IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, OUKO & J. MOHAMMED JJ.A)

CIVIL APPEAL NO. 293 OF 2014

BETWEEN

THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND..... APPELLANT

AND

MICHEAL MWALO ..... RESPONDENT

(Appeal from the ruling and order of the Industrial Court at Nairobi (L. Ndolo, J.) delivered on 18th March 2013 in

H.C.CR. A. NO.212 OF 2008)

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JUDGMENT OF THE COURT

BACKGROUND

1. This judgment is from the ruling and order of the Industrial Court of Kenya (now the Employment and Labour Relations Court) delivered on 18th March 2013 by Linnet Ndolo, J in Industrial Court Case No.1093 of 2012 which the appellant challenged in this appeal. The relevant antecedent facts in this appeal are discernible from the record.

2. **The respondent**, Micheal Mwalo, qua claimant, sued **the appellant**, The Board of Trustees of the National Social Security Fund, in the Industrial Court seeking orders that he was wrongfully and unfairly declared redundant and demoted; that his rank was reduced and his duties and services were downgraded; that there was forceful application of the collective agreement terms of employment on his (respondent's) employment contract; that his freedom of association was, unfairly and wrongfully abused.

3. The parties broached the possibility of settlement and by dint of a consent dated and filed in the said suit on 19th November 2012, the respondent's claim was settled on the terms that he would be paid (1) severance pay amounting to Shs.10,568,587/20 (2) three months pay in lieu of notice amounting to Shs.627,102/=; (3) leave pay amounting to Shs.285,679/80; and (4) relocation allowance of Shs.50,000/=.

4. It seems that all was not well in the appellant's camp for thereafter the latter went back to the Industrial Court under a certificate of urgency seeking, inter alia, orders for stay of the decree extracted on 10th December 2012 from the consent-judgment that ensued from the settlement and the recorded consent. The record shows that the Board of the National Social Security Fund, the appellant herein, held a meeting at which it declined to compensate the respondent pursuant to the settlement and directed the management to have the consent giving rise to the settlement reversed and the respondent re-deployed, with the rider that if the respondent failed to take up the re-deployment, due process be resorted to with a view to dismiss him. The respondent was intent on pursuing the fruits of the consent judgment, and hence the application by the appellant to the Industrial Court seeking to review the consent.

5. The application for stay and review of the consent judgment by the appellant was heard inter-partes on 12th February 2013. The challenge mounted on the settlement by the appellant was predicated on the ground that the appellant as the Board of the National Social Security Fund had not given its prior approval to the settlement and therefore, it contended, the consent was illegal. It therefore prayed for its reversal.

6. It is important to note that the settlement was reached between the respondent as claimant on the one hand and the Managing Trustee of the appellant acting on the appellant's behalf through counsel on the other hand. The record of appeal shows that there was a tug-of-war between the Chairman of the appellant and the latter's Managing Trustee that led to the action by the appellant in reneging on the consent giving rise to the settlement.

7. The Industrial Court (Linnet Ndolo, J) resolved the matter in its impugned decision of 18th March 2013 by holding that –

> ***"there is no specific provision (in law) barring the Managing Trustee from giving instructions to the appellant's duly appointed advocates to settle disputes by consent. Good corporate governance demands that the powers of the Chief Executive Officer who is the head of the management to be clearly spelt out in order to avoid collision of roles with the Board".***
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> ***"The instrument of appointment of the Managing Trustee contemplated under Section 33(3) of the National Social Security Fund Act or the appellant's internet policy and operational documents would ordinarily have provided that demarcation. None of these documents was produced and it was therefore not possible for the Court to determine the actual powers delegated to the Managing Trustee by the Board as contemplated under Section 33(4) of the Act.***
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> ***"A reasonable man dealing with a Chief Executive Officer (CEO) expects that the CEO has the authority to do what he does. In the absence of breach of an express provision of the law, a third party cannot be subjected to prejudice for having taken the word of the CEO. To rule otherwise would be to expect anyone dealing with the CEO to get into the corporation boardroom to verify the word of the CEO."***
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> ***"In the light of the foregoing, I find that the appellant (the respondent in the Industrial Court) has failed to prove any ground for review of the consent judgment entered on 20th November 2012. The application for review is therefore dismissed with costs to the claimant (the respondent in this appeal)."***

8. It is that decision by Linnet Ndolo, J that precipitated the appeal before us.

GROUNDS OF APPEAL AND SUBMISSIONS OF COUNSEL

The appellant put forward 4 grounds of appeal in its memorandum of appeal (dated and lodged in Court on 21st October 2014) as follows:-

