



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 16 OF 2013

(Formerly Nairobi Cause No. 72 of 2011)

**FREDRICK NGARI MUCHIRA, HOWARD KIPKOECH KORIR & 98
OTHERS.....CLAIMANTS**

-VERSUS-

PYRETHRUM BOARD OF KENYA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 4th October, 2013)

RULING

The court delivered the judgment in this case on 31.05.2013. The claimants and the respondents filed their respective applications seeking review of the judgment. The applications for review were heard together and the ruling was delivered on 19.07.2013 as the court allowed the review and ruled thus,

“In conclusion, the court finds that the applications for review shall be allowed to the extent of the court’s findings in this ruling; parties shall bear own costs of the applications for review; and consequential to the review the final decree shall issue for judgment for the claimants against the respondent for:

- 1. A declaration that the redundancy of the claimants was unfair to the extent that the respondent did not comply with some of the mandatory redundancy conditions in section 40 of the Employment Act, 2007 as per the findings in the judgment.**
- 2. The respondent to pay the claimants as follows:**
 - i. the respondent to pay the claimants of or above the age of fifty years (as at effective date of redundancy) severance pay at the rate of thirty days pay (being wage or basic salary) for union employees and fifteen days pay (being wage or basic pay) for management staff and less the amount paid under the erroneous principle of computation based on the period pending attainment of the mandatory retirement age of sixty years;**
 - ii. the respondent to pay the claimants deductions that the respondent made but remittance was not conveyed to the respective recipients and as claimed by the claimants;**
 - iii. the respondent to pay claimants outstanding payment for leave days as per the schedule in the folios 53 to 55 and the leave bonus as per folios 45 to 52 of the bundle annexed to the certificate of urgency filed on 26.05.2011;**
 - iv. the respondent to pay the management staff four months gross salaries and the union staff two months gross salaries as at time of termination in view of the unfairness involved in the redundancy process; and**

- v. **the respondent to pay claimants No. 48 Renison Kiprono Langat and No. 49 Ferdinand Kisiangani Wanjala, half salary withheld during the interdiction and the redundancy package withheld in view of the wrong computation owing to the interdiction and in line with the findings in this ruling and judgment as to the computation applicable.**
3. **The claimants to compute their respective payments in order (2) above and to file in court and serve the respondent by 25.07.2013 and the respondent to file and serve any objections to the computation by 30.07.2013 for hearing of any objections and to record the particulars of the payments on 31.07.2013.**
4. **Taking into account the financial status of the respondent and its public service status, the respondent to pay the claimants the dues as ordered in (2) above by 1.11.2013, failing which interest to be paid on the amount at court rates from the date of the judgment till the date of full payment.**
5. **The respondent to pay costs of the case.”**

On 16.09.2013, the respondent **Pyrethrum Board of Kenya** filed a Notice of Motion dated 13.09.2013 together with the application for review seeking orders for review of the judgment to the effect that staff welfare funds deducted from the claimants and not remitted should not be paid to the claimants as ordered in the judgment. The ground for the review was that the claimants had all along been knowledgeable that they had received the staff welfare fund but erroneously included the same as unremitted contributions which may not only lead to unjust enrichment but also to double payment by the respondent and a loss to the tax payer. To support the review, the respondent relied on **exhibit B** as attached on the application being a list of names dated 31.09.2009 said to be the respondent's employees and titled **“PYRETHRUM BOARD OF KENYA STAFF WELFARE REFUND EMPLOYEES NOT ASSISTED FROM THE FUND”**

The claimants have opposed the application for review filed for the respondent as per the grounds of opposition dated 26.09.2013. The claimant's grounds of opposition and submissions are as follows:

- a. The law does not allow a party to seek review of a judgment twice or to apply for review of an already reviewed judgment like in this case. It was submitted for the claimants that Rule 32 (7) of the Industrial Court (Procedure) Rules, 2010 specifically provides that an order made for a review of a decree or order shall not be subject to further review.
- b. There is no new and important evidence being introduced at this stage which was not in possession and within reach of the respondent before and during the trial and the application for review does not meet any other ground for grant of an application for review.
- c. The evidence being introduced at this stage that the welfare fund was remitted to the claimants contradicts the evidence on record tendered on oath and the respondent is seeking to approbate and reprobate in the same breath and which is not tenable in law.
- d. The application is an afterthought calculated to frustrate and obstruct the course of justice.
- e. The application is misconceived, hopelessly and incurably defective and a monumental substantive and procedural legal nullity and an abuse of the court process especially in view of the appeal already preferred by the respondent to the court of appeal.

