



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO 74 OF 2003

CHRISTOPHER LEBO & 331 OTHERS.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

RULING

1. The application dated 26.09.2016 seeks

(1) Review of orders of the Deputy Registrar made on 6th September 2016 adopting the opinion of the mediator dated 16th May 2016, as judgment of the court

(2) Costs of the application be provided

2. The applicants who are 332 in number, sued the Respondent for unlawfully and without regard to fair labour practices, terminating their employment with Kenya Power and Lighting Co. Ltd. On 1st September, 2015 according to the Supporting Affidavit by **CHRISPUS K. SICHEI** the parties agreed to attempt an out of court settlement, and they jointly agreed to record a consent referring the matter for mediation before retired Justice J. B. Havelock. The parties agreed to change the names of some of the claimants appearing on the order issued on 1st September 2015 and a new order was given to that effect.

3. For purposes of clarity, the order of 1st September 2015 read inter alia;

(1) This matter is referred to mediation before Hon. Justice (Rtd) J. B. Havelock.

(2) The mediation begun by hearing of the claims of the following plaintiffs;

a) Enock P. Manyi

b) Stephen K. Mwambare

c) Philemon Abuya

d) Robinson Rop

e) Henry Nyandika

f) Christopher Lebo

g) Francis Maina Wambugu

h) Maina Mbugua Peter

i) Benson Gichure Kiarie

j) Luke Ochieng

“The matter proceeded for mediation and on 16th May 2016, the mediator gave his opinion which the Deputy Registrar adopted as judgment of the court.”

4. The reason for seeking the orders is that there exists an error/mistake on the face of the record to the extent that there was a belief that the orders dated 1st September 2015 and later amended with orders issued on the 10th December 2015 meant that the opinion was to be adopted.

(ii) That the orders issued on the 6th September 2016 were issued on the understanding that the same was by consent of the parties to have the opinion adopted as an order of the court, yet the applicants had not consulted to about adoption, and are thus aggrieved.

5. It is further contended that the Registrar was bereft of powers to adopt the consent, and the said adoption if left predisposes the applicants to suffer irreparable harm. The application is said to be made in good faith and that the Respondent will not suffer any damage or harm.

6. In opposing that application, the Respondent through its Manager, Legal Services **AWUOR OWITI** deposes that the opinion of the mediator was adopted as judgment of the court with the consent of all the parties who were present in court. That **Ms. ODWA** who appeared in court and held brief for **MR OKARA** (counsel for the applicants) consented to the order being made.

Further, the 10 Plaintiffs/Applicants were also in court, and the Deputy Registrar called out their names one by one and they all agreed to the order being made.

7. It is also pointed out that the applicants have not alleged any fraud, misrepresentation or undue influence regarding the said consent.

8. The Respondent contends that the parties agreed to refer the matter for mediation and agreed that the opinion of the mediator would be in writing so as to be returned to court, and neither party objected or challenged the opinion of the mediator that the content of the consent was explained to all by the Deputy Registrar.

9. The Respondent also emphasizes that this is a very old matter, and litigation must come to an end, stating that the complainant is being prejudiced as it continues to lose witnesses who are familiar with the matter, and to retrieve documents relating to a total of 332 plaintiffs from the archives is an onerous task.

10. This court is urged to retain the opinion of mediator as judgement of the court because failure to do so means there is no possibility of the case being concluded in the near future.

11. The applicant’s counsel submits that when the mediator made his opinion on 16.05.2016, the applicants were dissatisfied and a date was fixed before the Deputy Registrar for directions so as to enable the matter be placed before a judge. That when the matter was mentioned before the Deputy Registrar on 6th September 2016 **Ms. ODWA** who held brief for **MR OKARA** (counsel for applicants) indicated that her instructions were limited to seeking adjournment and she did not have authority to record a consent. However the Deputy Registrar purportedly, by error recorded a consent that the parties were in agreement to have the opinion adopted as judgment of the court.

12. It is argued that the Deputy Registrar did not have authority/capacity to record a verbal consent citing **order 49 Rule 3 CPR** which provides that;

“Any order may by consent of the parties evidenced in writing, be entered by the Registrar or in a subordinate court, by an Executive Officer so authorized in writing by the Chief Justice.”

Further that **order 49 Rule 2** provides that judgment may on application in writing be entered by the Deputy Registrar generally – therefore the consent ought to have been in writing – the only exception being consents entered under Order 10 and **Order 25 rule 3**, and so the orders adopting the opinion should be considered null and void.