1. ***The learned Judge erred in law and fact in her Ruling by primarily being driven and basing the same upon her observations of the previous conduct of the Appellant.***

2. ***The Learned Judge erred in law and fact in her judgment by totally failing to appreciate the primary issue of illegality of the consent that was raised in the application and authorities cited in support of the same.***

3. ***The learned Judge erred in law and fact in her Ruling by failing to appreciate the law particularly the provisions of sections 3, 4 and 33 of the National Social Security Act, in order to appreciate the functions of the Board vis-à-vis the powers and duties of the Managing Trustee.***

4. ***The learned Judge erred in law and fact in her Ruling by failing to totally address her mind as regards the gravity of the issues raised by the appellant and the totality of evidence adduced by the appellant.***

9. The appeal came up for hearing before us on 15th January 2015. **Mr. Muchoki Gichuru**, learned counsel for the appellant, argued all the four grounds of appeal while **Mr. Cyprian Onyony**, learned counsel for the respondent, opposed the appeal. Counsel for the appellant also relied on 9 authorities contained in his list of authorities while counsel for the respondent relied on 8 authorities, six of which were in his first list of authorities and two in a second list of authorities. We have perused them. These were the arguments that counsel advanced before us.

10. Submitting on behalf of the appellant, Mr. Gichuru contended that the mandate to manage the National Social Security Fund was vested in the Board of Trustees. The Fund comprises workers' funds. Counsel contended that Section 33 of the National Social Security Fund Act does not confer on the respondent the power to deal with issue of funds in the manner that he did in this case without prior approval of the Board unless the Board had delegated its powers to him. It was counsel's submission that the Board had not delegated its power to the Managing Trustee to effect the settlement. He referred to paragraphs 8 and 9 of the respondent's statement of claim in which the latter averred (and lamented in paragraph 8) that his duties were reviewed and that he was demoted to a clerk (grade 7) without the consent of the Board of Trustees. In paragraph 9, he conceded that his *"termination/appointment/confirmation and demotion could only be through the Board of Trustees."* Counsel also drew the court's attention to paragraph (ii) in the minutes of Board of Trustees of 13th December 2012 in which the latter, inter alia, resolved that the Managing Trustee would attend Audit and Risk Committee meetings by invitation with the rider that the Internal Audit & Risk Manager would check with institutions such as NHIF, Standard Chartered etc for adoption of best practice. But of note is the fact that the minutes relate to the period after the litigation between the parties, and not before. They are, for that reason not very helpful in that they are ostensibly made with the dispute in mind and, and at any rate any reasonable person would in the circumstances be forgiven for viewing them as self-serving.

11. On the law, with regard to the issue of review, Mr. Gichuru submitted that as the consent on the basis of which the settlement was recorded was illegal for want of sanction by the Board, the Industrial Court had an obligation to review the matter. The law, he said, was in support of such review. He referred to the decision in **Kenya Commercial Bank v. Specialised Engineering Co. Ltd [1982] e KLR 485** and submitted generally on the authorities in his list of authorities and stressed that the authorities emphasized the significance of the issue of illegality.

12. The appellant emphasized the issue of illegality of the consent giving rise to the judgment on the ground that the Managing Trustee acted without authority and in contravention of the National Social Security Fund Act.

13. Mr. Gicheru cited in his list of authorities, inter alia, cases that emphasized the issue of illegality in transactions.

14. In **Birket V. Arcon Business Machines Ltd** [1999] 2 All ER 429 The Court of Appeal in England

held that -

> ***"if a transaction was on its face manifestly illegal, the court would refuse to enforce it, whether or not either party alleged illegality. If a transaction was not on its face manifestly illegal but there was persuasive and comprehensive evidence of illegality, the Court might refuse to enforce it even if illegality had not been pleaded or alleged. The principle behind the court's intervention of its own notion in such a case was to ensure that its process was not being abused by an invitation to enforce sub silentio a contract whose enforcement was contrary to public policy"***

15. In **Makula International Ltd Vs His Eminence Cardinal Nsubuga and Another** [1982] HCB II, the Uganda Court of Appeal held that -

> ***"...a court of law cannot sanction what is illegal and illegality once brought to the attention of the Court, overrides all questions of pleadings including admissions made thereon."***

16**.** Counsel for the appellant urged us to allow the appeal and set aside the decision of the Industrial Court. He did not put a spirited case on the ground of review. But even if he had, the facts do not disclose any ground on the basis of which a Court of law would be entitled to review the consent judgment. There was no discovery of new and important matter or evidence nor was there some mistake or error apparent on the face of the record. There was also no discernible matter that could constitute *"any other sufficient reason"* on the basis of which review could be justified. In **National Bank of Kenya Ltd v. Ndungu Njau** (Civil Appeal No.211 of 1996) this Court (differently constituted) stated with regard to review:-

> "***A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."***

17. It is now settled law that *"any other sufficient reason"* in Order 45 Rule 1 of the Civil Procedure Rules need not be analogous with the other grounds in the order because clearly Section 80 of the Civil Procedure Act confers an unfettered right to apply for review and so the words *"for any other sufficient reason"* need not be analogous with the other grounds specified in the Order (see **Sandar Mohamed v. Charan Singh [1959] EA** 793 at pg 795 f-h.

18. In retort, and submitting on behalf of the respondent, Mr. Onyony contended that there was no evidence or law to show that the Managing Trustee could not instruct an advocate as he did. He invited our attention to Sections 3, 4 and 33 of the National Social Security Fund Act, Cap 258 and emphasized that under Section 33(2) the Managing Trustee is the Chief Executive of the Fund and is responsible to the Board of Trustees for its management. He pointed out that the instrument appointing the advocate for NSSF was not furnished to the Court below by the appellant to show whether or not the Board had sanctioned the consent for the settlement of the claim. In counsel's view, the failure to provide that instrument ought to be construed adversely to the appellant's case. Moreover, contended Mr. Onyony, the powers delegated to the Managing Trustee were not produced to the Court below to show whether or not they included power to enter into settlement or to compromise a monetary claim against NSSF. It was counsel's further submission that it cannot be that before a consent is recorded to settle a matter as happened in this case, the court must inquire whether the advocate for NSSF had been properly instructed or retained in the brief. That, in counsel's view, would be to require the court to engage in micromanagement! Counsel also alluded to the minutes of NSSF of 13th December 2012 (made after the consent had been recorded) and in particular the minute in which the Board of Trustees was recorded to have declined to compensate the respondent and instead directed management to have the consent reversed and the respondent re-deployed or due process be followed to dismiss him if he declined to accept redeployment. Counsel pointed out that the Board did not raise any issue of want of authority on

the part of the respondent to enter into the consent nor were the allegations of collusion or connivance or misrepresentation made against the respondent in those minutes. If these genuinely existed, contended counsel, the Board would have had a record of same. In his view, it was not until after the respondent had left employment and started demanding his dues that the Board started alleging illegality in the making of the consent, yet it furnished no evidence to show that the Managing Trustee had no authority to settle monetary claims, much less instruct an advocate. Counsel concluded his oral submissions by pointing out that the appellant had failed to canvass any of the grounds in the memorandum of appeal and urged us to dismiss the appeal with costs as lacking in merit.

DETERMINATION

19. We have circumspectly perused the record of appeal and duly considered the rival submissions of counsel for the parties and the authorities cited.

20. This being a first appeal, it is our duty to re-evaluate and re-examine the evidence adduced in the suit and make our own determination (see **Selle v Associated**

Motor Boat Company [1968] EA 123; Williamson Diamonds Ltd v Brown [1970] EA 1 and **Arrow Car Ltd v Bimomo and 2 Others [2004] 2 KLR 101.**

21. We have discerned that this appeal turns on only two issues, namely, (1) the role and powers of the Managing Trustee vis ? vis the role of the Board of Trustees and (2) whether the consent that gave rise to the consent judgment was valid.

22. Under Section 3 of the NSSF Act, the Social Security Fund is vested in and operated and managed by the Board of Trustees. The Fund contains contributions from workers and other payments required by the Act to be paid into it. Section 3(2)(c) stipulates that there shall be paid out of the Fund all benefits and other payments required by the Act to be paid out of the Fund.

23. In the case before us, the payment pursuant to the consent judgment was not shown to be outlawed by this Section. If it was, the matter would end there and the lower court decision would have to be reversed.

24. The Managing Trustee is appointed by the relevant Minister on recommendation of the Board of Trustees to hold office on such terms and conditions of service as may be specified in the instrument of his appointment. Neither party to these proceedings furnished the Court by way of evidence the instrument under which the Managing Trustee was appointed so as to show whether acts of the hiring an advocate to act for the appellant and to compromise the claim by the respondent were outside the remit or ambit of the Managing Trustee's powers.

