



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 8 OF 2012

DR. MARETE F. KITHINJI 1ST CLAIMANT
DR. SHADRACK M. ITHINJI 2ND CLAIMANT
JOASH ODHIAMBO OYUGI 3RD CLAIMANT
DANIEL M. KIHORO 4TH CLAIMANT
PHILEMON KILAGU 5TH CLAIMANT
SILAS NDUNGU GICHURE 6TH CLAIMANT
JOSEPH OSURE OGUOK 7TH CLAIMANT
COLLINS GILBERT OTIENO 8TH CLAIMANT
EDWARD NDUNGI LAAMA 9TH CLAIMANT

VERUS

THE PERMANENT SECRETARY MINISTRY

OF LIVESTOCK DEVELOPMENT1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION OF KENYA 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

M/s Karanja for the 1st, 3rd, 4th and 9th Claimants

Mr. Mutuma for 2nd Claimant

Mr Musyoki Kimanthi for the Respondent

Mr Musyoki Advocate of M/S Kimanthi & Associates has been on record and in conduct of this case on behalf of the 9 Petitioners since its inception whereas the Mr. Kuria Thande is on record for the 3 Respondents.

The parties through the above said Advocates reached settlement in this matter and a consent dated 18/10/2013 was filed on 23/10/ 2013.

The matter was then mentioned before me on 13/11/2013 when I accepted the consent as an Order of the Court and the matter was marked settled.

Meanwhile, the 1st, 3rd, 4th and 9th Petitioners have purported through a letter received by M/S Kimanthi & Associates on 16/4/2014, to withdraw their instructions from the said Advocate.

The letter was copied to all the Respondents and Mr. Thande Kuria, counsel from the Attorney General's Chambers in conduct of this matter.

Meanwhile the said petitioners have appointed M/S Kimondo Mubea & Co. Advocates to replace Mr. Musyoki Kimanthi to finalise this matter on their behalf.

M/S Kimondo Mubea & Co. Advocates filed a Notice of Motion dated the 1st January 2014 on the same day, on a certificate of urgency seeking an Order in the following terms:

1. That leave be granted to M/S Kimondo Mubea & Co. Advocates to come on record for the 1st, 3rd, 4th and 9th Claimants / Applicants in place of M/S Kimanthi & Associates.

The Application is made on grounds set out in the Notice of Motion which may be summarized as follows:

- i. That the relationship between the named Claimants and the firm of Kimanthi & Associates has soured and they do not want the proceeds of the consent award to be credited into the said firm's account.
- ii. That the said money payable to the 1st, 3rd, 4th and 9th Claimants has already been tabulated by the Respondents and it is due to be paid out any time now, hence the urgency of this application.

The application is supported by an Affidavit of Dr. Martin Kithinji the 1st Claimant on behalf of the 3rd, 4th and 9th Claimants.

The deponent alleges that a dispute has risen between the Applicants herein and the 2nd Claimant who has colluded with the firm of Kimanthi & Associates contrary to the initial agreement between the Claimants and M/S Kimanthi & Associates that the award would be paid into each Claimant's respective bank account, less legal fees.

A letter dated 19th December 2013 is annexed to the Application written by the 2nd Claimant Mr Shadrack Mwiti Ithinji to the 1st Respondent and Permanent Secretary Ministry of Finance stating that the award by the Court should be paid to the Advocates on record that is M/S Kimanthi and Associates. The letter is copied to the 3rd Respondent and to the firm of Musyoki Kimathi & Associates.

At the hearing of this application Mr. Musyoki drew the attention of the Court to an Agreement between the eight (8) Claimants and the 2nd Claimant dated 9th November 2011 while the Claimants were facing criminal charges that had led to termination of their employment in Criminal case No. 887 of 2000.

Mr. Musyoki had represented the Claimants in the criminal trial in which they were subsequently acquitted.

Mr. Musyoki thereafter took over the Civil Claim now settled by a consent award.

In terms of the Agreement, the eight (8) Claimants have conceded that they had no funds to pay the legal fees for Mr. Musyoki Advocate and had agreed that the 2nd Claimant Dr. Shadrack Ithinji Mwiti would take up the entire bill of financing all expenses “relating and incidental to pursuing their claim for compensation and reinstatement subject to recovering the said expenses from the co-accused.”

According to the agreement, the Claimants in the same agreement instructed M/S Kimanthi & Associates to represent them in case No. 887 of 2000 and High Court Petition No. 177 of 2011. It is instructive to note that the said Petition was subsequently transferred to the Industrial Court as Petition No. 8 of 2012.

The parties agreed under Clause 2 as follows:

“2 Legal expenses

2.1 The co-accused hereby directs the financier to incur and pay any expenses as shall be necessary to achieve the objective of clause 1 above.

2.2. In consideration of the financier’s agreement to finance all the legal and incidental expenses, the co-accused hereby undertakes to pay 30% of the sum recovered as compensation to the financier once the claim is finalized who in turn will, pay 5 % to the Advocates as legal fees and 2% to Mr. David Githuku Njoroge. The 30% shall include both salary arrears compensation and any other payments relating to this case, except payments related to pension and gratuity money. This Agreement shall expire once both salary arrears, and compensation payments have been settled.”

In their application sought to be heard *ex parte* in the first instance, the Applicants did not disclose to the Court the existence of this Agreement.

The Court is of the considered view that this is a material non disclosure intended to hoodwink the Court to grant the Application intended to replace M/S Kimanthi & Associates and defeat the Agreement through which the 2nd Claimant not only financed their legal fees in this matter but also did so during the Criminal trial that was concluded in favour of all the Claimants.

It is the Court’s considered view that the Application was brought in bad faith and the hands of the 1st, 3rd, 4th and 9th Claimants are dirty and tainted. They seek the hand of the Court to defeat an agreement entered into between themselves and the 2nd Claimant during their hour of need and take him to the Cleaners as it were.

The Industrial Court is a Court of equity and will not aid any person who comes before it with unclean hands.

Furthermore, M/S Kimondo Mubea & Co. Advocates should have before approaching this Court in this manner written to M/S Kimanthi & Associates seeking to find out if the firm had any objection to the intention to take over this matter and if there was no such objection, what outstanding matters needed to be settled as between the two firms of Advocates before the file was handed over.

This is the tested and honourable way in which Advocates and legal firms deal with each other on matters such as this one.

It is disingenuous, for the Applicants to want to avoid their legal obligations to their counsel who not only rescued them from the prison door step but also has facilitated out of Court settlement of this matter.

Counsel for the Respondents Mr. Kuria Thande expressed dismay at the conduct of the Applicants who have sought to circumvent the procedure of payments by Government arising from Court Orders.

Counsel heavily criticized the conduct of the Applicants in directly approaching a specific officer of the Respondent in order to get paid directly and avoid not only the office of the Attorney General but also side step their own Advocate on record.

Counsel told the Court that he smelt a rat from the overenthusiasm of the involved Government official contrary to known Government procedures.

The counsel prayed the Court not to be a party to such connivance and to quickly stamp its authority by dismissing this application brought prematurely and in bad faith.

The Court has fully agreed with the submissions by Mr. Musyoki, Mr Kuria, and Mr. Mutuma of M/S Okemwa & Co. Advocates who have come on record to represent the 2nd Claimant in order to elucidate his rights vis a vis the rest of the Claimants pursuant to the Agreement on legal fees signed by all the Claimants on diverse dates stated on the body of that Agreement.

The Agreement was also signed by Mr. Musyoki Kimanthi and David Githuku Njoroge as beneficiaries of the same.

Accordingly, the Application is dismissed with costs to M/S Kimanthi and Associates and the 2nd Claimant.

Dated and Delivered at Nairobi this 14th day of February, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE