



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 138 OF 2012**

**JAYESH M. SUTARIA .....CLAIMANT**

**VERSUS**

**JAMBO BISCUITS [K] LTD .....RESPONDENT**

**RULING**

**INTRODUCTION**

The respondent (hereinafter called the applicant) has brought application for review dated 14/3/2014. It seeks to review this court judgment delivered on 6/12/2013 so as to reduce the judgment debt by ksh.120,000 being the award of service pay in respect of the period between 15/8/2005 and July 2009.

The reason for the court to award the said sum was because the applicant had not produced a statement to prove NSSF remittances for the claimant in respect of the said period of about 4 years. The application is brought under rule 32(3) and it is supported by a memorandum, a verifying affidavit of Nitin Dawda and a supplementary affidavit sworn on 8/5/2014 by the applicant's counsel.

The application is opposed by the claimant by way of grounds of opposition filed on 26/3/2014. The gist of the opposition is that there exists no good grounds to warrant review of the impugned judgment and as such the application is a mere abuse of the process of the court.

The application was disposed of by filing written submissions.

**BACKGROUND**

The suit was heard on 7/5/2013 and 5/9/2013 when the parties called one witness each and thereafter filed written submissions. After considering the pleadings, evidence and the written submissions, the court entered judgment in favour of the claimant on 6/12/2013. The sum awarded was ksh.275,000/ inclusive of ksh120,000 awarded for service pay at the rate of 15 days per completed year of service for 4 years. At page 7 and 8 of the said judgment the court held that the said amount of service pay was payable because the respondent did not produce any evidence to prove that the claimant's NSSF deductions were remitted to the Fund.

The applicant was aggrieved and brought this application for review challenging the award of the ksh.120000 for service pay citing a mistake and/or error apparent on the face of the court's record. In the alternative the applicant contended that there is sufficient reason for the court to review the judgment.

## **ANALYSIS AND DETERMINATION**

After perusing and considering the court record, judgment dated 6/12/2013, the application, affidavits, the grounds of opposition and the written submissions the only issue that arose for determination is whether the application has satisfied the requirement for granting review orders.

Rule 32(3) of the Industrial Court (Procedure) 2010 Rules (ICPRs) allows the court to review its decision if any of the following grounds are proved:

- a. **discovery of a new and important evidence.**
- b. **mistake or error apparent on the face of the record.**
- c. **the award is in breach of a written law.**
- d. **the award requires clarification.**
- e. **any other sufficient reasons.**

In the present case, the applicant alleges that during the hearing she presented records to show that the claimant was listed among the employees whom the respondent deducted NSSF dues for remittance to the Fund. That although she did not have the statement to prove remittance of NSSF dues, she sought leave of the court to file the statement with the written submissions after close of the defence hearing. That she indeed filed the original copy of the NSSF remittance statement together with her written submissions.

According to the applicant the failure by the court to consider the said statement during the judgment was a mistake or an error apparent on the face of the record. It was submitted that it is as a result of the court's failure to consider the said NSSF statement that led to the erroneous award of the service pay of ksh.120,000/-. In addition, the applicant contends that had the court considered the NSSF statement, the award of ksh. 120,000 for service pay would not have been awarded. Consequently the applicant urged the court to review the judgment by setting aside the award of ksh.120,000 for service pay to avoid unfair enrichment on the part of the claimant.

The claimant did not rebut the foregoing facts by affidavit. He only responded on blanket points of law that the application has been brought after an inordinate delay and that there is no sufficient ground to warrant a review.

Upon considering the submissions made, in addition to the law and the judicial precedent cited, the court finds that no mistake or error apparent on the face of the records exists in the impugned judgment. The reason for this is that the record does not show that any leave to file the NSSF statement after close of the defence case was granted. If such leave was sought orally, then, the defence counsel ought to have ensured that the order granting such leave was recorded.

The court however finds that there is sufficient reasons for the review order to issue. The reason being that a statement showing that all NSSF dues were remitted to the Fund on behalf of the claimant had been produced in court after close of hearing but before judgment. The said statement had been annexed to the applicants submissions but it escaped the attention of the court at the time of writing the impugned judgment because it was not filed procedurally and the court was not notified during the mention for the submissions.

The purpose of the court however is to do justice and not to allow unfair enrichment of one party at the expense of the other. The question to answer is whether it will be just and lawful to retain the judgment as it is or should the same be reviewed and rectified. If the judgment is to be allowed to remain as it is after evidence of NSSF remittances has been proved, the judgment will be obviously in breach of Section 35(c) (d) of the Employment Act which disqualifies members of the NSSF from claiming service pay. It will also be unfair to the applicant who having remitted NSSF dues in compliance with the law is again be ordered to pay service gratuity. Equity will not allow the applicant to suffer double jeopardy in order for the claimant to acquire double benefit.

Consequently the court is of the considered view and finding that the applicant has demonstrated a

sufficient reason to warrant review of the judgment delivered on 6/12/2013 by setting aside the award of ksh.120,000 for service pay. The rest of the award and contents of the judgment shall remain as before. The respondent will however pay throw away costs of ksh.10,000 in respect of the application to the claimant.

**DISPOSITION**

The application is allowed by setting aside the award of ksh.120000 for service pay. The respondent is ordered to pay ksh.10,000 as throw away cost of the application to the claimant.

It shall remain so ordered.

**Dated, Signed and delivered this 18<sup>th</sup> July 2014**

**O. N. Makau**

**Judge**