REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 126 OF 2012

LONG DISTANCE TRUNK DRIVERS & ALLIED

WORKERS UNION ….....CLAIMANT

VERSUS

METREX LIMITED ….....RESPONDENT

R U L I N G

The claimant has filed a Notice of Motion dated 3/7/2013 seeking the review of this courts' judgment delivered on 10/5/2013. The motion is filed pursuant to rule 16(1) and 32 of the Industrial Court Procedure Rules (ICPR) 2010 and "all other enabling provisions of the law". The grounds upon which it is premised are set out in the body of the Motion and the supporting affidavit sworn on the same day by Mr. Nicholas Ndungu Mbugua.

The respondent has opposed the motion by filing grounds of opposition and a supporting affidavit sworn by Mr. Richard Mwaniki on 27/6/2013. The Motion came up for hearing on 28/6/2013 when the parties agreed to file written submission and highlighting them on 26/7/2013. All the parties filed their respective submissions but only Miss Samba for the respondent attended court on 26/7/2013 for highlighting.

I have carefully perused the application, the affidavits and the written submissions both for and against the Motion. The issues for determination is whether the application meets the threshold for granting of the review sought.

In answer to the aforestated determination, the questions that arise in my mind are firstly whether the courthas the jurisdiction to review its decisions. Secondly whether the court has properly been moved and lastly whether any of the grounds set by the law for review has been proved by the applicant.

The answer to the first question is obviously in the affirmative by dint of Section 12 of the Industrial Court Act and also as donated by rule 32 of the ICPR 2010. As regards the second question the answer is the negative.Bringing the Motion under rule 16(1) is quite wrong because the said rule deals with interlocutory applications before the suit is determined.

Secondly the Motion is bad in law and is incompetent by dint of rule 32(3) and (4) of the ICPR. The said rules provide that an application for review shall be in Form 6 set out in the First Schedule and shall be accompanied by a memorandum in support of the application. That has not been the case in the present Motion and as much as the court would want to be as informal as possible, it is also illegal for the

same court to act outrightly against the same law for which it is established to enforce. This is more so when the litigants are both represented by learned counsel. In my view, where the rules of procedure clearly and expressly provides far doing a particular thing in proceeding, the default thereof should only be excused on very exceptional cases and especially where the litigants are not represented by counsel. To that extent the Motion is declared incompetent and not capable of moving the court to invoke its jurisdiction to review its decision. Never the less, and for the sake of bringing the dispute to a rest, I have considered the third question raised above regarding the grounds upon which review is sought.

The grounds upon which the Motion is brought is that the claimant could not after due diligence, produce the gazetted ministerial order in court before the judgment under review was passed. The order is contained in Gazette Notice No. 9731 of 12/10/2007 annexed to the supporting affidavit as 'A". The affidavit does not show how much effort was used to book for the said gazette notice. Instead the deponent shifts blame to the court in paragraph 6 of the affidavit when he say;

"6. *That while giving evidence in court I got confused and did not understand properly the ministerial order the court referred to.*

7. That after reading the judgment I realized that the claimant had been issued with the Ministerial order"

surely the foregoing clearly shows a contradiction of words by the deponent. On the one hand he pretends that he always knew about the ministerial order but after due diligence he could not trace it then on the other hand he says that he never knew of the ministerial order even when the court asked about during trial and only came to know about after reading the judgment. He is not being truthful.

The issue of the ministerial order was raised by the defence in paragraph 6 and 7 as early as 9/9/22011 when the same was filed in court. The claimant ignored the issue and even when the suit was heard on 11/4/2013, the court asked the claimants counsel whether he need more time to call for employment records from the respondent but he refused. He seemed to be in some hurry, possibly to close the proceedings and take advantage of the absence of the respondent. The court is therefore not satisfied with the ground he relied upon for review.

In my view the claimant had the notice that he was required to produce the ministerial order and had the opportunity to even seek adjournment of the hearing for another day secured the exhibit but she squandered it. She can only therefore blame herself for the dismissal of the suit. The Motion is therefore dismissed with costs for lack of merits.

The good news, however is that the claimant can always begin the process of seeking recognition from the respondent afresh. It is also further good news to her that under Section 48(2) of the Labour Relations Act she can demand deduction and remittance of union dues from the respondent for the union members if their number is 5 or more or even before the recognition.

Signed, dated and delivered this 26th August 2013

ONESMUS MAKAU

JUDGE