



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

**CAUSE NO. 230/2013**

(Before Hon. Justice Hellen Wasilwa on 2<sup>nd</sup> October, 2013)

JOHN OJWANG ATIENO & 13 OTHERS ..... CLAIMANTS

**-VERSUS-**

1. THE MIGORI COUNTY GOVERNMENT

2. THE MIGORI COUNTY PUBLIC SERVICE BOARD... RESPONDENTS

**RULING**

The application before court is the one dated 19.9.2013. It is filed by the respondent applicants herein who seek orders for stay of orders granted on 18.9.2013 allowing the applicants application in terms of prayer II and IV. The applicants seek orders that the orders granted on the 18.9.2013 in terms of prayer II and IV be set aside, reviewed and be rescinded together with all the attended consequential orders. They also seek costs of this suit. The application is brought through a Notice of Motion filed under Rule 12, 16, 27 and 32 of the Industrial Court Rules and Section 12 of the Industrial Court Act No. 20 of 2011 and 12 and 13 of the Industrial Court Act 2011.

The application is grounded on an annexed memorandum in support of the application and an affidavit sworn by James Aggrey Mwamu the respondents applicant's counsel herein. The applicants contention is that, their counsel inadvertently failed to come to court on 24.9.2013 and so the applicants should not be condemned for mistake of their counsel. They seek orders that they be heard as they will be greatly prejudiced if not accorded a hearing.

The respondent claimants on the other hand opposed this application. They filed their grounds of opposition on 24.9.2013. They contend that the applicant respondents have no justifiable cause to warrant this court granting the orders sought. That in any case, the applicants have not exhibited the defence they wish to rely on hence the court's discretion to set aside or review has not been properly invoked. They aver that the applicants want to delay this case and they should not be allowed to do so. The respondent claimants submitted that there is no discovery of new matter warranting review nor mistake on record as envisaged under rule 32 of Industrial Court Rules. They also aver that under rule 13 of Industrial Court Rules, the applicants are obliged in law to have filed in court not later than 30th August 2013 a response to the claim which they have not done to-date. They have also infringed on claimants rights by not paying them salary for July 2013 to-date.

Having heard both parties the issues for determination are:-

1. Whether there are sufficient grounds to warrant this court setting aside/reviewing its orders of 18th September, 2013.

2. Whether the claimants application which was filed under the wrong procedures can be annulled by the court.

Under Rule 32 of the Industrial Court Rules 2010:-

**“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;**

**(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, judgment or ruling requires clarification or**

**(e) For any other sufficient reason.”**

Under Rule 32(4) of the said rules:-

**“An application under paragraph (c) shall be accompanied by a memorandum supporting the application and the court shall proceed to hear the parties in accordance with Section 26 of the Act.”**

What the applicant respondents therefore needs is to establish is that there is a new matter discovered which was not there previously, or there is apparent error on the face of the record or on account of the judgment, award, ruling being in breach of any written Law. None of these grounds have been established. Indeed Mr. Mwamu for the applicants has sworn an affidavit explaining his absence and failure to file a reply to the application by the respondents as being a failure on his part but this does not fall under the category set out in the law.

Going down to the last limits of rule rule 32(e) – review can be allowed for any other sufficient reason. Is the counsel's mistake then a sufficient reason to warrant the review? Case law cited points to this fact that counsel's mistake should not be visited against his clients. In the case of **Baraka Apparel EPZ (K) Ltd VS Rose Mbula Ojwang T/A Faida 2002 Caterers** C.A No. 280 of 2005. JJA Okubasu, Githinji and Waki had to deal with a similar issue where the mistake of counsel cost his client by the superior court dismissing his application. The learned JJA had this to say in terms of the discretion of the courts in such case while citing **Duffus P in Patel VS E.A Cargo Handling Services Ltd [1974] EA 75 at 76 and E.**

**“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules”.**

The Court of Appeal went ahead and allowed the application stating:-

**“--- the principle obviously is that unless and until the court has pronounced judgment upon the merits or by consent, it is to have power to revoke the expression of it's coercive power where that has been obtained only by a failure to follow any of the rules of procedure”.**

In the current case, this court has power to exercise it's discretion on the reasons given by counsel for applicants. There is the issue also raised by applicants on the application by claimants being filed under wrong provision of law. In reference to this, I refer to Article 159 of Constitution being alive to the fact that this court's main objective is to do justice to the parties. The upshot is that;

1. The application to review this court's ruling given on 18.9.2013 is allowed on condition that the orders given will remain in force in the interim.
2. The respondent applicants are now given leave to file and serve their reply to the memo of claim within 7 days. The respondents have leave to reply within 7 days thereafter upon service.
3. The application will now be heard *inter partes* on 5.11.2013.
4. Interim orders as at 18.9.2013 to remain in force.

**HELLEN WASILWA**

**JUDGE**

**2/10/2013**

**Appearances:-**

Abande h/b P. J. Otieno for claimant respondents

Mwamu for applicant respondents

CC. Sammy Wamache.