



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 88 OF 2013

NDAO MAHUPA DALUH.....CLAIMANT

v

CROWN PETROLEUM (K) LTD.....RESPONDENT

RULING

1. On 23 August 2013 this Court pronounced judgment in favour of the Claimant and awarded him Kshs 145,159/-. Immediately after the delivery of the judgment the Respondent sought for stay of execution pending filing of an appeal. The Court granted the Respondent 30 days stay of execution on condition that the decretal sum was deposited into Court.
2. On 6 September 2013 the Respondent filed an application to have the award reviewed. The application came up on 16 September 2013 but the Claimant sought time to reply and the Court fixed the hearing for 27 September 2013.
3. For reasons not on the record the matter did not proceed.
4. On 24 February 2014 the Claimant filed an application seeking various orders including one dismissing the Respondent's review application for want of prosecution. The application was initially mentioned *ex parte* on the day of filing before my brother Makau J and on 7 May 2014. The Judge directed that the motion be served for hearing on 14 April 2014 but because of court vacation it was not until 21 May 2014 that the motion came up for *inter partes* hearing. Respondent was not present.
5. Because the application involved a review application of my decision, Makau J referred the file to me. On that day again the Respondent was not represented. Because there was no evidence of service upon it, I directed the Claimant to serve the Respondent and return to Court on 12 June 2014 for hearing. The review application proceeded on the fixed date.

Respondent's case

6. The Respondent relied on the grounds set out on the face of the application and the supporting affidavit of Mr. Mohamed Ali Mohamed, its counsel. The counsel submitted that the Respondent was seeking a review because it was not heard and the reason given was that the counsel (Mr. Mohamed) was engaged in an Election Petition No. 6 of 2013 on 8 July 2013 when the Cause came up for hearing.
7. The supporting affidavit deposed that the counsel had instructed Mr. Thiaka to hold his brief and seek an adjournment but Mr. Thiaka went to the wrong Court. Counsel submitted it was unfair and prejudicial to punish the Respondent for the mistakes of its advocate. The Respondent also made reference to the constitutional right to a fair hearing.

Claimant's response

8. Mr. Muranje swore a replying affidavit on 20 September 2013. It was deposed that the hearing date was taken in the presence of both parties and the law firm could have instructed another counsel in the firm to handle the Cause.
9. It was further deposed that none of the Respondent's witnesses or representatives were in Court on the hearing date.
10. During submissions, Mr. Anaya for the Claimant urged that the Respondent had failed to demonstrate that it met the threshold of the conditions outlined in rule 32 of the Industrial Court (Procedure) Rules, 2010.
11. The counsel also submitted that the Respondent had failed to prosecute the review application timeously.
12. The Claimant sought that the application be dismissed with costs.

Analysis

13. Rule 32 of the Industrial Court (Procedure) Rules, 2010 has prescribed 5 grounds which a party seeking review should satisfy. A party need only satisfy one of the 5 conditions. The conditions are discovery of new and important matter of evidence, on account of some mistake or error apparent on the face of the record, an award being in breach of a written law, award needs clarification and lastly for any sufficient reasons.
14. The Respondent did not explicitly disclose which of the 5 conditions it sought to rely on. But the Court has keenly examined the grounds set out on the face of the review application and supporting affidavit.
15. There is no suggestion on the application, supporting affidavit and submissions that the Respondent had discovered new and important evidence or that there was an error or mistake on the face of the record. It was also not suggested that the judgment needed clarification or was in breach of a written law.
16. The application therefore must be examined in light of the condition of sufficiency of reasons given.
17. Mr. Mohamed's position is that Mr. Thiaka was instructed but went to the wrong Court. Mr. Thiaka did not swear any affidavit as to what transpired or at what point he discovered he was in the wrong Court. The Industrial Court in Mombasa has two Courts which are next to each other. Before the Court proceeded with the hearing, it went through the cause list. Indeed hearings ordinarily commence just about 10am.
18. The Court finds the reason given by the Respondent not sufficient.
19. The Respondent also made reference to constitutional imperative of a fair hearing.
20. The Respondent did not file its Response within the timelines set after service of Notice of Summons and copy of Memorandum of Claim. The Court had on 23 May 2013 granted leave and ordered the Respondent to file a Response within 14 days. The Court set a mention date of 17 June 2013 to confirm compliance. The Response should have been filed on or before 6 June 2013. This was not done.
21. The Response was filed on 17 June 2013. When the matter was mentioned, Mr. Mohamed did not even bother to explain why the Respondent had not complied with the peremptory order of Court. Neither did he seek the indulgence of the Court to have the Response admitted out of time.
22. The Respondent like any litigant has a right to a fair hearing. The Respondent by its conduct cannot argue that it was not given a chance to be heard.

Orders

23. The upshot of the foregoing is that the Respondent has not placed any material before Court to warrant the review of the judgment. The application therefore is dismissed with costs to the Claimant.
24. The monies deposited into Court should be released to the Claimant forthwith.

Delivered, dated and signed in open Court in Mombasa on this 18th day of July 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Anaya, instructed by Muranje & Co. Advocates

For Respondent Mr. Mohamed instructed by Balala & Abed Advocates