



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 114 OF 2015

BETWEEN

KAJIADO MULTI-TRANSPORTERS SACCO LIMITED.....PETITIONER

AND

THE GOVERNOR, KAJIADO COUNTY.....1ST RESPONDENT

THE EXECUTIVE COMMITTEE, KAJIADO COUNTY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Introduction

1. The Petitioner, Kajiado Multi-Transporters SACCO Ltd, describes itself as a Sacco registered by the Commissioner of Cooperatives Development and that it is an umbrella body for transporters within Kajiado County having a membership of 200 individuals. It has filed the present Application against the 1st Respondent, the Governor, Kajiado County whose office is a creation of **Article 180** of the **Constitution**; the 2nd Respondent, the Executive Committee, Kajiado County, which is duly created under **Article 179** of the **Constitution**; and the 3rd Respondent, the Attorney General, whose office is created under **Article 156** of the **Constitution**.
2. The Application was triggered by Consent Orders given by this Court on 27th March, 2015 as amended on 16th April, 2015 directing that sand harvesting levy and fees be maintained at Kshs 2,000.00 per trip pending further orders of the Court. The Petitioner has thus filed the instant Application seeking to have that order varied and for it to be allowed to amend its Petition to introduce those variations. In their Application dated 30th June, 2015, it specifically seeks the following orders:
 - a. ...
 - b. *That this Honourable Court be pleased to vary the Orders made on 27th March, 2015 as amended on 16th April, 2015 to state that three (3) axle-rod lorry Kshs 2000.00 per trip while two (2) axle-rod lorry Kshs 1000.00 per trip. (sic)*

- c. *That this Honourable Court be pleased to grant leave for the Applicant to amend its Petition to distinguish between the two axle-rod trucks and three axle-rod trucks.*
- d. *That this Honourable Court be pleased to grant leave for the Applicant to amend its Petition to include compensation for loss of user as a prayer for the duration of disobedience of court orders by the 1st and 2nd Respondents.*
- e. *The costs be in the cause.*

The Applicant's Case

3. In their Affidavit in Support, sworn on their behalf by Gerald Kimani Maina, the Petitioner's chairman, on 30th June, 2015, it is their case that it is apparent on the face of the orders of this Court that the same do not distinguish between payments for use of a two-axle-rod and a three axel-rod truck in sand harvesting.
4. They further contend that the **Kajiado County Finance Act of 2014** has made a provision for payment of Kshs 30,000.00 per month which translates to Kshs 1000.00 per trip for use of their trucks in sand harvesting and it was their case therefore that they were experiencing great financial loss in compliance with the said order in its current form.
5. Additionally, that the 1st and 2nd Respondents, contrary to the Court order, did clamp down their trucks and put them out of business for eight days from 9th April, 2015 to 16th April, 2015 for reasons best known to themselves and within that period, they suffered great loss in terms of special damages as follows:

<u>Date (2015)</u>	<u>Reg. No</u>	<u>Amount Claimed</u>	<u>SACCO (2000/Week)</u>
7 th -16 th , April	KBT 930Z	226,000.00	2000.00
7 th -16 th , April	KBP 121U	229,000.00	2000.00
7 th -16 th , April	KBV 344R	160,000.00	2000.00
7 th -16 th , April	KBX 395V	236,000.00	2000.00
7 th -16 th , April	KBW 928Z	158,000.00	2000.00

6. In this regard, it is the Petitioner's contention that it is seeking compensation for the said actions and that is why it is praying for leave to amend its Petition to reflect that new claim apart from the prayer to vary the orders made on 27th March, 2015.
7. That for the above reasons the Application should be granted as prayed.