The court has considered the application for second review made for the respondent and taking into account the parties' respective submissions, makes the following findings:

- a. The law is clear that a second review is not permissible. In the opinion of the court, the rule against review of an order or decree made consequential to review is to bring litigation to an end. The parties and the decision maker are entitled to make a mistake or error but not to repeat the same. In the opinion of the court, the only exception to the rule against a second review is the inherent power of the court to correct typographical errors on the face of the decision or to revise the decision on account of obvious manifest injustice on the face of the decision. In the instant case, the exceptions have not been established and the application would fail on that account.
- b. The court further finds that in the second application for review, the respondent is seeking to

introduce evidence by way of a document dated 31.09.2009 and without any explanation why the same was not produced at the hearing. The court finds that with due diligence, such document would have been produced at the hearing of the suit. Further, the court finds that the document shows that refunds may have been made to some employees but it does not show that the alleged refunds were with respect to the welfare funds deducted from the claimants and not remitted to the welfare society as prayed for by the claimants and granted in the judgment. Thus, the document would therefore not justify variation of the judgment in any event.

- c. The court holds that a party to a suit cannot appeal against the judgment and at the same go apply for review of the judgment as done by the respondent in the instant case. As submitted for the claimants, the court finds that the application for review by the respondent is an abuse of the court process in view of the preferred appeal.

Accordingly, the court finds that the respondent's application for review dated 13.9.2013 is amenable to dismissal with costs.

The second application for review by the respondent was heard together with the applications by Family Bank Limited and by Pareto Sacco Limited both brought under Rule 16(1) and 32 of the Industrial Court (Procedure) Rules, 2010.

Family Bank Limited filed a notice of motion in this suit on 16.09.2013 through Mirugi Kariuki & Company Advocates. The substantive prayers made were that:

- a. **the Bank be enjoined as an interested party in the suit; and**
- b. **the honourable court be pleased to review its judgment and decree by varying or setting aside the order therein directing the respondent to reimburse the claimants monies deducted from their salaries for onward transmission to the Bank which the respondent deducted but did not remit to banks and specifically to the interested party, the Bank.**

Pareto Sacco Limited filed the Notice of Motion on 26.09.2013 and made the substantive prayers as follows:

- a. **the Sacco be granted leave to be enjoined as an interested party in the suit;**
- b. **the honourable court be pleased to review its judgment delivered on 19.07.2013 and the decree by varying and setting aside the order therein, to pending the hearing of the application *inter partes*; and**
- c. **the court to make a declaration that the amount in unremitted deductions by the respondent attracts a 5% compound interest as per section 35 (1) of the Co-operative Act, Cap. 490, Laws of Kenya.**

The respective applicants supported their applications on the following grounds and submissions:

- a. Rule 32(1) of the Industrial Court (Procedure) Rules, 2010 provides thus, **“(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....”** It was submitted that the Rule refers to **“a person”** and not to **“a party”** and therefore any person even those not being parties to the suit like the applicants were entitled to apply for review. It was further submitted that the rule forms a basis for enjoining as parties, otherwise strangers to the suit, long after the judgment. The applicants submitted that under the rule, there exists irresistible implication that a person applying under the rule thereby becomes entitled to be enjoined as a party to the suit.
- b. The applicants submitted that it was necessary for them to be enjoined as interested parties and for review to be granted because the judgment ordered the respondent to pay the claimants deducted and not remitted monies owed to the applicants. Thus, if the judgment was not reviewed as prayed, the applicants would suffer serious loss as they may never recover the monies from the claimants. The Bank filed undated bank statements being exhibit AKII on the further supporting affidavit of Antony Komu as the alleged loans owed by the claimants.

- c. It was the Bank's case that the money to be paid to the claimants under the judgment was with respect to the alleged loans and further that no formal arrangement existed between the respondent, Pyrethrum Board of Kenya and the Bank to remit the deducted amount while the claimants were in employment or belatedly after termination of employment.
- d. The Sacco submitted that the deducted and not remitted money it was claiming under the application and payable to the claimants under the judgment were with respect to the claimant's subscriptions and loans advanced as Sacco members. As for the loans, it was submitted for the Sacco that the guarantors would not have been made to repay the loans as long as the money now in issue was available to repay the loans. The Sacco also relied on the affidavit of Silas Odhiambo Okumu filed on 26.09.2013.

The respondent **Pyrethrum Board of Kenya** did not oppose the applications. The claimants opposed the applications and stated as follows:

- a. The suit having been heard and determined, the applicants were incurably late in seeking to be enjoined as parties and the cited Rule 32 (1) did not entitle them to apply for review or to be enjoined.
- b. The applicants were barred from seeking a review in view of Rule 32(7) of the rules of the court that barred a second review.
- c. Section 19 of the Employment Act, 2007 was clear on the principles guiding deductions from employees' payments due from the employer and in the present case the claimants were clearly entitled to the orders in the judgment in view of the irregular deductions that were never remitted. There was no agreement between the Bank and the respondent with respect to the deduction of loans that were not remitted. In any event, if such agreement existed, then the Bank should sue the respondent. If the respondent was the Bank's agent to collect the loans from the claimants as stated in the supporting affidavit, then the Bank should sue the respondent under the agency arrangement.
- d. The Sacco should invoke the loan guarantee system to recover its loans and also recover the loans from the members' shares.

The court has considered the submissions and makes the following findings:

- a. The court finds that the use of **"a person"** in the cited Rule 32(1) does not open an application for review of a judgment, order or decree to be made by persons who are not parties to the suit. For avoidance of doubt, Rule 32(3) of the Industrial Court (Procedure) Rules, 2010 provides, **"(3) A party seeking review of a decree or order of the court shall apply to the court in Form 6 set out in the First Schedule."** The court further considers that the grounds for review namely discovery of new evidence, mistake or error, breach of written law, clarification or other sufficient reason are matters which attach to the parties to the suit and not strangers. The court holds that persons not being parties to the suit lack standing to apply for review of a judgment, order, decree or decision or determination of the court.
- b. The court finds that the window of enjoining interested parties is not a window for summary jurisdiction facilitating the interested party to obtain specific relief or remedy without due process of filing the pleadings, according the other parties chance to respond to such pleadings, complying with discovery proceedings and participating in the hearing process that results into a judgment or ruling. The court further holds that an interested party in a suit is a secondary or collateral party whose presence and participation will aid the court one way or the other to resolve the dispute between the primary parties being the plaintiff or claimant on the one part and the defendant or respondent on the other. In the court's opinion, there cannot be a useful role by a purported interested party long after the hearing and determination of the suit like in the instant case where the judgment has already been delivered by the court. In the opinion of the court, an interested party must, when admitted in the proceedings, have a chance to file pleadings and fully participate in the hearing. It is the further opinion of the court that allowing an alleged interested party

claiming substantive remedies long after the hearing and like in this case, after judgment, would culminate into irregularly allowing a new cause of action; a new or fresh suit for which the original parties in the suit would not be able to have a fair chance to state their respective cases. The court holds that there shall be no addition of a purported interested party after the hearing of the suit and is misconceived for a person to apply for such addition after delivery of the judgment or otherwise determination of the suit. The court therefore finds that the applications as made for Family Bank Limited and by Pareto Sacco Limited in this matter are misconceived and an abuse of court process because they are belated and if allowed, the ends of justice as for the primary parties would be defeated significantly.

- c. The applicants have asked for a review, no prayer for reopening and rehearing of the case, and consequential to the review, a summary setting aside of substantive orders made in the judgment. The court finds that such flow of things would be circumventing the due process in civil trials as the orders in the judgment would be set aside without the benefit of hearing the witnesses and evaluating the issues in dispute as they should ordinarily be set out in the pleadings and submissions. As submitted for the claimants, the applications as urged are misconceived, hopelessly and incurably defective as they are a monumental substantive and procedural legal nullity. In the opinion of the court, allowing the applications would amount to full violation of the rules of natural justice.

In conclusion, the respective applications for review by the respondent, the Pyrethrum Board of Kenya dated 13.09.2013, by the Family Bank Limited dated 12.09.2013, and by Pareto Sacco Limited dated 26.09.2013 are dismissed with costs.

Signed, dated and delivered in court at Nakuru this Friday, 4th October, 2013.

BYRAM ONGAYA

JUDGE