REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 992 OF 2012

KAKUZI LIMITED……..……...……..…**CLAIMANT**

Versus

KENYA PLANTATION & AGRICULTURAL WORKERS UNION…….**RESPONDENT**

RULING

1. What is before the Court for determination is an Application for the Review of Judgment dated 27th September 2013. The Respondent seeks Review of the Judgment of this Court given on 28th June 2013.

2. The Respondent/Applicant premises its Application on Section 16 of the Industrial Court Act 2011 and Rule 32 of the Industrial Court (Procedure) Rules 2010. There is a Memoranda in Support of the Application for Review attached to the said Application. In the Memoranda, it is submitted that the Respondent was aggrieved by the findings of the Court in the Judgment delivered in so far as the Judgment states that the Claimant is paying the Respondent's members for the rest days worked using a complex formula while practically the days do not tally as there are differences in the totals, the finding that the 2012 CBA provides for payment of rest days which is to be paid at double the daily rate and the previous practice by the Claimant is not binding as per the 2012 CBA.

3. The Review Application was urged by Miss Wachira who submitted that the Respondent sought the review on grounds under Rule 32(1)(d). She submitted that the judgment in its entirety was confusing and requires clarification because on one hand the Court finds for the Claimant despite having determined that the previous practice of paying rest days involved a complex formula and was not binding on the Respondent and on the other hand finding that the complex formula then in use needed to be simplified. She denied that the Respondent was on Appeal before the trial Court.

4. Mrs. Opiyo appeared for the Claimant/Respondent and she opposed the Application. The Claimant/Respondent filed an Affidavit in opposition on 22nd November 2013 and a list of Authorities on 10th December 2013. She submitted that the Application for Review amounted to relitigation and a reopening of the case. She stated that as evidence of relitigation the Respondent/Applicant had gone into the evidence adduced, they go into the evidence of the Claimant, the figures, the formula and the issue of the practice of paying rest days. They state that some of the findings are confusing to the Respondent. She submitted that where a party is dissatisfied with finding of the Court they ought to appeal against such a finding. She stated that what they were doing is to question the merits of the judgment. The current application, it was

further submitted went beyond the purview of Review if Rule 32 is considered. She cited various authorities in support of her submissions that the Respondent was attempting to have a second bite at the cherry.

5. In reply Miss Wachira submitted that the Respondent had not come to Court to ask the Court to render a different judgment or come to a different decision. All the Respondent was asking was for the Court to give clarification. Before that is done there is uncertainty which the Respondent feels cannot be satisfied by Appeal against the judgment. She submitted that on the strength of **Joseph C. Musyoki v AG [2012] eKLR** a review after 6 months can be allowed.

6. The Application as formulated at first flush seems like an attempt at appealing the decision of the Court. However on close examination, it is clear the Respondent did not completely digest the decision of the Court. In the determination made in the Judgment of 28th June 2013, the Court held that the Claimant had been paying the rest days using a complex formula which the Court held should be simplified. In addition the Court held that the application of rest days using that formula was not entirely binding as the parties had a CBA which provided for payment of rest days. That CBA is registered in this Court and has the force of law. If that is not clear enough then it is lost on the Court what further clarity can be brought to bear in this case. Simply put, I found that rest days were paid using a complex formula which could be disregarded since the CBA provided the payment of rest days.

7. The provisions of Section 16 of the Industrial Court Act and Rule 32 of the Industrial Court (Procedure) Rules 2010 are clear. This Court has power to review its judgments, awards, decision, decree or orders in accordance with the Rules. Rule 32 sets out the parameters. 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.

8. The law is amply clear as demonstrated above. The Respondent sought clarification, that has been done. The Claimant was right in that where a party seeks to have a second bite at the cherry the Court would not allow that. The decisions cited in support by the Claimant – **Patrick Njuguna Kariuki v. Del Monte (K) Limited [2013] eKLR**, **D. J. Lowe & Company Limited v. Banque Indosuez Civil Application No. Nai 217 of 1998** (unreported) and **James M. Kingaru & 17 others v. J. M. Kangari and Muhu Holdings Ltd & 2 others [2005] eKLR** were on point. A Court cannot sit on appeal of its decision, a Court must treat review applications with great caution. I believe the reasons are clear why the Court must treat review with great caution so as not to sit on appeal on its decision or permit relitigation of the case – the second bite at the cherry. I agree with Miss Wachira that a review can be preferred within a reasonable time and I am in concurrence that in certain circumstances an a review can be sought months after the decision for good cause. In this case, the review was brought after 3 months which is not inordinately long. In criminal cases a greater degree of latitude may be permitted since the Applicant might be in custody. However in civil cases it would be absurd to permit reviews beyond a reasonably short period such as 3 months.

9. The Application though successful in so far as it seeks a clarification does not alter the finding I made in June 2013 at all. In the premises, each party will bear their own costs and hopefully the matter will go to rest as the matter is now at an end.

It is so ordered.

Dated and delivered at Nairobi this **15th** day of **January** 2014

Nzioki wa Makau

JUDGE