



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 340 OF 2012**

**SYLVESTER ODOUR OYILE .....CLAIMANT**

**VERSUS**

**PRIME FUELS (KENYA) LIMITED ..... RESPONDENT**

**RULING**

1. On 17<sup>th</sup> July 2013 the respondent filed their application by Notice of Motion pursuant to section 26 of the Labour Institutions Act, Rule 16(1), 25(2), 26 and 32(2) and (3) of the Industrial Court Procedure Rules seeking for orders of review of the court judgement dated 13<sup>th</sup> June 2013, injunction on the claimant against executing the judgement and in the alternative the setting aside of the judgement. The application is supported by the annexed affidavit of Anthony Oluoch. The respondent filed the Replying Affidavit sworn by George Miyare and dated 31<sup>st</sup> July 2013. The respondent filed a further Affidavit dated 19<sup>th</sup> November 2013. The claimant filed a Replying Affidavit on 31<sup>st</sup> January 2014.

2. The application by the respondent is on the grounds that the claimant obtained decree on 3<sup>rd</sup> June 2013 and issued on 13<sup>th</sup> June 2013 and has followed with execution. There is a mistake/s or an error/s apparent on the face of the record which require clarification and there exists good grounds to warrant a review of the judgment and in the alternative, the judgement be set aside on the ground that the respondent should not be condemned unheard as the failure to attend court on 6<sup>th</sup> June 2013 is excusable and due to mistake of the respondent advocate which should not be visited upon the respondent. The prayer for review is on the basis that a party is bound by their pleadings while the court granted on matters not pleaded which prejudiced the respondent. The judgment should be set aside and or reviewed for the matter to be heard afresh.

3. In the supporting affidavit the respondent states that the judgment herein was delivered on 3<sup>rd</sup> June and dated 13<sup>th</sup> June 2013 and the claimant proceeded to execute but there are apparent mistakes and or errors that require clarification. That the judgment should also be set aside as there exists sufficient reasons to do so as the respondent was not given an opportunity to be heard and the failure to attend court on 6<sup>th</sup> June 2013 was due to the fact that the advocate was engaged in a case in No. 241 of 2013 in Nakuru and the assistant sent to court to have the matter adjourned did not attend. That this mistake by the advocate should not be used to prejudice the respondent. The judgement was delivered without appreciation of Rule 14(1) and (6) and 13(1) and (2) of the Industrial Court Procedure Rules where the court made an award on matters not pleaded which was prejudicial to the respondent and the same should be set aside.

4. In the further affidavit, the respondent further states that there are new grounds that have come to the knowledge of the respondent that the capacity and legal competence of the claimant to be represented

by an illegal entity or law firm which is not a recognized firm of advocates as contemplated under section 31, 32, 37, 38 and 39 of the Advocates Act. That all actions therefore carried out by an illegal entity and benefits obtained must collapse and the sum of kshs.1, 190,981.00 paid to the claimant were irregular and should be refunded.

5. In reply the claimant states that hearing in the matter proceeded on 6<sup>th</sup> June 2013 when both parties were aware, the claimant was heard on his case, and there was proof of unfair termination and established that kshs.1,097,499.00 ought to be paid. On 13<sup>th</sup> June 2013, the court found the claim to have merit and made an award. The respondent does not challenge the substantive findings in the court judgement but only keen to delay the closure of the matter.

6. In the next replying affidavit, the claimant states that claimant is now represented by Messrs. Atonga Miyare and Associates who have direct conduct of the matter and the claimant has remained represented by a proficient and qualified advocate at all times material to this suit. There is no contest that the claimant was unfairly terminated and the only issue pending is that the judgment should be reviewed which is also contested and the respondent will suffer no prejudice as a result of the judgment herein. The new issues raised in the Further Affidavit by the respondent are matters of law which should not be used against the claimant's case.

7. The application herein by the respondent raises an issue of law as well as other substantive issues that can be outlined as;

**Whether there judgement herein should be reviewed;**

**Whether there is a good case for setting aside the judgment of the court; and**

**Whether the claimant's claim is properly filed.**

8. The above issues raise serious presentations to the matter at hand. The first two issue on whether there is need for a review or the setting aside of the court judgment go to the core of the court findings but the same will be mute to consider if the third issue on the status of the claim is found in the affirmative and thus, this will be the first to consider.

9. The respondent submitted that the claim herein was filed by the firm of Lumumba Mumma and Kaluma Advocates, which firm of advocates was an illegal entity at the time of filing the claim. This was supported by a finding by the of the High Court in *Civil Case No 488 of 2010, Lumumba Mumma & Kaluma Advocates versus Kenya Railways Corporation*. The could held that the entity of Lumumba Mumma and Kaluma Advocate was not a legal entity and therefore had no legal capacity to file the claim herein that was filed for the claimant on 1<sup>st</sup> March 2010, drawn by Peter Kaluma of Lumumba Mumma and Kaluma Advocates. The claimant on the other had submitted that the claimant was at all material times represented by a qualified advocate the entity notwithstanding and should not be penalized for the mistake of his advocates.

10. This is a question of law that should be determined. Who filed the claim and did they have the standing to do so?

11. Section 22 of the Industrial Court Act is imperative and states;

In any proceedings before the Court or a subordinate industrial court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee specially authorized for that purpose.

12. Similarly section 23 of the Labour Institutions Act here thus:

***In any proceedings before the Industrial Court, a party to the proceedings may act in***

*person or be represented by a legal practitioner, an office bearer or official of that part's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee.*

13. On 6<sup>th</sup> March 2012 the claim herein was filed drawn by Peter Kaluma as instructed by Lumumba Mumma & Kaluma Advocates appearing for the claimant. At paragraph 1 of the claim, the claimant's address for purposes of the suit is Lumumba Mumma & Kaluma Advocates. I take it then the firm of advocates indicated as appearing for the claimant is that of Lumumba Mumma & Kaluma advocates. The entity Lumumba Mumma & Kaluma Advocates does not exist as a legal entity. The claimant did not produce any evidence that this entity exists as a legal entity within the meaning of section 22 or section 23 of the Industrial Court Act or the Labour Institutions Act respectively. Even in a case where Peter Kaluma was a qualified advocate as of 6<sup>th</sup> March 2012 he cannot be instructed to act for the claimant by an entity that does not have legal standing. The claim filed by a non-entity remains a nullity. It should be struck out. Despite knowledge of this fact, the current advocate for the claimant did not address this anomaly before judgement was delivered but opted to file a Notice of Change of Advocate whereas there existed no claim in law.

14. The claimant swore his Verifying Affidavit to his claim on 1<sup>st</sup> March 2012, his time for filing his claim stopped running on 6<sup>th</sup> March 2012 when the Verifying Affidavit was filed. His claim remains competent. The other issues set out for determination herein are mute upon the determination of the issue of the claim being a nullity.

**The claim and proceedings herein by Lumumba Mumma & Kaluma Advocates are struck out, all subsequent orders set aside. The claimant may file his claim which should be heard by any other Judge of the Industrial Court other than this Court (M. Mbaru, J). No orders as to costs.**

Delivered in open court this 7th day of April 2014..

**M. Mbaru**

**Judge**

In the presence of

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