The Case of the 1st and 2nd Respondent

8. While opposing the Application and urging the Court to dismiss the same with costs, the 1st and 2nd Respondents filed a Replying Affidavit sworn on their behalf by one, Dr. Kennedy Ole Kerei, the County Secretary of Kajiado County. They also filed Written Submission dated 14th August, 2015. It was deponed on their behalf that the instant Application is mischievous and only intended to delay the expedient hearing and disposal of the Petition and that it was only filed a day before the Petition herein was to be heard, on 1st July, 2015, while also seeking unclear orders.
9. Their case was further that when the Petitioner filed its Petition under Certificate of Urgency on

- 25th March, 2015, it misled the Court and deliberately concealed material facts by alleging that its members were not consulted before the sand harvest levies were imposed. The Application was therefore served on 26th March, 2015 for inter-partes hearing on 27th March 2015 but they (the above Respondents) were not able to put in a reply within the short notice of less than a day.
10. On that day in any event, it was agreed by consent that the Petitioner's members shall pay Kshs.2,000.00 per day as sand harvest levy pending the hearing of the Petition on 1st July, 2015. The Petitioner was at the time represented by the firm of M/s Kabaiku and Co. Advocates and that Counsel holding brief for Mr. Kaikai for the 1st and 2nd Respondents on the said day had no instructions to enter into a consent to that effect and that is why Mr. Kaikai and Co. Advocates on 13th April, 2015 filed an Application under certificate of urgency to set aside the said orders. The Petitioner had meanwhile, through another advocate, filed an Application for contempt against the 1st and 2nd Respondents and hence, both Applications were set for hearing on 16th April, 2015.
 11. Despite the above actions, it is the 1st and 2nd Respondents' case that the Kajiado County Attorney later communicated on phone with the new advocate for the Petitioner and they agreed to record a consent to the effect that pending the hearing of the Petition, the Petitioner's members shall be paying Kshs 2000.00 per sand harvesting trip and not per day, as earlier agreed and recorded by the Court. The amended consent order was recorded in Court on 16th April 2015 and thereafter, on that understanding, the Kajiado County Attorney indicated to the Petitioner's Counsel that the current **Kajiado County Finance Act** was lapsing by fact of law thus making the Petition unnecessary but the Petitioner insisted on proceeding with the Petition and also filed the present Application.
 12. The 1st and 2nd Respondents therefore argue that the instant Application is completely unnecessary as the consent recorded on 16th April, 2015 has served both parties well from the time it was recorded and that the Petitioners are on a fishing expedition pursuing very selfish interests lacking in bona fides.
 13. On the issue of amending the Petition, it was their assertion that the same is dishonest because when the consent order was recorded, it compromised both Applications that were coming up for directions on 16th April, 2015 and that is why the parties sat back to await the hearing of the Petition on 1st July, 2015. In this regard therefore, they contended that any other issue arising from the dispute should have been dealt with on the 16th April, 2015 or soon thereafter. That the matters of detail that the Petitioner is now seeking to raise were within its knowledge at the time of filing the Petition and most importantly, the Petitioner's Chairman was present during the stakeholders meeting held on 14th July, 2014 when all issues relating to the sand harvest levy were discussed exhaustively thus rendering the Petition superfluous.
 14. That in any event, what the Petitioners are therefore seeking is to set aside a consent order that has already served out its purpose considering that the financial year has come to a close, and a new Act with new provisions would soon be enacted.
 15. They also contended that they never defied the Court orders as alleged but what they did was call for proof of payments by supply of deposit slips which the Petitioner's members did not readily have. Further, that the deposit slips later supplied were those issued after the consent orders some as recent as June, 2015. Additionally, that there were many groups and individuals dealing with sand harvesting and they were all present during the stakeholders' forums and the Petitioners are seeking preferential treatment for unknown reasons. Further, that the initial order was obtained by what could qualify as fraudulent non-disclosure of material facts which they invited the Court to interrogate and find that the Petitioner is not deserving of those Orders.
 16. It was their other contention that the Petitioner and its members are fighting them sporadically, changing tactics from stage to stage. That while seeking to amend the consent order, they are at

the same time seeking to amend the Petition to accommodate the intended amendment to the order. In this regard, their argument was that it is trite law that a consent order can only be amended or set aside under very special circumstances and the Petitioner has not approached them at any stage to work out a new arrangement after the consent order was recorded.

