



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 418N of 2009

SHEM MIKAE.....APPLICANT/CLAIMANT

VS

D.T. DOBIE & COMPANY (K) LTD.....RESPONDENT

RULING

The Application before court is the Applicant/Respondent's application dated 13th May, 2011 for review of the court award delivered on 23rd September 2010. The application was filed through a Notice of Motion dated same day. The application is brought under Rule 16, 27(a) of the Industrial Procedure Rules, 2010. It is based on the grounds that:

1. The Applicant has fully complied with the award of the court.
2. That the decree extracted by the court is erroneous and is not drawn in accordance with the award of the court.
3. That the applicant has simultaneously applied for review of the said decree.
4. That the amount claimed in the warrant of attachment is not due and payable by the applicant.
5. That the applicant's goods have been proclaimed and likely to be sold unless the application was heard and orders sought given.

The application is supported by the affidavit of Vick Nyaga, the Human Resource Management and Administrative Manager of the applicant. In the interim, prayers for stay of execution were granted. The application was then heard *inter partes* on 26th August, 2011.

The applicants contend that the pension dues of the claimant were wrongly computed. That pension is run by an independent Manager and therefore could not form part of what claimant is entitled to. The Applicants also contend that the Claimant was paid his April 2009 salary and this had been paid before the filing of the claim. The Applicants also aver that leave days accrued had also been paid. This was also disclosed in response to the claim. The Appendices of the Respondent show these payments. The applicants also contend that the claimant's pension benefits were processed in the normal way long before the award was made and they attached hereto copies of documents relating to the processing and payment made to the claimant. They said an appropriate leave allowance had also been paid to the claimant in the month of April and so this should not be computed in the decree.

Further the Applicants contend that the decree requires the employer to pay over to the employee his dues

under the award without factoring in statutory deductions. There is also a claim of some money which claimant is expected for refund in the sum of Ksh.46,748/=.

The respondent in reply avers that the application for review is not warranted as the application for stay was even dismissed on 8th June, 2011. They deny payment of pension to claimant as alleged. They also claim the Respondent never paid the claimant his salary for April nor leave days of the same period. That issue of the statutory deduction would not arise if the payments had been made.

I have heard the Applicants herein. Review is usually granted in cases where it is apparent there is an error in face of record or upon discovery of new or important fact not in the knowledge of Applicant at time of the case.

In this case, Applicants seek review based on error apparent on record. Let me consider each aspect of what they want reviewed. First and foremost they indicate that claimant has been paid his pension dues proof of such is indicated in their members' information hand book on retirement benefits. They indicate that the claimant should apply for pension from the pension scheme. There is evidence that the claimant was a member of this scheme but he ceased being a member on 31st March, 2009. It is actually his duty to follow up his claim with the pension provider and he is entitled to his payment upon the attainment of 50 years or upon earlier retirement. The court ordered that he be paid this but the Respondent is not the one to pay but the Scheme. In that regard as the computation includes this pension refund, this is an error which I find should be excluded from the decree extracted.

The court also ordered claimant paid for leave and April pay. The Applicant indicate they paid him this. Evidence of such payment cannot be in form of a pay slip but in form of tangible copy of cheque or bank transfer to the claimant's account which the applicants have not exhibited.

The upshot is that the decree is reviewed only to the extent of removing Claimant's pension entitlement which claimant can follow with the provider of the scheme. The rest of the benefits be paid less normal statutory deductions.

Signed, dated and delivered in court at Nairobi this 27th day of November, 2012.

HELLEN WASILWA

JUDGE

Appearances:

Enonda Makoloo for Applicant

Wokabi holding brief for Kariara for Respondent

Rachel Gichuki Court Clerk