



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 855 OF 2012

VICTORIA MUKONYO.....CLAIMANT

VERSUS

JAMII BORA (K) LTD.....RESPONDENT

RULING

1. The Claimant/Applicant filed the Review Application and through it seeks a clarification on judgment. She submits that there is an error in calculation and there was oversight on the part of Court.
2. Mr. Gachoka for the Respondent opposed the Application. He relied on the Grounds of Opposition dated 13th January 2014. He submitted that the Application has no merits as it does not meet grounds of Review under Order 45(1) of the Civil Procedure Rules. There is no error on part of court or any other person. What is being termed as an error is failure to comply by provisions of the law. The provisions of Order 7 Civil Procedure Rules give a party who has been served with counter-claim a right to serve Reply to Defence and Defence to counter-claim. The Claimant was served with Defence and Counter-claim. There was no reply to Defence and there was no Defence to Counter-claim. The Court had every right to enter judgment and there is no basis for review because of Claimant's failure to follow the law. The Claimant argues she is a lay person but Rules of procedure cannot be ignored and the law cannot be changed because she is a lay person. We are all presumed to know the law of this country. One cannot rely on failure to file counter claim. The Court was bound to make an award based on pleadings and in absence of defence to counter-claim court had no option but to enter judgment. The Court has no discretion in the matter and thus he sought that the application be dismissed with costs.
3. The Claimant Mukonyo stated that the Grounds of Review are for clarification of the award, error in calculation and evidence overlooked. She asked for clarification as to whether she owed 73,000/=. She submitted that there is admission there was no petty cash and counter-claim is sought on the same she and stated that on the dismissal letter it was admitted there was no petty cash.
4. Rule 32 of the Industrial Court (Procedure) Rules 2010 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.

5. The Claimant states that there was an error on the face of the record. The Respondent quite rightly points out that failure to defend a counter-claim is not a ground for review. However, the Respondent misses the bus when it states that the Review does not meet Order 45 of the Civil Procedure Rules. The Civil Procedure Rules 2010 do not *strictu sensu* apply here. We have recourse to the Rules when there is lacuna in the Rules of this Court. Mr. Gachika is indeed correct to state that the law does not allow ignorance of it as a defence. The failure to file a defence to the counter-claim was fatal to the Claimant's case. However, looking at the judgment it would seem that the Court fell into error as the sums claimed by the Defendant and proved were different. The sum claimed by the Respondent in the Counter-claim was Kshs. 77,654/- whilst the documents the Respondent used showed that the Respondent admitted that the Claimant used Kshs. 66,936/- for petty cash. The Counter-Claim would therefore have been reduced by the sum and should have been for Kshs. 10,718/-. The Claimant cannot relitigate, she cannot reopen her case and therefore her submissions on the evidence that was not, to her mind, considered, is misplaced.
6. In the final result and on the basis of the foregoing, I review the decision of the Court and replace the sum the Respondent is entitled to on the Counter-Claim to Kshs. 10,718/-. No order as to costs.

Orders accordingly.

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

Nzioki wa Makau

JUDGE