



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1065 of 2010

CODA CONSULTING GROUP LTD.....APPLICANT/ RESPONDENT

VERSUS

JOHN KAMAU WANYOIKE.....RESPONDENT/CLAIMANT

RULING

The application before court is one for review of an award dated 25th March 2012. It brought by the Respondent/Applicant herein under rule 32 of the Industrial Court (Procedure) Rules, 2010 and Section 16 of the Industrial Court Act, Cap 20 of 2011 of the Laws of Kenya together with all other enabling provisions of the law.

The Applicants seek orders:

1. THAT the honorable court be pleased to certify this matter urgent and the same be heard *ex parte* in the first instance.
2. THAT this Honorable Court be pleased grant leave to the firm of Omulele & Company Advocates to come on record on behalf of the Applicant in place of Kabarú & Company Advocates.
3. THAT there be a stay of execution pending the hearing and determination of the application for review of the award.
4. THAT the claimant by himself, his servants, agents, auctioneers be restrained from selling or disposing the motor vehicles registration numbers KBK 444W, KAV 238P and KAS 886M or any other property belonging to the Respondent pending the hearing and determination of the application for review of the award.
5. THAT the costs of this application be borne by the claimant.

In the Interim, the court allowed the firm of Omulele & Company Advocates to come on record on behalf of the Applicant in place of Kabarú & Company Advocates. The Court also ordered a stay of execution but also ordered that the applicants deposit before this court Ksh.516,000/= the decretal amount as security in default of which the stay order will automatically be vacated. From the record it appears that the Applicants complied with the Interim orders given *ex parte*.

During the *inter partes* hearing the Applicants have submitted that their prayer be allowed. They relied on the grounds of review as the memorandum in support of the review.

They further submitted that the court erred in awarding 10 months' salary compensation as this is manifestly high in the circumstances. They also submitted that the award for accrued leave days of 210,000/= was an error. In view of the award as confirmed on the days were only 68 days as per page 8 of the award and this translated to Ksh.120,000/=. The applicants urged court to reconsider the award and reduce it to a reasonable figure.

The Respondents relied on their replying affidavit filed on 7th May, 2012, sworn by one John Kamau Wanyoike. They averred that the alleged apparent error on the record alleged by the Respondent Applicant is not disclosed. They further averred that there is no proof of an apparent error on the face of the record nor has new evidence emerged which was not available at the time of hearing and therefore there is no sufficient reason to warrant a review.

They submit that this application is misplaced in law and is meant to hoodwink the court in hearing an appeal out of time without leave of the court in the name of review.

Let me address myself to the grounds that would entitle this court to grant orders of review:-

Under Order 45 rule 1(1) of the Civil Procedure Rules 2009;

***“Any person considering himself aggrieved by a decree or order from which no appeal is allowed, but from which no appeal has been referred and who from the discovery of new and important matters or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, deserves to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay*”**

From this provision, review will be allowed where there is discovery of new and important matter or on account of some mistake or error apparent on the record. The same application must be brought before court without unreasonable delay.

In the instant case, the applicants content that there is an error apparent on the record which error they submit is a miscalculation on leave days as found by court in 68 leave days which translates to:

$$\begin{aligned} \frac{35000}{= 30 \text{ days}} &= \text{Kshs.1167 per day} \times 68 \text{ days} \\ &= \text{Kshs.79,356/=} \end{aligned}$$

I therefore agree that there is a mistake apparent in the record in relation to the calculation of leave days and I review that figure from Ksh.210,000/= to Ksh.79,356/=.

On the issue of compensation for 10 months being unreasonable, I do not agree with the applicants on the maximum allowed by law is up to 12 months. By granting 10 months compensation, the Learned Judge was well within the period allowed. I will therefore leave the amount awarded on this item as already granted.

The upshot is that there is no need to review the entire judgment. The review allowed on accrued leave from Ksh.210,000/= to Ksh.79,356/= brings the amount due to the Claimant less what is already paid to Ksh.464,625/=.

Dated, signed and delivered this 17th day of October, 2012 in the presence of Rachael Gichuki, Court Clerk, Walubengo for Claimant and no appearance for the Respondent.

HELLEN WASILWA

JUDGE