



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 34 OF 2013

ELKANAH NYAMBATI

CLAIMANT

v

PETRO OIL KENYA LIMITED

RESPONDENT

RULING

1. Before me is an application by the Respondent to review my award delivered on 10 May 2013.
2. The main ground given for the application are that
 - i. the hearing proceeded in the absence of the Respondent
 - ii. no hearing notice was served upon the Respondent by the Court 21 days before the hearing
 - iii. there are triable issues
 - iv. it is in the interest of justice that the Respondent be given unconditional leave to defend
3. The application was argued on 17 June 2013 and several decided cases were referred to. I have considered the authorities cited.

The law on review

4. Rule 32 of the Industrial Court (Procedure) Rules, 2010 makes provision on applications for review by parties who are aggrieved by a decree or order of the Court.
5. For the sake of brevity I will not repeat the grounds. But there are five grounds set out on which a party may rely on. These are
 - i. discovery of new and important matter or evidence which was not within knowledge of the applicant
 - ii. mistake or error apparent on face of the record
 - iii. decision being in breach of some written law
 - iv. to clarify the decision
 - v. sufficient reasons being given
6. I will now proceed to discuss whether the grounds urged by the Respondent meet the threshold set out by the law to merit a review.

Evaluation

7. The first ground taken by the Respondent was that the hearing proceeded in the absence of the Respondent. These grounds can only be sound under the other sufficient grounds.
8. As regards the first ground relied on by the Respondent, I dealt with the sequence of events

- preceding the hearing in my judgment and, in my view, the Respondent has not shown that by the way it acted it merits a review. No proper explanation has been given why the Respondent did not file a Memorandum of Response within the stipulated time or the extended time given by the Court on 13 March 2013.
9. Moreover, the Judgment sought to be set aside went to some lengths to outline the background preceeding the hearing.
 10. Closely related to the first ground was the second ground that the Court had failed to serve a hearing notice upon the Respondent 21 clear days before the hearing date fixed for the Cause. The Respondent cannot harp on the fact that the Court did not serve it with a hearing notice 21 clear days before the date set for hearing. Rule 20(2) of the Industrial Court (Procedure) Rules, 2010 requires the Court to cause to be sent to the parties a hearing notice. The act of the Court or its registry fixing a hearing date and asking the other party to serve a hearing notice will substantially be in compliance with the rule.
 11. The Respondent was not in compliance with the rules as far as the time of filing Memorandum of Response was concerned. By the time of setting the hearing date it had not filed a Memorandum of Response to give its particulars for purposes of service as required by rule 13 of the Court's rules. It did not also explain clearly why it failed to file a Response when it was given more time.
 12. The Respondent must be taken to be aware of the rules of the Court. Its Memorandum of Response itself was substantially not in accord with the rules. No witness statements or documents sought to be relied on were filed.
 13. In any case, though the rules provide for the Court to cause service of a hearing notice, the practice and procedure of the Court has always been that the parties fix/take convenient hearing dates and where a hearing date is given in the absence of a party, the other party serves a hearing notice. The Respondent's conduct as far as the process of setting down this Cause for hearing was dilatory at best. The decision of the Court was not in breach of any written law.
 14. The existence of triable issues has never been one of the factors to consider in an application to review a decision of this Court. Rule 32 has explicitly set out what a Respondent needs to establish to merit a review order.
 15. The Respondent's case as set out in its Memorandum of Response, though filed out of time and without leave was considered in the judgment sought to be reviewed. The rules of this Court in fact allow the Court to determine a Cause solely on the basis of pleadings and submissions without hearing the parties if the parties so agree. It would not be out of place therefore for the Court to consider a pleading on record though filed out of time and without leave.

Conclusion

16. In my view the Respondent has failed to satisfy the Court that the grounds it sought to rely on for a review meet the expected threshold and I do dismiss the application for review with no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 12th day of July 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Nyange

for Claimant

Mr. Tole

for Respondent