not to award interest. That this position was unstated in **VELEO (K) LTD V BARCLAYS BANK OF KENYA LIMITED (2013) eKLR.** That if the court does not award interest it means that the court has determined that the award of interest is not necessary.

It was further submitted that the case relied upon by the Claimants is distinguishable from the present application as it relates to a money loaning agreement which would essentially earn interest under normal circumstances. That this case which was largely settled by consent and where the court ordered deposit of money in court as security should not be treated in the same manner.

The 1st and 3rd Respondents further submitted that there is a moratorium in place in respect of proceedings subsisting or instituted against the 1st and 3rd respondents by a court of concurrent jurisdiction which is valid and has not been subjected to appeal or review. They prayed that the application be dismissed.

The intended 4th Respondent, Prudential PLC submitted that there is no legal or factual basis to join the 4th Respondent to these proceedings. That it is trite law that he who alleges must prove as was stated by **Hon. Justice Abuodha** in the case of **TECHNO SERVICE LIMITED V MICHAEL KARUE WACHIRA (2013) eKLR**. In this case **Abuodha J** stated

> ***"it is a settled rule of evidence that he who alleges must prove. That is to say any person who wants a court or a tribunal to make a finding in his or her favour concerning a question in dispute must as a matter of duty bear the burden of providing facts and evidence to persuade the court or tribunal that they are entitled to a determination in their favour."***

It was submitted for the intended 4th Respondent that the only evidence before the court in support of the application are two newspaper reports which cannot constitute evidence of ownership of a company. That the allegation by the Claimants remain unsubstantiated.

It was submitted that the intended 4th Respondent is registered in England and Wales and is not trading in Kenya nor has it purchased shares in Shield Assurance, the 2nd Respondent herein. That it is Prudential Africa Holding Limited which owns shares in Shield Assurance as confirmed by the Membership Register annexed to the affidavit of Kosima Wetende at annexe "CW1". It was further submitted that even if the shareholding of the 2nd Respondent has changed, its legal personality does not change. that this is the position in law as stated in the case of **Salomon & Co. Limited v Salomon [1897] A. C 22**

HL which was applied by **Gikonyo J.** in **ADC of Kenya v Nathaniel K. Tum and Another [2014] eKLR** when he stated as follows:

> ***"That a company is a legal entity distinct from its shareholders and the directors in other words, it is a juristic person - a legal person - with corporate legal personality separate from those who compose it…"***

The intended 4th Respondent further relied on the decision of **Mutungi J.** in **MANCHESTER OUTFITTERS LIMITED & TWO OTHERS V GALOT HOLDING LIMITED & 3 OTHERS [2013] eKLR** and by **Mbogholi J.** in **JOYCE AKINYI CHINEDU V ANTHONY CHINEDU ELC NO.304 OF 2009. Mbogholi J.** held *inter alia* that the "***interest of a shareholder is restricted to that share … the right to vote in a meeting … and any dividends that may be declared".***

It was submitted for the intended 4th Respondent that the case of **TAWU V KBS** (supra) relied upon by the Respondent is not helpful as it consists of only an order without any reference to facts relied upon in arriving at the decision.

It was further submitted that the 2nd Respondent is still in existence as a company albeit trading under the new name, but without change in personality. That there is therefore no impediment to execution of judgment against it as alleged by the claimants.

It was also submitted for the intended 4th Respondent that it will suffer prejudice and a grave miscarriage of justice if the order seeking to enjoin it to this suit is granted as it did not participate in the proceedings and the case is already at execution stage. It was further submitted that there is no order that the outstanding debt is to be paid by the 2nd Respondent based on this court's ruling of 19th March 2014 when it stated:

"…***the judgment does not say that the 2nd Respondent will pay the outstanding debt.***"

On the prayer to award interest, the intended 4th Respondent submits that interest is a substantive matter which came up before the court. That the court in its discretion did not award interest in the judgment. That the suit relied upon by the claimants, Bank of Baroda (K) Limited (Supra) relates to rate of interest to a commercial lending claim and is not relevant to this claim which is for damages in an employment claim.

It was further submitted for the intended 4th Respondent that the court is *functus officio,* relying on the case of **DHANJI JADRA RAMJI V COMMISSIONER OF PRISON AND ANOTHER [2014] eKLR in which Emukule J.** expounded on the application of the doctrine thus

> ***"functus officio, defined in the Black's Law Dictionary, Ninth Edition as [having performed his or her office] of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."***

It was submitted that there is no clerical or arithmetic mistake, or any error in the judgment arising from any accidental slip or omission. That the fact that interest was not awarded by the court is final and the court cannot sit on appeal of its own decision. It was further submitted that the Civil Procedure Rules do not apply on interest as **Section 12(4) of the Industrial Court Act** is clear and comprehensive on award of the same. It was further submitted that **Section 26 of the Civil Procedure Act** confirms the discretionary powers of the Court in awarding interest.

It was also submitted on behalf of the intended 4th Respondent that there has been inordinate delay of one(1) year and six(6) months before the application for review was made and the argument by the Claimants relating to prejudice in the absence of interest are matters that ought to have been addressed in the main case before judgment was delivered.

The intended 4th Respondent submitted that the application be the Claimants is unmerited and it should not be allowed.

Issues and determination

I have considered the application, the affidavits in support and opposition thereof, the written submissions of the parties and the authorities cited. In my opinion the issues arising therefrom are the following:-

1. ***Whether this court is functus officio and therefore lacking jurisdiction to hear and determine the application by the claimants.***
2. ***Whether the application is unmerited due to inordinate delay in filing the same.***
3. ***Whether the 4th interested party should be enjoined to the proceedings.***
4. ***Whether the claimants are entitled to review of judgment delivered on 29th April, 2013 to provide for payment of interest on decretal sum.***

Functus officio as defined in Black's Law dictionary supra applies where the court has accomplished its task by rendering a determination in a matter before it. However, review of a decision by it's very definition involves re-opening a matter that has already been determined in circumstances which would otherwise be closed. For a Court to review its decision, it must fit within the limited circumstances provided by the law, which in the case of this Court, are contained in Section 16 of Industrial Court Act and **Rule 32(1) of Industrial Court (Procedure) Rules**. These are the discovery of new and important evidence that could not have been discovered with diligence before the hearing, on account of an error or mistake apparent on the face of the record, for breach of any written law, for clarification or for any other sufficient reasons.

In so far as the Claimants' application is for review of judgment this court is not *functus officio*.

The 1st and 3rd Respondents as well as the intended 4th Respondent submitted that the applicants are guilty of delay, having brought this application for review more than one year six months after the decision in respect of which the review is sought.

The **Industrial Court Act and Industrial Court (Procedure) Rules** do not define timelines for filing of applications for review of decisions or orders of the court. In this case the decree has been extracted and a ruling on the bill of costs rendered. The case is at execution stage.

As pointed out in the submissions filed by counsel for the 1st and 3rd Respondents, the Claimants objected to an application filed by the 2nd Respondent on 8th day of July 2013 on grounds of delay. The Claimants can therefore not expect a different standard to be applied to them. If two months was considered as delay by them, then one year six months must be inordinate delay.

This notwithstanding, in the application by the Claimant's no explanation has been given for not filing this application earlier. It is my considered opinion that an unexplained delay of more than one year and six months is so inordinate as to deny the Claimants the right to make an application for review, taking into account the nature of the prayers sought and what has transpired since the judgment was delivered.

Besides the delay, the Claimants have not persuaded me that they merit the orders sought. As I pointed out in the judgment, the portion of the decree that was not satisfied by the money's deposited in court as security are to be paid by the 3rd Respondent on behalf of the 1st and 2nd Respondents. In any event, as pointed out by the intended 4th Respondent, a change of shareholding or a change of name does not does not affect legal personality or shift liabilities from a limited liability company.

Again as pointed out by the intended 4th Respondent, the Claimants have not adduced any evidence to prove that the intended 4th Respondent has taken over ownership of the 2nd Respondent. The only evidence relied upon by the Claimants is a newspaper report. This is not an official record and is not

admissible evidence. There is no explanation why the Claimants did not obtain official records from the register of companies.

On the issue of interest, it is instructive to note that parties herein recorded a consent judgment which was adopted by the court in the following terms:-

By an agreement dated 30th June 2011 and filed in court on the 1st July 2011, the parties agreed on settlement of part of the claim as follows:-

1. ***It is hereby agreed that judgement be entered and awards be made to the claimants as follows:-***

a. ***DAVID MUIRU NJOROGE - Kshs.252,673***
b. ***JOSEPH KAMAU RUOYA - Kshs.285,786***
c. ***NOBERT WABWEIRE OMANYO - Kshs.1,081,451***
d. ***SIMON MAINA CHEGE - Kshs.570,775***
e. ***LABAN MWANGI CHEGE - Kshs.584,000***
f. ***STEPHEN WAMBUGU WAWERU - Kshs.220,000***
g. ***RAHAB WOTHAYA ESIROMO - Kshs.569,482***
h. ***MICHAEL GIKONYO KINYANJUI - Kshs.140,229***

TOTAL - Kshs.3,704,396

2. ***That the above amounts covers the items of one months' notice period for the claimants terminated, leave days, salary arrears, days worked, deductions not remitted and leave allowances and leaves out the issues of pension and damages.***
3. ***That the said amount of Kshs.3,704,396.00 be released to the Claimants through their advocates Messrs Kinyanjui Kirimi & Co. Advocates immediately from the sum of Kshs.10 million held in court.***
4. ***That the question of compensation damages for JOSEPH KAMAU RUOYA for the usage of his name for the employers' advertisement, and the claim for six months pay in lieu of notice for SIMON MAINA CHEGE and that of the other employees named above for unfair termination be dealt with by way of written submissions for Court's determination.***
5. ***That the question of pension dues claimed (employers and employees contributions) be agreed upon and further consent be recorded thereof failing which the same be determined by the Court after written submissions.***
6. ***The advocates of the parties be allowed to highlight the submissions on damages compensation and or pension issues.***
7. ***That the costs of these suits be agreed upon or be taxed upon the final orders herein.***

According to the consent the only issue that was left to be determined by this court was item No.6 of the consent, that is, damages compensation and or pension issues. Since this was a consent by the parties, the court did not have the liberty to determine any matters outside the consent. The consent clearly did not provide for any leeway for this court to determine the issue of interest.

Normally, the court has discretion on whether or not to award interest. In this particular case however, the court did not have that discretion as parties had cut out for the court the issues to be determined.

On the foregoing grounds I find no merit in the application for review and dismiss it. There shall be no orders for costs.

Signed this day of 2015

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Read in open Court this 29th day of October 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE