



Jirongo & another v Board of Trustees of the National Social Security Fund (Environment & Land Case 364 of 2011) [2015] KEELC 853 (KLR) (3 June 2015) (Ruling)

Shakhalaga Khwa Jirongo & another v Board Of Trustees Of The National Social Security Fund [2015] eKLR

Neutral citation: [2015] KEELC 853 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 364 OF 2011**

LN GACHERU, J

JUNE 3, 2015

BETWEEN

SHAKHALAGA KHWA JIRONGO 1ST PLAINTIFF

THE SOLOLO OUTLETS LIMITED 2ND PLAINTIFF

AND

**BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY
FUND DEFENDANT**

RULING

1. The Plaintiffs filed an application dated 20th March 2012, and sought orders that :
 1. The Court be pleased to declare that this suit has been partially compromised and enter judgment for the Plaintiffs against the Defendants in the sum of Kshs. 490,850,090/= with costs to the Plaintiffs.
 2. The Court be pleased to determine the interest rate and sum payable by the Defendant to the Plaintiffs pursuant to the Settlement Agreement dated 20th December 2011.
 3. The Court be pleased to review and vary the Settlement Agreement dated 20th December 2011 and order that: The Plaintiffs be at liberty to pursue their claim in respect of increased scope of work, bored piling, inflation and loss of user of plant and equipment to full hearing.
 4. Such other or further orders as this Court may deem just and mete to grant.
2. The application is premised on grounds that the parties reached a settlement on 20th December 2011, which was forwarded to the Court in form of a letter to the Deputy Registrar on 22nd December 2011 and that thus far the Settlement has been part performed. The Plaintiff avers that in the said



Settlement, they omitted the rate of interest and that quantum had not been agreed upon. It is averred that after filing the Settlement Agreement, the Defendant made undertakings to pay the balance of the interest calculated by itself in the sum of Kshs. 300,183,554.90/= upon fulfilling the internal approval mechanisms. The Defendant also undertook to negotiate the Plaintiff's claim of additional scope of work, bored piling, inflation and loss of user of plant and equipment. The Plaintiffs aver that they are apprehensive that the new Managers of the Defendant are prevaricating on the undertakings and commitments made by the previous Managing Trustee. The Plaintiffs urge that the Settlement be varied and adjusted so as to preserve their right to pursue their claims in the event that the Defendant does not wish to negotiate and settle as agreed. Further, that the Court should determine the rate of interest and the quantum of interest due to the Plaintiffs where the parties fail to agree.

3. The application is supported by an affidavit sworn by the 1st Plaintiff who reiterated the grounds of the application deposing that he entered into a Settlement Agreement with the Defendant for the offered amount of Kshs. 490,850,090/= in settlement of their claim. However, that he had direct negotiations with the Managing Trustee, the Corporations Secretary and a Mr. Nzatu where it was agreed the Plaintiffs accept the offered amount and to reserve the question of the rate of interest payable on the said settlement and quantum for additional works for further discussion and Board ratification. Following the agreement, the Defendant paid the offered amount in two instalments in the months of January and February 2012, which amount did not include the Plaintiffs' claim on additional works together with costs and interests which were to be reviewed by the Board of Trustees of the Defendant. It is deposed by the 1st Plaintiff that following a meeting held on 27th February 2012, between the parties, the Plaintiffs' advocates presented figures for the additional items as well as the interest due for discussion which the Defendant in which the Defendant has never responded to.
4. The 1st Plaintiff deposed that it is just and mete that the Court does determine the interest payable to the Plaintiffs pursuant to the settlement in view of the fact that the parties have not agreed on the issue. Similarly, that the Court should vary the Settlement Agreement to reflect that the suit is settled save for the claims for additional works, bored piling, inflation and loss of user of plant machinery and equipment which the Plaintiffs are ready to adduce evidence. The deponent reiterated that the Settlement Agreement was entered into on the basis of the Defendant's Managing Trustee's commitment and undertaking to pay the with-held interest on the settlement sum and re-submit the four heads of claim to the Board of Trustees for approval. He deposed that it would be a gross misrepresentation and fraud on the part of the Defendant to be allowed to renege from the commitment which informed the execution of the Settlement Agreement.
5. Mutemi Nzatu, the Property Development Manager of the Defendant swore a Replying Affidavit on 16th April 2012 wherein he deposed that the matter had been concluded as per the consent filed in Court on 22nd December 2011. Further, that the said consent was clear and unequivocal and only left the issue of party and party costs to be determined. It was deposed that if there were any promises to resubmit additional issues after the payment of the offered amount, the same ought to have been reduced to writing. It was deposed that the Plaintiff had not established cogent reasons to warrant a review of the settlement since there was no fraud, coercion, mistake or misrepresentation.
6. The application was canvassed by way of written submissions. Wagara, Koyyoko & Company Advocates for the Plaintiffs filed submissions dated 14th August 2014 wherein counsel submitted that since the Defendant reneged on the understanding upon which the consent was recorded, its conduct was in bad faith amounting to misrepresentation and unjust enrichment and therefore the Plaintiffs were seeking an opportunity to prove their claims. It was submitted that the Managing Trustee of the Defendant assuring the Plaintiff and the subsequent refusal to honour the undertaking constituted fraud which is sufficient a ground for variation of consents. Counsel submitted that it would be unjust



and unconscionable to allow the Defendant to defeat the Plaintiffs' legitimate claim for interest and the four heads of claim on the basis of consents entered on dishonest misrepresentations.