Secondly, it is argued that **Ms. Odwa** did not execute the purported consent by signing it nor did the Respondents counsel.

13. Further that such consent should have involved all the 332 plaintiffs and not just the ten. That in any case, the applicants have met the threshold for review as set under Order 45 Rule 1 of the Civil Procedure Rules premised on the grounds that there exists an error on the face of the record.

14. In response, the Respondents submit that the parties elected to adopt the mediator’s opinion as judgment of the court out of their own volition and there is no mistake or error on the face of the record. The Respondents maintain that the applicants were represented by an advocate who raised no objection to the opinion being adopted as a consent judgment and urged this court to be guided by the decision in **Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd (1982) KLR 485** where the court held that;

“The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not ... to be set aside or on one or either of the recognized grounds.

15. There are two major issues,

- a) Whether the Deputy Registrar had authority to record the adopted consent,
- b) Whether sufficient reasons have been established to warrant setting aside the consent.

Order 49 Rules 2 & 3 are clear on instances when a Deputy Registrar may record a consent judgment – the bottom line is that the consent should be in writing. In this instance the consent was not in writing and appears to have been made orally in court. What was in writing was not the consent but the opinion.

This could have been salvaged if the terms had been verbally dictated then endorsed either by parties or their counsel in the form of a signature to signify owing it. This did not happen.

16. Then of course there is the question as to whether there was a mistake or error on the part of the Deputy Registrar thereon.

Courts have pronounced times without number, that a consent order can only be set aside on grounds which would justify the setting aside of a contract and include but are **NOT** limited to fraud, collusion, illegality, mistake being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts – see **FLORA WASIKE V DESTIMO WAMBOKO [1982 – 88] IKAR 625, and SAMWEL MBUGUA IKUMBU V BARCLAYS BANK OF KENYA LTD [2015] eKLR.**

The mediator was very clear at paragraph 10 of his report, that it was before him was a mediation **NOT** a determination – hence his opinion on the various issues.

17. The matter was set for pre-trial conference on 23.8.16. Then on 6.9.2016 **Ms. Odua** who held brief for **Mr Okara** indicated that the instructions she had were that the matter was for directions. The Respondents counsel admitted the matter was for directions but added that it had been referred for mediation, and the mediator had rendered his opinion in writing and a copy filed in the court record. He stated;

“We pray that this opinion be adopted by the court pursuant to the consent of the 1st Sept.2015 becomes an order of the court and subsequently the judgment. This is because the reference was made by consent. We do not think any party is opposed.”

Ms. Odwa was categorical and stated;

“Mr Okara is indisposed. I have no instruction to adopt the mediator’s opinion. I pray for a further mention.”

18. The request for mention was rejected and the Deputy Registrar, being persuaded that **Miss Odua** had ably represented the applicants adopted the opinion as a judgment of the court.

Even without going into the fairness of which **Ms. Odua** did concede to the consent (which she did not), it is argued that **Mr Murugaru** who advised the court on the issue of consent did say that parties had consented to the opinion being adopted as judgments of the court – he said;

“WE DO NOT THINK THAT ANY PARTY IS OPPOSED.”

19. The Deputy Registrar did not interrogate the parties to confirm **Mr. Murugaru’s** belief nor establish whether **Ms. Odua** was willing to take the bullet of consent.

Apart from that, there was outright misrepresentation – that;

- a) Because the parties had consented to the matter being sent to mediation and gave a list of 10 names, and
- b) Because the parties entered a further consent amending the 10 names,
- c) Then it followed that the consent continued to flow into accepting the opinion (which the mediator had clearly stated was not a determination of the case) as judgment of the court. That was incorrect and I need not say more. There was misrepresentation as to warrant the consent being set aside. It certainly meets the threshold discussed in a long line of cases dating from 1952 **ISMAIL SURNERJI HIRANI V NOORALI ESMAIL KASSAM (1952) 19 EACA 131** to as recent as 2015 in **SAMUEL MBUGUA IKUMBI V BARCLAYS BANK OF KENYA LTD.**

Consequently I hold and find that the application is merited and is allowed to the effect that the consent order recorded on 6th September 2016 be and is hereby set aside.

Costs of this application shall be borne by the Respondents.

DATED, SIGNED and DELIVERED at ELDORET this 7th day of May, 2019.

H. A. OMONDI

JUDGE