



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 752(N) OF 2009**  
**PHINIAS ASENEKA NGERESA.....CLAIMANT**  
**VS**  
**SAROVA HOTELS LIMITED T/A SAROVA STANELY.....RESPONDENT**

**RULING**

**Introduction**

1. On 27th May 2010, Chemmutut J (as he then was) delivered an *ex parte* Award in favour of the Claimant for the sum of Kshs. 1,381,597 made up of Kshs. 1,270,933 in terminal benefits and Kshs. 110,664 in compensation for unfair termination of employment.
2. An application to set aside the *ex parte* Award was dismissed by the Trial Judge on 26th July 2011. A subsequent application for stay of execution pending appeal was dismissed by Nduma J on 13th March 2013. Following a Decree issued by the Court on 11th July 2013 and proclamation of the Respondent's goods on 22nd July 2013, the Respondent moved the Court under Certificate of Urgency seeking orders for stay of execution and review of the Award on the basis of an alleged error on the computation of the terminal dues awarded to the Claimant.

**The Respondent's Submissions**

4. Mr. Wachira for the Respondent submitted that the Respondent had paid the sum of Kshs. 758,996.70 being the correct amount due net of statutory tax. According to the Respondent, the correct figure before addition of the 6 months' salary compensation ought to have been Kshs. 964,949 and not 1,270,933. The total decretal amount before statutory tax would therefore be Kshs.1,075,613 and not 1,381,597 as reflected in the Decree and warrant of attachment.

**The Claimant's Reply**

5. In opposing the Respondent's application, Counsel for the Claimant submitted that the issue had been raised before and dismissed. According to the Claimant, the error was not clerical but divergence on the number of years the Claimant had served with the Respondent.
6. The case giving rise to the Award in question was heard in the absence of the Respondent who had been duly served. An application for review made on 15th July 2010 was dismissed in July 2011. The Respondent filed a Notice of Appeal on 15th August 2011 and an application for stay of execution on 16th August 2012. The application for stay was dismissed on the ground of inordinate delay.

7. In a Replying Affidavit sworn by the Claimant, it was deponed that the instant application was a back door attempt by the Respondent to be heard on the claim, which right the Respondent had waived by failing to attend the hearing in spite of due service. The application was meant to deny the Claimant the fruits of his Award.

**Ruling by the Court**

8. The only issue for determination by the Court is whether the Respondent is entitled to an order for review of the Award of the Court delivered on 27th May 2010. It is the Claimant's case that an application for review was heard and dismissed by the Court and the matter is therefore *res judicata*. The Respondent on the other hand contends that the issue currently before the Court, being erroneous computation of terminal dues is distinct from the one raised in the application dated 16th August 2011.

9. I have had occasion to peruse the Rulings delivered by Chemmutut J on 26th July 2011 and by Nduma J on 13th March 2013 and have satisfied myself that the issue raised in the current application being computation of the terminal dues payable to the Claimant was not ventilated in any of the applications canvassed before the Court.

10. Rule 32 (1) (b) of the Industrial Court (Procedure) Rules, 2010 provides that:

**32. (1) 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—**

**(b) On account of some mistake or error apparent on the face of the record**

11. A simple addition of the figures provided by the Claimant in his Memorandum of Claim as particulars of loss and damage which were adopted by the Court in its Award gives a cumulative figure of Kshs. 964,949 and not 1,270,933. Figures do not lie and there is no need for further argument on this matter. There is clearly an error on the face of the Award of the Court delivered on 27th May 2010. The Respondent's application is therefore allowed and the Award is reviewed by substituting the figure of Kshs.1,270,933 under Claim (i) on page 7 with the correct figure of Kshs. 964,949.

12. Each party will bear their own costs and the Claimant will pay the Auctioneer's charges.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2013**

**LINNET NDOLO**

**JUDGE**

**In the Presence of:**

.....*Claimant*

.....*Respondent*