



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**INDUSTRIAL COURT AT NAIROBI**  
Cause 1721 of 2011

**ONGERE CHARLES**  
**OKOTH.....CLAIMANT**

**VERSUS**  
**PRESSMASSTER**  
**LIMITED.....RESPONDENT**

**RULING**

The Respondents have made an application dated 23<sup>rd</sup> May, 2012 supported by a Memorandum and Supporting Affidavit by sworn by Caroline Thongori Mathenge on 8<sup>th</sup> June, 2012.

The application urges this court to review its orders dated 13<sup>th</sup> March, 2012 by which the court directed the parties to file written submissions instead of calling oral evidence. The order was made in the presence of the counsel for both parties. It is the Respondent's contention that the order was not by consent but a unilateral proposal by the claimant which was approved by the court.

The Respondent further contends that she filed her written submission as ordered to avoid being in contempt of the court. The applicant has relied on "*Giro Commercial Bank Ltd -Vs- Jasvinder Singh Dhadialla (2085) eKRL*" to request the court not to visit the advocate's mistake on her client.

The application is vehemently opposed by Mrs. Rashid for the Claimant/Respondent. According to Mrs. Rashid the order to dispose off the claim by written submission was by consent. As such the application for review herein has not met the threshold of interfering with a consent order.

According to her, the application is an afterthought because the counsel for the Applicant had subsequent to the order under review applied for leave for extension of time to enable her file her submission. Then after granting of the leave, the counsel filed her submission on behalf of the applicant.

Mrs. Rashid has asked this court to dismiss the application for reasons that the written submissions were not filed under protest and also the fact that there are no new points of law or important matter discovered after the order under review.

According to her the precedent quoted by the Applicant is distinguishable from the present case in that in the former, the order was not by consent.

**UPON PERUSING** the Application **AND UPON HEARING** the submissions by the learned counsel for the two parties, the court has discerned the following issues for determination:-

- (1) whether the court has the jurisdiction to entertain the application?
- (2) whether the order under review was by consent?
- (3) whether the application has satisfied the requisites for granting the orders sought?
- (4) whether prejudice is to be occasioned by granting the orders sought?

As regards the first issue, it is doubtless to say that the judge who made the order is no longer in the station. Nevertheless, nothing in the law bars another judge in the station to entertain the application.

Regarding whether or not the order under review was by consent, I have perused the court record to find the answer. It is clear from the minutes of the judge then sitting that, the parties present namely Kiage holding brief for Rashid and Mrs. Kakai holding brief for Enonda did not say anything to the Court.

The record reflects only the court order. Nothing on record suggests that it was a consent order. To me it looks like the court's direction on its own motion. To this extent I agree with the argument of the applicant's counsel that the order was by the court and not parties' consent.

The next issue I considered is whether the applicant has met the threshold of reviewing the order in issue. I am satisfied that there is an error apparent on record and also that there is a good cause for allowing the application. The fact that Mrs. Rashid believes that the order was by consent is persuasive to me that there is an error on record.

I find also that the fact that there is a burden of proof on the Respondent to explain the lawfulness or otherwise of the termination of employment, that alone is a good cause for reviewing the order in favour of the applicant to allow her to adduce enough evidence by calling all the witnesses he would like to support his case.

I have also perused Sec.21 and Sec.24 of the Industrial Court Rules 2010 to interrogate the extent of the judge's discretion in directing how the hearing of a dispute can be done. My understanding of the said provisions aforesaid is that the judge's direction must be subject to the consent of all the parties to the case and that the procedure used must be the most suitable while avoiding legal technicalities.

Having satisfied myself that there is a good cause for review, I find that declining to grant the review order would occasion prejudice and possibly a miscarriage of justice.

Accordingly, I grant review as prayed by the Applicant in his application, set aside the order directing disposal of the suit by way of written submissions and allow the parties to proceed by way of oral evidence unless otherwise agreed by consent by all the parties.

I make no order as to costs.

**Orders accordingly.**

**DATED** and **DELIVERED** at Nairobi this 31<sup>st</sup> day of July, 2012.

Onesmus Makau  
**JUDGE**

