



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 96 OF 2013**

**BERNARD DAMUNGA NDUNDA.....CLAIMANT**

**-VERSUS-**

**KERIO VALLEY DEVELOPMENT AUTHORITY.....RESPONDENT**

(BEFORE HON. JUSTICE BYRAM ONGAYA ON FRIDAY 20<sup>TH</sup> DECEMBER, 2013)

**RULING**

The court delivered the judgment in this case on 20.09.2013. On 11.11.2013, the respondent filed a Notice of Motion under **sections 3A and 100 of the Civil Procedure Act, Cap.21 Laws of Kenya and Order 51** praying for the substantive orders that the court to amend the arithmetical error in the judgment and the court to extent the time within which the sum calculated is to be deposited in an interest earning account of both parties. The application was based on the supporting affidavit of Esther J. Keror filed on 11.11.2013 and the grounds set out in the application as follows:

- 1. The applicant is aggrieved by the judgment due to arithmetical error because the claimant's gross salary was Kshs.79,636 and not Kshs.94,599.00 as stated in the judgment.**
- 2. That it is in the best interest of justice, fairness and expediency in all circumstances of the case that this application be allowed considering the error was not deliberate.**
- 3. That consequential to the correction of the error the respondent should deposit in an interest earning account Kshs.875,996.00 and not Kshs.1,040,589.00 as erroneously computed in the judgment.**

The respondent opposed the application by filing the grounds of opposition on 29.11.2013. The respondent urged as follows:

- 1. The application is tailored at buying time for the applicant and thus is an abuse of court process.**
- 2. The court lacked jurisdiction because judgment had been delivered, the court was *functus officio* and could not entertain the application especially that the application was for review and the respondent had preferred an appeal by filing the notice of appeal.**
- 3. The power of the court under section 100 was essentially a power to review and there being an appeal, the review was untenable and the power under the section did not extend to amending a judgment.**

The application was heard on 11.12.2013. The court has considered the submissions and makes the following findings:

- 1. Under section 3 of the Industrial Court Act, 2011, the guiding principal in the exercise of the**

powers of the court is to facilitate the just, expeditious and proportionate resolution of disputes governed by the Act. Section 16 of the Act provides that the court shall have the power to review its judgments, awards, orders or decrees in accordance with the rules. Rule 32 of the Industrial Court (Procedure) Rules, 2010 provides for the review of the decisions made by the court. Rule 33 provides for correction of errors by stating that the court shall cause any clerical mistake, incidental error or omission to be rectified without reference to the parties and shall notify the parties of the mistake, incidental error or omission.

2. The court has carefully considered the application and finds that the court has jurisdiction, despite the applicant's preferred appeal, to rectify the mistake or incidental error in the judgment as established by the applicant in view of the statutory guiding principal objective of the court and the provisions of rule 33.
3. The court further finds that the applicant moved the court and urged the application under misconceived statutory provisions.
4. The court finds that the substance of the mistake or incidental error in the judgment is not disputed and is found to have been a valid dissatisfaction that if not rectified would defeat ends of justice. The court further considers that in the circumstances of this case and taking into account the powers of the court under rule 33, the preferring of an appeal by the respondent would not bar the court from rectification of a judgment as envisaged under the rule.

In conclusion, the court has considered the ends of justice and makes the following orders:

1. The judgment is rectified by:
  - a. deleting “**Kshs.1,040,589.00** at Kshs.94,599.00” at page 13 of 16 in paragraph one and inserting “**Kshs.875,996.00** at Kshs.79,636.00”;
  - b. deleting “Kshs.1,040,589.00” at page 13 of 16 in paragraph 2 and inserting “Kshs.875,996.00”;
  - c. deleting “Kshs.1,135,188.00” at page 13 of 16 in paragraph 2 and inserting “Kshs.955,632.00”;
  - d. deleting “Kshs.2,175,777.00” at page 13 of 16 and inserting “**Kshs.1,831,628.00**”;
  - e. deleting “**Kshs.1,040,589.00** at Kshs.94, 599.00” in order (b) at page 15 of 16 and inserting “**Kshs.875,996.00** at Kshs.79, 636.00”; and
  - f. deleting “**Kshs.2, 175, 777.00**” in order (c) at page 16 of 16 and inserting “**Kshs.1,831,628**”.
2. As ordered by the court on 11.12.2013, the respondent Kerio Valley Development Authority to deposit the sum of Kshs.875,996.00 in an interest earning account in the names of the parties' Advocates by 11.01.2014 and in default, execution to issue.
3. Each party to bear own costs of the application.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 20<sup>th</sup> December, 2013.**

**BYRAM ONGAYA**

**JUDGE**