



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**  
**CAUSE NO. 376 OF 2013**

**ALEX TOYA INDASIO**

**CLAIMANT**

v

**MINI BAKERIES (NRB) LTD**

**RESPONDENT**

**RULING**

1. Alex Toya Indasio (Claimant) sued Mini Bakeries (Nrb) Ltd seeking one month notice pay, 10 years service and 12 months compensation for unfair termination. The Respondent filed a Response on 18 November 2013 and the Cause was heard on 27 March 2014 and judgment pronounced on 20 June 2014.

2. In the judgment, the Court dismissed the Claim with costs which provoked the Claimant to file an application for review on 4 July 2014 seeking that the Claimant be awarded service pay pursuant to section 35 of the Employment Act, 2007. The grounds for the review of the judgment were that there was an error or mistake apparent on the face of the record and that there are sufficient reasons to review the judgment.

3. The review application is the subject of this ruling.

**Claimant's case**

4. According to the Claimant, in the Court failing to make a finding on the service pay issue, there was an error or mistake on the face of the record because the Court had held that the Claimant's employment had been converted into term employment pursuant to section 37(1) of the Employment Act, 2007.

5. The Claimant further urged that service pay under section 35 of the Employment Act, 2007 is a statutory right to which an employee was entitled to even in cases of summary dismissal. This, it was submitted was sufficient reason to review the judgment.

**Respondent's case**

6. The Respondent filed Grounds of Opposition on 1 September 2014 contending that the application was misconceived, bad in law and an abuse of court process; sufficient grounds had not been given; that the judgment was clear; that there was no prayer to convert the claimant's employment into term contract; that the grounds for review amounted to grounds for an appeal and that the application was not brought with clean hands.

7. In submissions, the Respondent urged that there was no error or mistake on the face of the record and that the issues raised by the Claimant were issues which properly should be raised on an

appeal. It was submitted the Court was right to dismiss the claim.

## **Evaluation**

8. The Industrial Court (Procedure) Rules, 2010 have provided the grounds for a review. An applicant should meet and satisfy at least one of the grounds.

9. In the Statement of Claim filed in Court on 28 October 2013, one of the prayers sought by the Claimant was Kshs 213,000/- on account of 10 years service pay. The Respondent's case was that the Claimant was a casual employee and was not entitled to any terminal benefits.

10. On the pleadings, there was joinder on the employment status of the Claimant. Depending on how the issue was resolved, the Claimant's prayer for service pay would have been implicated. The Court did not consider the issue but dismissed the Claim on the basis that the Claimant had confessed to misconduct.

11. The Claimant attacks the non consideration and failure to award service pay one two prongs. The first that there is an error or mistake on the face of the record. Secondly, that under section 35 of the Employment Act, 2007, an employee is entitled as a matter of statute to service pay.

12. In my view, where a Court fails to determine an issue arising out of the pleadings, the proper forum to impugn the decision is on appeal. It is not an issue of an error on the face of the record or a mistake. Were the Court to accede to the Claimant's request it would amount to second guessing what the Court which pronounced judgment meant or sitting on appeal on a decision of peer Court.

13. The Court has agonized over the second ground raised by the Claimant. In the view of the Court it is not prudent to make a determination of the interpretation, extent or scope and legal implications of section 35(1)(c) as read with section 35(5) of the Employment Act, 2007 under an application for review.

14. The proper time and place to decide on the reach of section 35(5) of the Employment Act, 2007 would be while dealing with specific issues arising out of the pleadings and where a party feels aggrieved on the basis that the Court did not consider a statutory provision which was implicated, it should be challenged on appeal.

15. In my view, what the Claimant is alleging is an alleged misapprehension of the law by the Court. I say so because essentially the Claimant is contending that the Court failed to consider an issue arising out of the pleadings without giving reasons.

16. In the case of *Eastern and Southern African Development Bank v African Green Fields Ltd. and others* (2002) 2 E.A. 371 it was held that

*An order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the laws or that he exercised his discretion wrongly in the case....The proper way to correct a Judge alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error he apparent on the face of the record and therefore requires no elaborate argument to expose.*

## **Conclusion and Orders**

17. Arising from the above, the Court reaches the conclusion that the Claimant has failed to demonstrate that there was an error apparent on the face of the judgment or mistake, or shown sufficient reasons to review the judgment.

18. The Court therefore dismisses the review application without an order as to costs.

**Delivered, dated and signed in open Court in Nakuru on this 17<sup>th</sup> day of October 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant      Mr. Maragia instructed by Wambua Kigamwa & Co. Advocates

For Respondent    Mr. Nyambane instructed by Jones & Jones Advocates