**THE REPUBLIC OF UGANDA**

**IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA**

 **LABOUR DISPUTE MISC. APPLN. No. 219/2019**

**ARISING FROM LDR NO 227/2014**

**NASSANGA SAPHINA KASULE ………………………….. APPLICANT**

**VERSUS**

**STANBIC BANK …………………. RESPONDENT**

**BEFORE:**

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

**PANELISTS**

**1. MR. EBYAU FIDEL**

**2. MS. JULIAN NYACHWO**

**3. MR. MAVUNWA EDSON HAN**

**RULING**

**BACKGROUND**

This application is brought by Notice of Motion under Section 82 of the Civil Procedure Act, Orders 46 rule 1 and Order 52 rule 1 and 3 of the Civil procedure Rules and Section 17(1) of the Labour Disputes (Arbitration and Settlement) Act, 2006, for orders that:

1. The Judgement of this Court delivered on 23/08/2019, in respect of LDR. No. 227 of 2014, be reviewed regarding, Severance allowance, repatriation allowance and reimbursement of outstanding loan obligations and Aggravated damages.
2. Costs of this application be awarded to the Applicant.

The grounds of the application are contained in the Affidavit deponed by the Applicant, Nassanga Saphinah Kasule and summarised as follows:

1. That she is aggrieved by the decision of this Court made on 23/08/2019 in LDR No.227 of 2014 in disregard of her witness statement.
2. That the decision of this Court regarding severance allowance, Repatriation allowance, Reimbursement of outstanding loans obligations and aggravated damages was made in error.
3. The in the interest of Justice this court should review its decision accordingly.

In reply, Daisy Alinda Ruhweza, a Legal Officer of the Respondent, deponed that, the Industrial Court delivered its award on 23/08/2019 and among others found that the Applicant was not entitled to salary arrears for the remaining 18 years of her contract and she was not entitled to the reimbursement of funds used to clear the outstanding obligations namely housing loan of Ugx. 149, 852, 583/-, salary loan of Ugx. 20, 094, 188/- because she had not pleaded the same and it is trite that a party is bound by their pleadings.

That she was not entitled to payment of provident fund of Ugx. 33, 986,250/- because she had not worked and therefore did not earn salary as a basis for the employer’s contribution and the claim was not pleaded.

That the Applicant was not entitled to severance pay of Ugx, 165,258,250/- and whereas the Applicant made a submission on severance pay and even made reference to its provisions in the Respondent’s Severance Policy, it was not pleaded and the policy does not make it a right.

The Applicant did not plead repatriation therefore it was denied, she was also denied exemplary and aggravated damages. In the circumstances the Application has no basis to merit the award of an order for review and it was a clear abuse of court process.

That the Court rightly held that parties are bound by their pleadings and the Applicant cannot claim what was not pleaded in her memorandum of claim.

In any event there is no new and important evidence previously overlooked by this court and no error apparent on the face of the record as what is sought to be reviewed was never in contention because it was never pleaded in the memorandum of claim.

**REPRESENTATIONS**

The Applicant was represented by Mr. Dhobuazi Richard Jimmy as an Agent and the Respondent by Mr. Alex Ntale of MMAKS Advocates, Kampala.

**SUBMISSIONS**

The Applicant proposed 2 issues for resolution of this application as follows:

1. Whether there are grounds for court to grant an order for review.
2. Whether the Applicant is an aggrieved party.

It was submitted for the Applicant that according to Order 46 rule 1 of the Civil Procedure Rules, an order for review can be granted in the following circumstances:

1. Where there is discovery of new and important matter or evidence which after due diligence was not within the applicant’s knowledge or could not be produced by him or her at the time when the decree was passed or the order was made.
2. That there is an error or mistake apparent on the face of the record.
3. For any other sufficient reason.

According to Mr. Dhobouazi the basis of the Application is that there was an error apparent on the record. He relied on **Mugisha Rogers vs Equity Bank (U) Misc. Appln. No 70 of 2019** in which this court cited **Attorney General and others Vs Boniface Byanyima HCMA No. 1789 of 2000** which held that *“Mistake or error apparent on the face of the record refers to an evident error which does not require extraneous matter to show its correctness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment”,* He contended that this court declined to award Severance allowance, repatriation allowance and reimbursement of outstanding loan obligations and Aggravated damages because they were not pleaded in the memorandum of claim and yet they were prayed for in the witness statement and they remained unchallenged during cross examination. He cited **Donna Kamuli Vs DFCU Bank LDC No. 002/2014,** to the effect that this court awarded the Claimant, Donna Kamuli Severance pay and loan obligations yet she had not pleaded the same in her memorandum of claim but on the basis of evidence adduced on the same during the trial. In the circumstances it was a mistake or error apparent on the face of the record, for Court not to grant the same prayers to the Applicant in the instant application, because according to him she had stated them in her witness statement.

He further contended that Section 87(a) of the Employment Act makes the award of severance pay to a person who was unlawfully terminated a right which court should have awarded based on the general prayer *“ Any further or better relief as the court may think fit”*

With regard to the refusal to make the award of aggravated damages, Mr. Dhobuazi argued that, had court considered the aggravating circumstances raised by the Claimant and Mr.David Mutaka DW1 it would have made a different decision. He went on to list what he considered the circumstances which court ought to have considered such as the fact that the Respondent did not clear the impression created by the e- mail to other banks, alleging fraud on the Applicant. In his view failure to award aggravated damages by this court was an error apparent on the record, therefore Court should review its award.

In reply Counsel for the Respondent citing the same law, Order46 rule 1(supra), submitted that the Respondent agreed with the court’s decision in refusing to award the remedies in contention in this application, because they were not specifically prayed and or pleaded for in the memorandum of claim. Counsel relied on **Fang Min vs Belex Tour and Travel Limited SCCA No. 6 of2013,** in which the Supreme Court stated that:

*“It is now well settled that a party cannot be granted relief which it has not claimed in the plaint or claim.*

He also cited several other authorities to the same effect and argued that there are no grounds whatsoever to merit the grant of an order for review of the Award of Industrial Court. Therefore, the Applicant’s reliance on an alleged mistake or error apparent on the face of the record is misconceived. He further cited **Lalwak Alex vs Opio Mark MA No.0058/2016**, which cited ***Nyamogo & Nyamogo Advocates vs Kago[2001] 2 EA,173,*** which defined an error apparent on the face of the record as follows:

*“ An error apparent on the face of the 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 mere erroneous decision and an error apparent on the face of the record. Where the error on a substantial point of law stares you in the face and there could reasonably be no two opinions, a clear case of 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 vie was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal….*

*The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter.”*

According to Counsel, as elaborated in Paragraph 3(i) to 3(x) of the Respondent’s Affidavit in reply, this Court dealt with the remedies stated in submission including those not pleaded or prayed for in the memorandum of claim and declined to award them with reasons, therefore Court it did not err or overlook any part of the case including the Applicant’s witness statement. According to him the Court’s refusal award severance pay for instance was be cause was not pleaded in the memorandum of claim. In light of **Lalwak** (supra), Counsel contended that *“what the Applicant is asking court to do is to reverse a decision taken on the basis of what she considers to be an incorrect exposition of the law on Severance, repatriation allowance and reimbursement of outstanding loan obligations and or improper exercise of discretion on aggravated damages”*, which in his view sounded like an appeal and not a review. He insisted that there is no ground to merit an order for review of this Court’s award, there being no mistake or error apparent on the face of the record or other sufficient reason analogous to an error or mistake. He prayed that the Application is dismissed with costs.

In rejoinder Mr. Dhobouzi restated his earlier submissions and insisted that the decision in in respect of LDR. No. 227 of 2014, would have been different had the Court looked at the Applicant’s witness statement, section 87(a) of the Employment Act 2006, the record of cross examination proceedings and the last prayer of the memorandum of claim. Therefore is in the interest of Justicet this court should review its decision.

**DECISION OF COURT**

The Labour Disputes (Arbitration and Settlement) Act, 2006 provides that:

***17. Interpretation and review of awards***

***(1) Where any question arises as to the interpretation of any award of the Industrial Court within twenty one days from the effective date of the award or, where new and relevant facts concerning the dispute materialize, a party to the award may apply to the Industrial Court to review its decision on a question of interpretation or in the light of the new facts.***

***(2) The Industrial Court may decide the matter after hearing the parties or without a hearing, if the consent of the Parties is obtained.***

***(3) A decision of the Industrial Court shall be notified to the parties and shall be deemed to form part of the original award and shall have the same effect in all respects, as the original award.”***

Section 82 of the Civil Procedure Act cap 71, *provides that any person aggrieved by a decree or order from which an appeal is allowed but no appeal has been preferred or by a decree or order in which no appeal is allowed may apply for review of judgment to the Court which passed the decree or order, and the Court may make such order on the decree or order as it thinks fit.*

Order 46 rule 1 of the Civil procedure Rules provides that:

1. *Any person considering himself or herself aggrieved -*
2. *by a decree or order for which an appeal is allowed but from which no appeal has been preferred or*
3. *by decree or order from which no appeal is hereby allowed and who from discovery of new and important matter or evidence which after the exercise of due diligence was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order against him or her, may apply for a review of judgment to the court which passed the decree or order for review.*

In light of the law, therefore, for this court to be moved to review its own decree or order, the Applicant must prove either of the following:

1. *There are questions which arise as to the interpretation of the award of the Court.*
2. *The Applicant had discovered new and important matter of evidence which in spite of the exercise of due diligence was not within his knowledge at the time the judgment or decree was entered.*
3. *There is an error apparent on the face of the record, the error must be manifest and clear and no court would remit such an error to remain on the record such as a wrong application of the law or failure to apply the appropriate law*
4. *That there is any other sufficient cause to warrant the review of the decree.*

From the perusal of the Application, the Applicant relies on reason (c) that is that, there is an error apparent on the face of the record, because this Court misapplied the law when it declined to make awards regarding Severance allowance (section 87(a) and repatriation allowance and reimbursement of outstanding loan obligations because they were not pleaded in the memorandum of claim and it improperly exercised its discretion when it declined to award aggravated damages, which is if not addressed will occasion a gross miscarriage of justice, therefore it should review its award.

It is trite that a review of a decree or Order is strictly meant to correct self- evident errors or omissions on the part of the Court because once a decree or order is issued a court is rendered functus officio. A review is therefore an exception intended to correct apparent errors and not to change the decision of the court. As stated in **Lalwak Alex vs Opio Mark MA No.0058/2016**,

*“… The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter…”* and and **Mugisha Rogers vs Equity Bank (U) Misc. Appln. No 70 of 2019** *“…It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment…”.*

After carefully considering the submissions of Mr. Dhobouzi, it is clear that he makes elaborate reasoning and argumentation, including citing several authorities, in a bid to establish the purported errors, which contrary to the principle that the error or mistake must be so apparent, it must be so manifest or self- evident with no need to prove its existence.(see **Lalwak**(supra). The fact that he laboriously tries to prove the errors is a clear indication that they were not apparent on the face of the record, and therefore this ground fails as a basis to warrant a rev

In our considered opinion, this Application is not seeking a review on the basis of an apparent error on the record, but rather it is asking court to reevaluate the evidence it relied on to make the award and its application of the law to the facts of the case because in their view the decision arrived at was a wrong decision therefore it should be reversed. Therefore, by any stretch of imagination this cannot be considered to be a review, because a review as already discussed is only intended to correct apparent errors but not to reverse a decree or Order of Court. What the Applicant is seeking in our view is a reversal of the decision. Therefore, the grounds as set out and argued by Mr Dhobouazi, as the basis for the review of the order in LDR 227/2014, are grounds for appeal and not of review. The Applicant had the option to lodge an appeal. In **Lalwak Alex vs Opio Mark MA. No 0058/2016,(supra)** that, ***“… if the court reached a wrong conclusion of law, in circumstances of that nature, it could be a good ground of appeal but not for review otherwise court would be sitting in appeal on its own judgement which is not permissible in law…”***

In any case, the Court of Appeal in **DFCU Vs Donna Kamuli CA No. 121/2016,** citing **Fang Min vs Belex Tour and Travel Limited SCCA No. 6 of2013,** overturned **Donna Kamuli Vs DFCU Bank** ( supra) which the Applicant relies on in support of this application, when it held that, *“… a party cannot be granted relief which it has not claimed in the plaint or claim*.” As to whether a witness statement amounts to pleadings, the Court went ahead to state that:

*“… S.2 of the Civil Procedure Act, defines a pleading to include any petition or summons and also includes the statements in writing of the claim or demand of any plaintiff and the defence of any defendant to them and the reply of the plaintiff to any defence or counter claim of the defendant. In light of the above definition, iam of the considered view that a* ***witness*** *statement (emphasis ours) is not a pleading but rather evidence of prof of matters pleaded.*

In the circumstances, the application does not meet the criteria for review and it is accordingly dismissed, with no orders as to costs.

**1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE .…………..**

**2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA .……………**

**PANELISTS**

**1. MR. EBYAU FIDEL ……………..**

**2. MS. JULIAN NYACHWO ………………**

**3. MR. MAVUNWA EDSON HAN ………………**

**DATE: 21/AUGUST/2020**