



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1148 OF 2012**

**STEPHEN MBUVI KATHOKA .....CLAIMANT**

**VERSUS**

**PARBAT SIYANI CONSTRUCTION CO. LTD ..... RESPONDENT**

**RULING**

This is a ruling with relation to two applications, one from the respondent dated 8<sup>th</sup> July 2013 brought under Order 22 Rule 2 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act seeking a stay of execution of the decree and judgement herein and the application of the claimant 10<sup>th</sup> July 2013 seeking a review of the judgement herein dated 11<sup>th</sup> June 2013.

Looking at the respondent's application first, the same is based on the grounds that if execution pending appeal is not granted it will be rendered nugatory and the respondent will suffer substantial loss where the stay already granted has expired and if the decretal amount is paid to the claimant, chances of recovery upon the appeal being a success will be difficult as he has no means of proper income.

This application is supported by the annexed affidavit of Faraday Nyangoro, the respondent advocate on the basis that judgment herein was entered for the claimant for kshs.200, 663/= and a stay of 30 days granted from 11<sup>th</sup> June 2013 which has now expired and the claimant may proceed with execution and being aggrieved by the judgement has filed a Notice of Appeal.

The main purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the applicant who wishes to exercising his undoubted right of appeal is safeguarded and the appeal if successful is not rendered ineffective. The order for a cash deposit against the intended appellant is more geared towards ensuring that an appellant takes steps to have their appeal heard and determined without undue delays since he is denied the use of the money but not in any way to deny a successful litigant of the fruits of his litigation and locking up funds to which on the face of the record he is entitled.

Stay has already been given herein for 30 days. To give more time to the respondent will be to deny the claimant the fruits of his judgement. This will not be granted.

On the second application the claimant is seeking a review of the judgement of the court on the grounds that the court in the calculation on overtime was erroneous where four (4) hours were awarded per day for the three (3) years which amounts to 1095 days and based on a salary of Kshs.19,000/= the same should have been calculated at a higher rate of 1 ½ times of a normal worked hour per week and as per the regulation of wages and conditions of employment Cap 229 and hence should be amended.

From the claimant's application, I note the reliance of Cap 229 which has since been repealed and does not apply. That aside, the calculation of the overtime hours as outlined in the application does not relate to an error but a challenge of the basis of the same based on a rate as under a repealed law. Whereas the principles that guide this Court on review are clear, the same are set out under the Industrial Court Procedure Rules, 33;

*(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 apparent 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, the judgment or ruling requires clarification; or*

*(e) For any other sufficient reasons.*

I find the issues raised by the claimant do not form discovery of a new matter or evidence, the court calculation is not a mistake or in breach of the law relied on, the Employment Act. Accordingly the application for review will be dismissed.

- 1. The application by the respondent dated 8<sup>th</sup> July 2013 is hereby dismissed;**
- 2. The application by the claimant dated 10<sup>th</sup> July 2013 is hereby dismissed; and**
- 3. Each party to bear their own costs.**

**Delivered in open Court this 22<sup>nd</sup> day of August 2013**

**M. Mbaru**

**Judge**

In the presence of

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