REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 30/2013

(formerly Nairobi No. 1229/2011)

(Before Hon. Justice Hellen Wasilwa on 30th July, 2013)

GEORGE NYABIRA NYATAMA & 3 OTHERS .....CLAIMANT

VERSUS

GUSII MWALIMU CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LTD ….....RESPONDENTS

R U L I N G

The application before court is the one undated and filed in court on 4/7/2013. The application is brought through a claimants Memorandum supporting application for review and brought under Rule 32(3) and (4) of the Industrial Court (Procedure) Rules 2010. the application is for review of this court's judgment dated 19.6.2013. The applicants have made various submissions in support of their application, on issue of reinstatement, they submit that the claimants had not been out of employment for 3 years as stipulated under Section 12(3) vii of the Industrial Court Act 2011 and therefore they should be reinstated. The claimants aver that the claimants were on leave and were paid salary upto and including September 2011 thus the three years started running from October 2011.

The applicants also aver that the court should review its judgment and order that the applicants be paid salary upto 60 years which are lost years. This is based specifically on court's wider jurisdiction to award damages under S.123 (3) (v), (vi) and (vii) of the Industrial Court Act 2011. The respondents on the other hand opposed this application. They filed their grounds of opposition to the review application dated 16.7.2013 on 17.7.2013. They contend that the application does not meet the threshold for review in that there are no new grounds nor is there discovery of new and important evidence. They contend that there is no mistake apparent on the face of the record or other sufficient reason to warrant a review. They aver that all matters that are raised in the claimant's application for review are matters that were within the claimants knowledge at the time the judgment was made and at best the proposed application for review could form basis for appeal and not review. The respondents also contend that this court's jurisdiction has already been ousted since issues the court is being invited to arbitrate upon have already been determined and if the court considers them. It will be like the court sitting on it's own appeal. They urged court to dismiss this application accordingly.

Having considered the submission of the parties, the issues for determination are whether;

1. This court has jurisdiction to entertain this application.
2. The application in form and content is properly before court.

3. Whether there are matters warranting review of this court's judgment.
4. The application can be granted.

On 1st issue, S. 16 of the Industrial Court Art 2011 provides that;

"The court shall have power to review it's judgments awards, orders on decrees in accordance with the Rules".

The Rules under reference are the Industrial Court (procedure). Rules 2010 and Rule 32(1) of the said Rules provide as follows;

" A person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgment or ruling,

a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or

b) on account of some mistake or error on the face of the record, or,

c) on account of the award judgment or ruling being in breach of any written law, or

d) if the award, judgment or ruling requires clarification, or for

e) any other sufficient reasons.

Under Rule 32(2)

"An application for review of a decree or order of the court under sub paragraphs (b), (c), (d) or (e) shall be made to the judge who passed the decree or made the order sought to be reviewed".

Rules for bringing such an application will be as set out in sub Rules (3) and (4) of Rule 32.

In answer to question 1 therefore, I find that this court has jurisdiction to hear this application for review.

In form and content, the application is also filed as provided for under Rules 32(3) and (4) of the Industrial Court (Procedure Rules) 2010.

The applicants contend that there is a mistake on the record in calculating the time when the claimants stopped working. They aver that the mistake is calculating this dismissal or early retirement age before September 2011. Their contention is that since the applicants were paid salary upto September 2011 their retirement started to run from October 2011 and therefore they are covered by provision of S. 12(3) (vii) of the Industrial Court Act 2011. S. 12 (3) (vii) deals with reinstatement of dismissed employees and provides that in the exercise of it's jurisdiction, the court has powers to make;

"an order for reinstatement of any employee within three years of dismissal subject to such condition as the court thinks fit to impose under circumstances contemplated under any written law, or ---"

It is important to note that this court has already made a finding that the applicants were served with retire3ment notices on 30.11.2010. This is from their own evidence. The respondents did agree that they paid them some moneys as salaries for 6 months after they retired in appreciation of the good work they had done. This was not a renewal of the retirement time or notice. To contend that there is an error on this aspect is therefore to miss the mark.

There is no new or apparent evidence adduced in court and neither is there any error in the record pointed out to this court. What the applicants are asking court to do is to try and change the judgment on issues that can be raised through an appeal and therefore sitting on appeal on it's own judgment. I find the application for review is not merited and I dismiss it accordingly.

HELLEN WASILWA

JUDGE

30/07/2013

Appearances:-

Ajwang for claimants present

Claimants in person present

N/A for respondents present

CC. Sammy Wamache.