7. Mohammed Muigai Advocates for the Defendant filed submissions dated 28th June 2013, wherein counsel submitted that the Settlement Agreement constituted a valid and binding contract which could only be varied or set aside and substituted with other orders on the grounds that would justify a similar variation to a contract. It was submitted for the Defendant that if indeed the Settlement Agreement was just but an interim agreement pending further negotiations on other items, nothing would have been easier than it to be indicated on the consent filed in court. Further, that since these were negotiations before the consent was entered, the parties would be aware of the additional items and therefore incorporated them into the consent before execution and filing if indeed that was the intention. Conversely, that the term "full and final settlement" in the consent executed between the parties was clear and unambiguous. Counsel thus submitted that there was no justification why the Settlement Agreement should be varied, and that in that regard, the court could not interfere with a valid contract between parties.
8. Counsel further submitted that in the event that there were any promises made by the former Managing Trustee, the same did not form part of the Settlement Agreement and further that they were uncertain as they are verbal only known to the former Managing Trustee and the 1st Plaintiff. Additionally, the former Managing Trustee lacked authority to unilaterally bind the Defendant unilaterally to a contractual arrangement. Counsel pointed the Court to the provision of Section 4 of the First Schedule of The *National Social Security Fund Act* (Cap 258) which provides that the Board of Trustee is the only body with authority to contract on behalf of the Defendant.
9. This court has considered its instant Notice of Motion and the written submissions and find that:-

The Plaintiff entered into consent with the Defendant on 22nd December 2011 as follows:

"BY CONSENT

The Suit and Counterclaim herein be marked as settled on the following terms:

- a) The Defendant do pay to the Plaintiffs the sum of Kshs. 490,850,090/- in full and final settlement of their claim.
- b) Costs of the suit be awarded to the Plaintiffs."

10. The contents of the consent are not in dispute, in fact the Plaintiff admits that the Defendant has settled the amount together with the costs of the suit. The Plaintiff's issue, which is the gist of the application, is that the consent was entered into on the verbal undertaking that the former Managing Trustee of the Defendant will present to the Board additional issues that require its approval before payment can be made to the Plaintiff. These are: rate of interest on the settlement amount, and payment for additional works, bored piling, inflation and loss of user of plant and equipment. The Plaintiffs pray that the court does determine the interest rate and vary the Agreement so as to re-open the case to enable they adduce evidence to prove their claim. In essence, the Plaintiff asks of this court to vary the terms of their Settlement Agreement which was adopted as a consent order.
11. Both counsels in their submissions cited leading authorities on the subject of variation and setting aside of consent orders, including:

Flora Wasike V. Destimo Wamboko (1982 – 1988) IKAR 625 where the Court held that:



It is now settled that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, for example, fraud, mistake or misrepresentation or if certain conditions remain to be fulfilled, which are not carried out.

Brooke Bond Liebig (T) Limited – vs- Maliya (1975) E.A. 266 where the Court held that:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all the parties to the proceedings or action, and 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 material facts, or in misapprehension or in ignorance of material facts, or in general for reason which would enable the court to set aside an agreement.”

12. From the foregoing decisions, it is clear how a Court should treat consent orders. The Courts cannot vary or set aside an order entered by consent unless the circumstances enumerated in the authorities cited occur. The Plaintiffs aver that there was fraud and misrepresentation in the execution of the consent order because their signing was on the understanding that the other items would be presented to the board for ratification.
15. From the Plaintiff's averments, it is evident that the issues allegedly meant for further discussion and ratification by the Board was within the parties' knowledge before execution of the consent. The Plaintiffs produced a letter dated 20th December 2011 accepting the Defendant's offer but requested the Defendant to reconsider the interest payable on the settlement amount and four heads of claim. They also annexed another dated 27th February 2012 addressed to the Defendant's advocate stating that signing of the consent order was based on a firm and unequivocal undertaking by the Defendant. The Plaintiffs profoundly relied on these letters to show that the consent was subject to the Board deliberations of interest rate and the other heads of claim.
13. Whilst this Court would want to believe that there were negotiations leading to an undertaking promise by the former Managing Trustee of the Defendant, there is no way of ascertaining this fact. Firstly, there were no minutes presented to the court of the deliberations between the parties capturing the Plaintiff's request and the Managing Trustee's undertaking to present the same to the Board. Secondly, and more importantly, this aspect was not captured in the consent between the parties. The Plaintiffs having had prior knowledge of pending issues, had the option of entering into a partial settlement by accepting the offer made by the Defendant on conditions. "Full and final settlement" in my view, signifies a clear intention on the part of the parties that they have agreed on all issues and factored in prior negotiations.
14. It is my finding, and I do so hold that the Plaintiffs have not established fraud or misrepresentation on the part of the Defendant to warrant the setting aside or variation of the consent order dated 22nd December 2011. In the circumstances, their application is dismissed with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF JUNE 2015

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiffs/Applicant



.....For the Defendant/Respondent

..... Court Clerk

