



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NYERI**

**CAUSE NO.115 OF 2013**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT**

**-VERSUS-**

**LIMURU MILK PROCESSORS.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 28<sup>th</sup> November, 2014)

**RULING**

The court delivered its judgment in this suit on 6.06.2014 in favour of the claimants and against the respondents. At paragraph 6 of the judgment the court stated that when the case came up for hearing on 27.03.2014 only the claimant union appeared. The court upon being satisfied that the date was taken by consent directed that the same proceeds by way of written submissions limited to the issue whether there was actually a declaration of redundancy and if so, if it was contrary to the provisions of the Employment Act, 2007 and the existing CBA.

The respondent filed on 14.07.2014 the notice of motion brought under Order 22 Rule 22(1) of the Civil Procedure Rules, Section 35(6) of the Employment Act, 2007, Section 3A of the Civil Procedure Act and all other enabling provisions of law. The application was based on the supporting affidavit of Joshua Njogu Njoroge attached on the affidavit. The respondent prayed for stay of execution of the decree pending the making of consequential orders in the application. The respondent further prayed that the ex-parte judgment entered on 6.06.2014 in favour of the claimant as against the respondent be set aside, the respondent be granted leave to defend the suit herein on merit and the draft defence annexed to the application be deemed to be duly filed and properly on record, subject to payment of the requisite court fees.

The respondent submitted that the respondent did not file a defence in the suit because its advocate had advised that the respondent was required by law to pay the grievants their redundancy dues. The respondent had failed to pay the redundancy dues because of financial hardships and had let out its milk processing plant so as to meet the financial difficulties and bank loans due from the respondent. Further it was submitted that the respondent had discovered and been advised that the grievants were entitled to pay under the staff provident fund and therefore not entitled to the orders made in the judgment. For that submission, the respondent urged that section 35(6) of the Employment Act, 2007 provides that an employee does not qualify for gratuity or further payment where the employee is a member of a registered provident fund like in the present case. The respondent further urged that the grievants having received pay under the provident fund, they were not entitled to redundancy pay as ordered in the judgment.

The claimant opposed the application by filing on 18.09.2014 the notice of preliminary objection and filing on 12.10.2014 the replying affidavit of Andrew Kinyua. The claimant submitted that the application was incompetent because it had failed to invoke and satisfy the provisions of the rules of the court for review and setting aside of the judgment or decree should therefore fail. The claimant specifically cited and submitted that rules 16 and 32 of the Industrial Court Procedure Rules, 2010 applied but were not invoked. The claimant submitted that at the hearing and determination of the suit, the respondent had filed a defence which was on record.

The court has considered the submissions and makes findings as follows:

1. The court finds that at all material time, the respondent had filed a defence in the suit.

- Accordingly, the court finds that it was misconceived for the respondent to seek an order to file a defence and the prayer was clearly an abuse of court process.
2. The judgment is clear that the hearing date was taken by consent and the court finds that the respondent has not established any valid reason or ground for failing to attend at the hearing.
  3. The respondent appears to urge that there was an error of law or new discovery that section 35(6) of the Employment Act, 2007 barred the grievants from being paid redundancy package under section 40 of the Act and as agreed in the CBA. The court finds that first, there is no justification that such would be a discovery after judgment that with due diligence, the respondent would not have urged the same at the hearing. Second, as submitted for the claimant, there is no application for review made in accordance with the rules of the court to justify such submission by the respondent. Thirdly, the respondent has not established any legal basis, that, the parties were by reason of the section 35(6), barred from negotiating and agreeing upon more favourable redundancy package or enforcing provisions of section 40 of the Act on redundancy. The court finds that the provisions of section 35 (6) were not relevant to the redundancy situation in view of the clear provisions of the collective agreement and section 40 of the Act. The court further holds that where an employee is entitled to more than one option of the terminal benefits, in absence of any justified bar, the employee must be held or deemed to be entitled to the more favourable option of the terminal dues.
  4. The court has revisited the judgment. At paragraph 7 it is clearly stated that the court considered the defence on record and found that the respondent had made bare denials. Further, at paragraph 8 of the judgment the court found that the respondent had failed to comply with the redundancy procedure prescribed in section 40 of the Employment Act, 2007. The court finds that the prayer for leave to defend the suit is therefore misconceived and unfounded.

In conclusion, the respondent's application filed on 14.07.2014 and dated 2.07.2014 is dismissed with costs.

**Signed, dated and delivered in court at Nyeri this Friday, 28<sup>th</sup> November, 2014.**

**BYRAM ONGAYA**

**JUDGE**