



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 542 OF 2009

1. JOSEPH MWANGI GITHUA
2. NICHOLAS MBIYU KAMAU
3. CHARLES NDIRITU WAWERU
4. R W NGUGI..... PLAINTIFFS

VERSUS

MBO-I-KAMITI FARMERS CO. LTD.....APPLICANT

RULING

1. The Plaintiffs' claim against the Defendant in this suit was lodged on 12th October 2009 by **plaint dated 7th October 2009**. Apart from the four Plaintiffs named in the title of the suit there are another 16 claimants named in paragraph 1 of the plaint.

2. The Plaintiffs' claim is simply pleaded as the **"amount of money due and owing for salaries arrears and other emoluments"**, the Plaintiffs having been employees of the Defendant at various times. The main relief sought in the plaint is simply stated as **"determination of the amount due and owing for salaries arrears and other emoluments"**. No particulars at all of what appears to be a claim in special damages were pleaded.

3. The Defendant filed a statement of **defence dated 21st January 2010**. It denied that the Plaintiffs were ever its employees, and if they were, it denied that they were owed any dues as claimed. The Defendant also pleaded that there were various other suits concerning or related to the subject matter of this suit. It also denied the jurisdiction of this court to hear and determine the suit.

4. On 6th August 2010 a consent dated the same day signed by Advocates on both sides was filed in court. The consent was,

"By consent judgment be entered for the Plaintiffs against the Defendant for KShs 23,101,082/50 plus costs and interest".

On 9th August 2010 judgment was entered upon that consent for the Plaintiff against the Defendant for KShs 23,101,082/50 plus costs and interest. A decree was subsequently issued on 14th March 2013.

5. The Defendant then applied by **notice of motion dated 12th April 2013** for the main order that the judgment entered on 9th August 2010 pursuant to the consent dated 6th August 2010 be set aside and the

suit be heard on merits. That application is the subject of this ruling. The application is brought under **Order 22, Rule 22** of the **Civil Procedure Rules, 2010** (the **Rules**.) **Sections 1A** and **3A** of the **Civil Procedure Act, Cap 21** (the **Act**) are also invoked.

6. The three grounds for the application stated on the face thereof are –

- (i) That the consent order was entered through misrepresentation without full disclosure to the Defendant's board of directors.
- (ii) That there was no resolution of the Defendant's board of directors instructing the Defendant's counsels to consent to judgment being entered in favour of the Plaintiffs.
- (iii) That the Plaintiffs will not suffer any prejudice or injustice if the consent is set aside and the suit proceeds to hearing on merit.

7. The supporting affidavit is curiously sworn by one of the Plaintiffs, **Robert Waweru Ngugi**. He states that he is the fourth Plaintiff. He does not state that he has sworn the affidavit on behalf of the other Plaintiffs or with their consent. He depones as follows, *inter alia* –

- (i) That he was informed (not stated by whom) that some of the Plaintiffs have moved to the **Industrial Court** to execute the decree herein without notifying him.
- (ii) That he has not authorized the 1st additional Claimant herein to swear any affidavit on his behalf in execution of the decree.
- (iii) That when the suit was filed he was the general manager (apparently of the Defendant) and that he instructed the Defendant's advocate to appear on behalf of the Defendant in this suit.
- (iv) That subsequently he instructed the Defendant's advocate to enter into a consent.
- (v) That he gave those instructions awaiting formal resolution by the Defendant's board of directors as instructed by the then Chairman of the Defendant, one Stephen Waweru Njenga.
- (vi) That he left the Defendant before he could get any formal resolution of the Defendant's board of directors authorizing the consent judgment.
- (vii) That he has no claim pending against the Defendant as all his dues have been paid.
- (viii) That in fact most of the Claimants have also been paid all their dues by the Defendant despite the decree herein.
- (ix) That he now wishes for his name to be withdrawn from this claim or any decree passed herein, and that the consent judgment ought to be set aside having been compromised and most of the Claimants paid.
- (x) That in any event the consent judgment was wrongly entered as the Defendant's board of directors had not authorized the same by resolution.

8. There is a replying affidavit sworn by the 1st Plaintiff, Joseph Githua Mwangi. He has deponed that he has the authority of the 2nd and 3rd Plaintiffs as well as the rest of the Claimants to swear the affidavit. He has deponed as follows, *inter alia*, –

- (i) That in effect the affidavit sworn in support of the application by the 4th Plaintiff is irregular as he cannot be on both sides of the dispute.

(ii) That the Advocates of both sides had full and proper instructions to enter into the consent judgment.

(iii) That the said judgment has not been satisfied.

9. The application was canvassed by way of written submissions followed by oral highlighting. The Defendant's submissions were filed on 11th June 2013 while those of the Plaintiffs were filed on 18th June 2013. Highlighting was done on 16th July 2013. I have considered the submissions, including the cases cited.

10. In its submissions the Defendant has introduced the issue of jurisdiction, but I cannot quite understand to what purpose. This suit was filed on 12th October 2009 when this Court had jurisdiction to hear and determine employer/employee disputes such as is disclosed in this suit. It was not until the promulgation of the Constitution of Kenya 2010 on 27th August 2010 that the High Court, by dint of **Article 165(5)** thereof, was denied jurisdiction in such matters. Even the consent judgment was entered before promulgation of the new Constitution. It was entered on 9th of August 2010. Until and unless that judgment is set aside, there is no longer any suit herein upon which the issue of jurisdiction can be raised. The submission that this court lacked jurisdiction to enter judgment in accordance with the consent letter is entirely unmeritorious and is rejected.

11. It is now established that a consent judgment will be set aside only upon the same principles and circumstances as would obtain in the case of a contract, for instance where there is misrepresentation, illegality, etc. The Defendant herein has pleaded misrepresentation, that misrepresentation being that the Defendant's board of directors had not authorized the settlement.

12. The issue of authorization of the settlement by the Defendant's board of directors was internal to the Defendant and its advocates. It was not something that should have concerned the Plaintiffs. Lack of such resolution of the Defendant's board of directors cannot amount to a misrepresentation by the Plaintiffs. For a misrepresentation to form the basis for setting aside a consent judgment, or indeed any contract, it must come from the adverse party. This was not the case here.

13. Even the supporting affidavit which alleges want of such resolution of the Defendant's board of directors is not sworn by a director of the Defendant. It is sworn by one of the Plaintiffs! Whatever the motivation of the 4th Plaintiff in appearing to abandon his fellow Plaintiffs and joining the Defendant on the other side of the dispute, his affidavit does not establish any misrepresentation by the Plaintiffs leading to the consent judgment as would entitle this court to set it aside.

14. The application is entirely without merit and must be refused. It is hereby dismissed with costs to the Plaintiffs. Any interim stay of execution in place is hereby lifted. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF OCTOBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2013