REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 204 OF 2011

1. KENNETH KIPKEMBOI SETTIM
2. JOSSY M. KIOKO……..……**CLAIMANTS/APPLICANTS**

versus

NATIONAL SOCIAL SECURITY FUND

THE BOARD OF TRUSTEES…….**RESPONDENT**

RULING

1. The Application being a Notice of Motion dated 27th June 2013 is what is up for determination. Mr. Arusei appeared for the Claimant/Applicant while Mr. Okeche appeared for the Respondent. Mr. Arusei urged the Application thus: the Motion seeks in prayer 2 and 3 an order of Review of Order of 14th June 2013. Prayer 3 is that upon Review the Claimants claim be reinstated for hearing on merits. He relied on grounds on the face of Motion and the Affidavit of Kenneth Kipkemboi Settim and the annexures and the submissions made. He stated that on 14th June 2013 the Court dismissed the claim in its entirety and it is upon that dismissal that he now seeks a review of that order. He submitted that the main ground of attack is that what was before Court on that day was conciliatory report and the issue was one - either the adoption or non-adoption of the report as the law provided for. He submitted that for the Claimant it was urged that the Conciliator's report be adopted. The Respondent on the other hand, sought rejection and the suit to proceed to full hearing. The Parties filed various submissions on 16th June 2013 and the affidavit of Kipkemboi Settim of 26th April 2013. All these were geared toward persuading the Court to accept the Report as an Order of Court. The Court did not adopt the report. His complaint is that Court did not accept report but instead went ahead to dismiss the claim with costs. The Court should have heard the parties before being condemned thus the Claimants were condemned unheard. The matter should have gone to full hearing as the matter was concluded without main hearing.

2. He thus submitted there exists not only an error on the face of record but also sufficient grounds to warrant review of the orders so that parties may be heard. He stated that whether or not the Claimants case will succeed is another issue. Equity will not suffer a wrong to be without remedy and thus urged Court to grant remedy. The Court has jurisdiction to grant Review, he had moved the Court properly for review of the orders. He relied also on Article 159(2)(d) of the Constitution. He urged the Court to rise above the technicalities raised as the Claimants seek substantive justice. He relied on the case of **Microsoft v. Mitsumi & Anothe**r a decision of Ringera J. as he then was. Justice Ringera stated that rules of procedure are hand maidens and not mistresses of justice

and should not be raised to a fetish. The judge stated that a Court of law will have to raise above that and save the proceedings. Relying on the case of **Kanda v Government of Malaysia** [1962] AC 322, he submitted that parties have a right to be given a fair opportunity to state their case. He went on to further submit that the NSSF will suffer no prejudice if matter goes for full hearing. They will interrogate and test the evidence. They will suffer no prejudice and if there is any injury thrown away costs will be adequate remedy.

3. Mr. Okeche opposed the Application and relied on the Grounds of Opposition filed on 7th July 2013. He submitted firstly that the Review Application does not meet the requirement of Rule 32 of the Industrial Court (Procedure) Rules 2010. Secondly, the Applicant has not shown any grounds for Review. Thirdly, the application is bad in law, incompetent, misconceived and an abuse of the process. For any party to proceed on review they must proceed under the grounds in Rule 32(1)(a), (b), (c) or (e). It has to be either of them. The first is the discovery of new matter which was not within their knowledge. Second one is a mistake or error on the face of record. Third, on account of the award being in breach of any law. Fourth, if judgment requires to be reviewed. He stated there is no discovery of new evidence and thus Grounds 2 and 4 do not need to be argued. Paragraph 5 and 6 of Response deals with issue of apparent error on face of record. The court proceeded *suo motu* to dismiss the claim by the Claimant. The only issue before of Court it was said was only the conciliator's report. There is no indication in the submissions or on the cases cited. It is argued the Court *suo motu* decided the claim. He posed the question 'what constitutes error on face of record?' He submitted that in the written submissions of the Claimant filed on 16th April 2013 the Claimants stated that in their considered submissions the acceptance of claim will substantially resolve the issues except for costs. He thus held that the Claimants cannot double speak and ask for conclusion and then now come and say re-open the case. In the supplementary affidavit of 16th April 2013, the Claimant says he has been advised the Court was *functus officio*. A court which has not heard you is not capable of being *functus officio*. The Claimants are only seeking to revive the claim after the dismissal. The Court should note the submissions and the prior proceedings are like day and night. After protracted examination of the matter the Court examined the law, facts and submissions made by parties. As that is the only issue he submitted that the only relevant authority is **Kishore Kumar Dhanji v. Ndeffo Ltd. & 4 Others – HCCC 170 Nakuru**. There is no demonstration at all that there is an error, that parties did not make submissions on other parts. There is no discussion on the breach of law and the issue then is only on the error. They do not seek any clarification on the matter, therefore he surmised that the Application is bad in law and it does not amount to grounds for review.

4. He stated that the Court considered Section 15 of the Industrial Court Act, Section 17 of Employment Act, Section 62 of Anti Corruption and Economic Crimes Act, and Section 44 of the Employment Act as compared to Section 17. He submitted that sections of Acts of Parliament are substantive, they are not more technicalities, they are the law. If a party has any disagreement they should seek amendment. There is no basis for saying there are technicalities being raised these are procedural as opposed to technicalities. He thus urged the Court to dismiss the Application for review with costs as it was merely an attempt to have the matter heard afresh. The Claimants can appeal if they so wished.

5. Mr. Arusei in a brief reply, stated that the learned counsel for the Respondent had misconceived the Claimant's claim. There was a breach of the law as the right to be heard is a statutory right. The non-adherence to it renders any Ruling or Judgment fundamentally flawed. He stated that it is trite law parties do not confer jurisdiction. The fact he had invited the Court to decide a matter is not that he invited the Court to conclude the matter by conciliator's report. He submitted lastly, the right to hearing is a constitutional imperative that should be jealously guarded.

6. The issue before Court from the submissions of parties and the pleading being the Notice of Motion Application dated 27th June 2013 is one. Whether the Claimants were condemned unheard. What was before the Court on 2nd May 2013 was the Conciliator's Report. The Court heard the parties and proceeded to render a decision on 14th June 2013 wherein the Court

dismissed the suit with costs.

7. The principle at play is *audi alteram partem* which embodies the concept in law that no person should be condemned unheard. Any party whose life, liberty or property is in jeopardy has the right to confront the evidence against him or her in a fair hearing. This is one of the fundamental principles of constitutional law and finds expression in various Articles in the Constitution such as Article 25(c), Article 50 and Article 40(2)(a).

8. The Court of Appeal in the case of **Pashito Holdings & another v Ndungu & 2 others [E&L Volume 1] 295** held that one should not be condemned unheard. In the case before me, the Claimants complain that they were not heard. From the perusal of the record, the Claimants never testified.

9. Section 15 of the Industrial Court Act 2011 provides as follows:-

> *15. (1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.*
>
> *(2) The Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is satisfied that there has been no attempt to effect a settlement pursuant to subsection (1).*
>
> *(3) Subject to any other written law, a certificate issued by a conciliator accompanied by the record or evidence of the minutes of the conciliation meetings giving reasons for the decisions as arrived at by the conciliator, shall be sufficient proof that an attempt has been made to resolve the dispute through conciliation, but the dispute remains unresolved.*
>
> *(4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.*
>
> *(5) In the exercise of its powers under this Act, the Court may be bound by the national wage guidelines on minimum wages and standards of employment, and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance.*

Quite evidently, a Court can determine a matter without a verbal hearing.

10. Article 159(2) of the Constitution provides in *parri materia*

> 159. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) …….;
>
> (b) ……..;
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
>
> (d) justice shall be administered without undue regard to procedural technicalities; and
>
> (e) ……..

11. The Court had every right to hear the dispute in the manner the Claimants case was heard but in coming to the decision, the Court may have breached a fundamental cardinal principle in that the Claimants were not on notice that the suit would be determined on the strength of the conciliators report or without taking of *viva voce* evidence. The Respondent in the arguments advanced on 2nd of May 2013 advanced the proposition that the suit should proceed to full hearing. The position taken now is akin to the one Mr. Okeche alludes to in his submissions as regards the Claimants. The Court was said to be *functus officio*. That is far from the correct position. Until the Court pronounces itself on any review as may be filed or stay proceedings the Court is not *functus officio.* Even legal advice contained in an affidavit cannot confer the status of *functus officio* on a Court properly seized of a matter. In the premises I will set aside my decision of 14th June 2013 and allow the dispute to be heard before me at a convenient date where the parties will testify and call witnesses. The costs will abide the outcome of the resultant hearing.

Orders accordingly.

Dated and delivered at Nairobi this 31st day of January 2014

Nzioki wa Makau

JUDGE