17. For the above reasons they pray that the Application should be dismissed with costs.

The 3rd Respondent's Case

18. While opposing the Application, the AG filed Grounds of Opposition dated 6th July, 2015 in which he stated that:

- i. The Application is speculative, seeking to test the waters of litigation and is a fishing expedition aimed at delaying the expedient disposal of the Petition.
- ii. The Application seeks to set aside a consent properly recorded by parties.
- iii. The Application has no legal basis in the **Civil Procedure Act and Rules** and the orders sought are overtaken by events.
- iv. The Petitioner is guilty of material non-disclosure.

19. The AG further submitted that much as the Constitution is all-encompassing, other Acts of law and procedure remain relevant and where there is a clear law bestowing the court power to exercise jurisdiction, that law must always be invoked and the new Constitution was not intended to do away with the rest of the laws.

20. Accordingly, that the **Civil Procedure Act and Rules** provides for amendment of pleadings, discharging, varying or setting aside of court orders but the present Application ignores all those as the Petitioner has not invoked them.

Determination

21. Based on the foregoing, the key issue to be determined is whether this Court should allow the instant Application and to grant the orders sought therein by the Applicant.

22. The law on setting aside consent orders or varying them has been well established over time by this and other courts. Similarly, the courts have rendered themselves in regard to the second issue relating to amendment of pleadings.

23. In saying so, although the matter before me was filed under the Constitution, the same rules applicable in civil matters also apply to such matters. As to the nature of consent orders therefore and the obligation by parties to respect and be bound by the same, the Court in **Hiram vs Kassam (1952) 19EACA 131** acknowledged that:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the Court..... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

24. Further, in **Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd, Civil Case No.1728 of 1979**, the Court opined:

“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 lightly to be set aside or varied save by consent or an order on one or either of the recognized grounds.... A consent order entered into

by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

25. I also note that in **Lian Mong Yee vs Abdul Rashid Maidin and Others (2001) 3 CLJ 905**, the Court made the observation that:

“... the jurisdiction to set aside a contract is universal and extends to all types of void contracts. It demonstrates the flexibility of equity in the field of remedies and its ability to do complete justice in cases where the common law is found wanting. Like any other equitable jurisdiction, it is subject to discretionary bars that operate upon the conscience of the particular litigant. So, laches unclean hands, want of mutuality and so forth are grounds upon which equitable relief may be denied. In the present instance, if the respondents are right in their argument, the consent order is void for illegality. It may therefore be set aside like any other agreement.”

26. Finally, Majanja J. in **Edwin Thuo vs The Attorney General and Another, Nairobi Petition No.212 of 2011** specifically addressed his mind on the use of constitutional provisions to set aside a Consent Order or agreement and said:

“What the decisions I have cited and considered show is that whether the issue before me was approached as an attack on a consent judgment, issue of estoppel, res judicata or an abuse of process of court, the principles upon which the court acts in such circumstances are clearly within the limitations to fundamental rights and freedoms envisaged under Section 70 of the old Constitution. I therefore hold that as long as the Agreement remains binding on the parties, neither party can circumvent the effect and consequences of this Agreement by attacking it under the guise of a petition to enforce fundamental rights and freedoms.”

27. As regards the amendment of pleadings, the Court in **AAT Holdings Limited v Diamond Shields International Ltd, Civil Case No 442 of 2013** pointed out that:

“[6] The general power of the court to amend pleadings draws from section 100 of the Civil Procedure Act (hereafter the CPA). Parties to the suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. I agree with counsel for the Defendant that the discretion should be exercised judicially. Section 100 of the CPA and Order 8 rule 3 of the CPR, provides a broad criteria which should guide the court in the exercise of discretion that; 1) the amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and 2) is just to do so. Case law has then broken down these broad requirements into biteable and defined principles of law which circumscribe the exercise of discretion in an application for amendment of pleadings.”

28. The law in regard to amending pleadings in the instant matter is also to be found under **Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** which provides that:

A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.

29. In that regard, the Court in **Institute for Social Accountability and Another vs Parliament of Kenya and 2 Others, Petition No.71 of 2013**, stated that:

“Rule 18 of the Rules clearly stipulates that the court may permit an amendment at any stage of the proceedings. The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits,

provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.” (Emphasis added)

I am in agreement with the above principles and i shall take them into consideration in determining the present Application.

30. In doing so, i must at this stage give a brief factual analysis of the events leading to the instant Application. In this regard, I note that:

- on 27th March, 2015 a consent order was entered between the parties to the effect that the Petitioner and its members would pay sand harvesting levies of Kshs 2,000 per day.
- On 13th April, 2015, the Petitioner/Applicant filed a Chamber Summons Application together with a Notice of Motion Application dated 10th April, 2015 in which it sought for orders of committal against the Governor, Kajiado County and the Executive Committee, Kajiado County and further that they be directed to appear before the court to show cause for their continued disobedience of the said court orders.
- On 16th April, 2015, the said consent order of 27th March, 2015 was amended again by consent of the Parties to the effect that the Petitioner’s members were required to pay Kshs 2,000 for each trip made in sand harvesting instead of making the same payment each day.
- The Petition was thereby set for hearing on 1st July, 2015.
- On 30th June, 2015, the instant Application was filed by the Petitioner/Applicant.

31. The question then that begs for answers at this juncture is: has the Applicant made a case the setting aside or varying of the consent order and has it made a case to warrant leave for amendment? My answer to these questions must certainly be in the negative.

32. I say so because, firstly, I note that the primary reason for reviewing the said orders is that the order of 27th March, 2015 as amended on 16th April, 2015 has a blanket application on both axle-rod and three axle-rod trucks. In this regard, I take the view that the foregoing reason proffered by the Applicant was well within its knowledge as early as 16th April, 2015. I am therefore unable to understand the reason for the review two months later after the said orders were in place. The Applicant has also not given reasons to justify why it had to wait until a day to the hearing of the Petition to file the instant Application. If indeed there were strains in complying with the said orders as alleged, I do not see the reason why the Applicant had to wait for two months to seek review and setting aside. To me, that delay is inordinate and unjustifiable.

33. In any event, no plausible reason has been given why the issue of the axle-rod of any truck should be a matter to be considered at all. I can guess why it is an issue but the Petitioner failed to show me why I should invoke that differentiation to set aside consent orders lawfully entered. Further, none of the grounds for setting aside a consent order as set out above were invoked by the Petitioner and in the end, its Application was not only bare on facts but poor in the supporting legal framework.

34. Secondly, in regard to the Application to amend the Petition, the Petitioner has stated that its reason for seeking leave to amend the Petition is to enable it make demands for compensation in regard to damages as a result of contempt by the Respondents. While bearing in mind the stipulated principles in regard to allowing or disallowing an application for amendment, as I have reproduced elsewhere above, I am satisfied that the Petitioner has not established a case to warrant the grant of such leave to amend. I say so because the matter of compensation is predicted on facts that may have arisen after the filing of the Petition and is therefore a wholly new cause of

action. In addition, the said complaints can only be sustained if the Contempt Application against the Governor of Kajiado County and the 2nd Respondent had been proved. That Application was compromised when the consent order was amended on 16th April 2015. What then is the basis for such a new prayer even if it could be properly admitted? I submit none.

35. It follows from the foregoing that on the law and the facts, the proposed amendment cannot be allowed.

36. I must also point out that in addition to the above, it is not in dispute that the Petitioner obtained the earlier orders in this Court by failing to disclose that they were involved in the consultation in regard to the matters at hand. It is also not in dispute that they abandoned their Application for contempt. On this basis I am inclined to agree with the Respondents' contention that the conduct of the Applicants in regard to this matter raises serious questions such as; why was the present Application filed after two months? Why didn't the Applicant proceed on with the Application for contempt if they were serious at all? Why did it file the present Application a day to the hearing of the Petition?

37. Absence of answers to the foregoing questions lead to the conclusion that the instant Application was not filed in good faith and is an abuse of Court process.

38. Based on my reasoning above, I am inclined to dismiss the instant Application with costs to the Respondents as costs follow the event.

39. I shall further order that the Petition must be fixed for hearing on the merits unless by fact of the consent orders of 27th March, 2015, there is nothing left to be heard.

40. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Kaikai for 1st and 2nd Respondents

Mr. Aluku holding brief for Mr. Ojienda for Petitioners

Order

Ruling duly delivered.

Mention on 8/4/2016 for directions.

ISAAC LENAOLA

JUDGE