25. Read as a whole, the NSSF Act does not bar the Managing Trustee from hiring the services of an advocate and the Industrial court was right in its conclusion in this regard. The learned Judge (Linnet Ndolo J) delivered herself in this regard thus:-

> ***"there is no specific provision barring the Managing Trustee from giving instructions to the respondent's duly appointed advocates to settle disputes by consent! Good corporate governance demands that the powers of the Chief Executive Officer who is the head of management be clearly spelt out in order to avoid collision of roles with the Board."***

26**.** As Section 3 of the NSSF Act constitutes the NSSF into a body corporate with perpetual succession and a common seal with capacity to sue and be sued, company law principles apply to it. For this reason the principle in the English case of **Royal British Bank v. Turguand** [1856] 6 E & B 327 applies. Simply put, the rule in Turguand's case states that a person dealing with a company in good faith is entitled to assume that the company has complied with its internal procedures and formalities. We may add that such person is under no obligation to find out whether what, *ex facie*, appears to be the practice of the company has the blessings of the Board or shareholders or is in accord with the Articles of Association of the company. The issue of due diligence does not extend so far as to encapsulate the

internal decisions of the company relating to the way the company runs its affairs. The rule in Turguand's case has been embraced by courts in this country and has been cited in various authorities but we see no need to reproduce them here. Even in the Republic of South Africa, the Supreme Court of South Africa has applied the principle in the case of **Stand 242 Hendrik Potgieter Road Ruimsig Pty v. GÖbel (No.246/10) [2011] ZASCA105 (June 2011)** where the Court rendered itself thus –

> ***"the rule, in essence, is that a person dealing with a company in good faith is entitled to assume that the company has complied with its internal procedures and formalities."***

27. English courts have for many years applied the principle. In **Mohoney v. East Holyford Mining Co [1875] L.R. 7 HL 869 Lord Hatherly** stated –

> ***"when there are persons conducting affairs of a company in a manner which appears to be perfectly consonant with the articles of association, then those dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company."***

28. In the instant appeal, the burden was on the appellant to show that the Managing Trustee exceeded the remit of his powers. The appellant was in a position to do so as it had the records. It did not. It is instructive that even in the Board of Trustees meeting of December 2012, the issue of lack of mandate or power on the part of the Managing Trustee to settle monetary claims or to hire an advocate was not raised. Subsequent allegations that the Managing Trustee had no power to hire an advocate to settle the claim may appear to right thinking persons to be an afterthought calculated to help the NSSF eschew the judgment debt arising out of the consent. Allegations too by the Appellant's legal officer inputing collusion and connivance on the respondent after the consent judgment and after the appellant had made a decision to mount an assault on the consent may appear self-serving. At any rate, such allegations did not transcend the realm of rhetoric and speculation as they were not buttressed by any evidence.

29. The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.

30. There is a plethora of cases in the High Court and in this Court stating the law on the issue of setting aside of a consent judgment. Some of them were cited by counsel in this matter. It will suffice to refer to a few of these.

31. In **Wasike v Wamboko the High Court at Kakamega** (Gicheru J, as he then was) held -

> ***"1. A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.***
>
> ***2. The Civil Procedure Act (Cap 21) Section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties where a party seeks to prove that the decree is invalid ab initio and should be rescinded or that there exist circumstances to warrant varying the decree.***
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> ***3. In this case, there were no grounds which would justify the setting aside of the consent judgment.***
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> ***Appeal dismissed."***

32**.** The position is clearly set out in **Setton on Judgments and Orders** (7th Edn), Vol.1 pg 124 as follows-

"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...

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 general for a reason which would enable the court to set aside an agreement."

33. This passage was followed by the court of appeal in Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269 in which Law Ag P said:

> ***"A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."***

34. In **Kenya Commercial Bank Ltd V. Benjoh Amalgamated Ltd, Githinji J**, (*as he then was*) considered the circumstances under which a consent Judgment can be set aside and referred to and relied on the decision in **Hirani V. Kassam [1952] 19 EACA 131** in which the above passage from Seton on Judgments and Orders was approved. (The decision by Githinji J, was reversed by this court on a different point).

> ***"It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-***
>
> ***"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."***

35. In **Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd** [1982] KLR 485, Harris J correctly held inter alia, that –

1. ***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.***

2. ***A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.***

36. The appellant did not place any evidence to show illegality in the consent giving rise to the judgment, and the allegations of collusion and connivance had not even a scintilla of evidence to support them. They remained mere allegations without more and coming as they did after the appellant's decision to challenge the consent, they were hardly credible.

37. The upshot of what we have stated above is that the appeal is bereft of merit in that the appellant has failed to show that the learned Judge of the Industrial Court (Linnet Ndolo, J) erred in her decision of 18th March 2013 in which she refused to review the consent judgment entered on 20th November 2012 in Industrial Court Case No.1093 of 2012. In the result, we dismiss the appeal with costs.

Dated and made at Nairobi this *24th day of April 2015*.

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR