REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 813(N) OF 2009

(Before D.K.N. Marete)

STEPHEN OMBOGA AND 9 OTHERS…..…..…....…….CLAIMANT

Versus

SPIN KNIT LTD ……....…….……RESPONDENT

RULING

This is an application by way of a Notice of Motion dated the 19th July, 2012 and seeks the following orders of court;

a. *That the court be pleased to grant leave to the Claimants to effect change of Advocates from Gatitu Wang'oo & Co. Advocates to S. Ndege & Company Advocates.*

b. *The Honourable Court be pleased to review its award made on 13.7.2011.*

c. *In the alternative this Honourable Court do review and set aside its award made on 13.7.2011 and the cause be heard afresh.*

d. *Cost of this Application be provided for.*

The Respondent in defence raises Grounds of Opposition dated 21st March, 2013 and filed on 27th instant as follows;

2.1 That the application is bad in law, incompetent, misconceived and an abuse of the court process.

2.2 That the application fails to meet the requirements as set out under Rule 32(1)(a)(b)(c)(d) & (e) of the Industrial Court Procedure Rules under which an application for Review can be considered.

2.3 That the Applicant is guilty of inordinate delay in bringing this application as the judgement sought to be reviewed was delivered on 13th July 2011.

2.4 That the Applicant has not shown any other sufficient reason why the Award should be reviewed.

When the matter came for hearing on 20th May, 2013, the parties were agreeable to a disposal of the

matter by way of written submissions which they indeed filed on 9th and 19th July, 2013 respectively for the claimant and respondent.

The claimant's/Applicant's case and submission is that their application seeks a review of the award of court made on 13th July, 2011 and in the alternative to set aside its award made on 13th July, 2007. He relied on the following grounds;

a. *The Claimants are aggrieved by the award of this Honorable court made on 13.07.2011 and have made discovery of new and important matter or evidence which were not within their knowledge or could not be produced by them at the time when the award was made.*

b. *There is no error apparent on the face of the award.*

c. *This application has been filed without undue delay after obtaining certified copies of proceedings and the award.*

d. *It is in the interest of justice that the award made on 13.07.2011 be reviewed and set aside*.

The claimant contends and submits that their counsel did not include material particulars relating to their six years period of service and therefore occasioning an error in the computation of terminal dues. Two, this computation of terminal benefits for a lesser period occasioned an error on the face of the record which error should now be eradicated.

The claimant also submits that taking into account the period the proceedings were availed, there is no inordinate delay in the filing of this application as this was done upon receipt of the court's proceedings. Lastly, they submit that it is in the interest of justice that this is done as it is unlikely to prejudice the respondent, or at all. The matter is primarily on submissions of documents which, if they had been submitted would have yielded different results.

The respondent in his submissions opposes the application and prays that the same be dismissed with costs. The issues for determination therefore are;

1. Whether the Claimants' application meets the requirements as set out under Rule 32(1)(a)(b)(c)(d) & (e) of the Industrial Court (Procedure) Rules under which an application for review can be considered; and

2. Whether the Applicants are guilty of inordinate delay in bringing this application as the judgement sought to be reviewed was delivered on 13th July 2011; and

3. Whetherit is in the interest of justice that the Claimant's application for review be granted.

Discovery of new and important evidence comes out as a ground for review under Rule 32(1)(a) of the Industrial Court (Procedure) Rules, 2010 conditional upon this being after exercise of due diligence and also that the evidence should not have been within the knowledge of the person or could not be produced by that person at the time the order was made. This is not the case here as the Claimants/Applicants aver that their advocate omitted to include this data and evidence on the record. This is lack of due diligence and is not condoned by rule 32(1)(a).

The above position in law is amplified by authorities cited in the respondent's submissions as follows;

> ***Benson Benard Mbuchu Gichuki Versus Kenneth Kiagiri Mwangi & another High Court at Nairobi Civil Suit 3729 of 1991*** *the court at page 3 held that "A review is not an avenue by parties to fill the blanks that were left during the hearing, but which were, due to negligence, inadvertence, or even accident, omitted. To do so would defeat the well-known legal maxim that litigation must come to an end."*

Error apparent on the face of record

The Respondent submits that the Claimants have failed to establish that there is an error apparent on the face of the record. The issue of the dates of employment was raised during the hearing of the case and addressed by the Honourable Judge in his award. The Judge found that the Claimants were paid all the terminal benefits they were entitled to thereby putting the issue to rest.

In the Case of ***Kishor Kumar Dhanji V Ndeffo Limited & 4 others [2011] eKLR High Court at Nakuru Civil Case 170 of 2009****, the Honourable Judge at page 2 held that "A mistake or error on the face of the record must be one that stares one in the face, as it were, and on which there cannot be two opinions. In* ***Nyamogo and Nyamogo Advocates Vs. Kago (2001) 1EA 173****, the Court of Appeal reiterated that:*

"An error apparent on the face of record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a merely erroneous decision and an error apparent on the record. Where an error on a substantial point of law stares one in the face, and there could reasonable be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by along drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal." The issues raised in this application to demonstrate the existence of mistakes or errors on the face of the record are highly contentious and there are two or more opinions on each of them. In ***National Bank of Kenya Vs. Ndungu Njau, Civil Appeal No. 211 of 1996****, it was emphasized that the error or mistake must be self evident and should not require an elaborated argument to be established; that it will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.*

This again is not the case here.

Further it is not required under the Industrial Court Procedure Rules that a party should obtain certified typed proceedings for purposes of review of the Court's award. Consequently, the Claimants are guilty of inordinate delay since their application for review was filed more than one year after the Award was delivered.

Further, the Respondent denies the allegation that the civil Procedure Rules apply to the present application for review. The Industrial Court Procedure Rules apply to Industrial Court cases. Under Section 12(1) of the Industrial Court Act, the Industrial Court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution.

CONCLUSION

1. *The Claimants' application for review fails to meet the requirements under Rule 32(1)(a)(b)(c)(d) & (e) of the Industrial Court Procedure Rules and further, the Claimants are guilty of inordinate delay in filling their application for review.*

2. *The issues raised by the Claimants in their application were already canvassed during the trial and addressed by the learned Judge in his Award.*

3. *The Claimants have not shown any other sufficient reason for to warrant review of the Court's Award.*

4. *In view of the above, the Claimants are not entitled to the prayers sought in their application for review.*

The respondent's case in opposition to the application for review is compelling and cut. It would require a lot of convincing to run away from it. In the circumstances, I am inclined to dismiss this application with costs of the respondent.

Dated, delivered and signed the 20th day of December, 2013.

D.K. Njagi Marete

JUDGE

Appearances

1. Mr. Ndege instructed by S. Ndege & Company Advocates for the Claimant/Applicant.

2. Mr. Oketche instructed by Federation of Kenya Employers for the Respondent.