



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 7 OF 2014

BETWEEN

SAMUEL WAMBUGU MWANGIAPPELLANT

AND

OTHAYA BOYS' HIGH SCHOOLRESPONDENT

(Appeal against the Ruling of the Industrial Court of Kenya at Nyeri, (Abuodha, J.) dated 3rd October, 2013

in

Industrial Cause No. 1 of 2013)

JUDGMENT OF THE COURT

1. The appellant filed a statement of claim against the respondent in the Industrial Court at Nyeri. He averred that at all material times he had been employed as a watchman by the respondent. He was employed on 3rd December, 2008 and worked continuously for 21 months earning Kshs. 6,000/= per month. The appellant in his claim stated that he diligently discharged his duties until 21st August, 2010 when the principal of the respondent school, Mr. D. M. Muriithi, verbally terminated his employment.
2. The appellant informed his union, Kudhehia, about the dismissal; by a letter dated 25th August, 2010 the union instructed the respondent to pay the appellant his terminal dues. The District Labour Office called for a conciliatory meeting on 10th March, 2011; on that day, the appellant avers that the meeting took place in the presence of the principal of the respondent school, the union official and the conciliator. It is the appellant's claim that since he did not personally attend the meeting, the said conciliation meeting was illegal. After the conciliation meeting the appellant was paid Kshs. 60,100/= which he admits receiving.
3. The appellant's claim before the Industrial Court against the respondent is for lost salary and house allowance from the time of unlawful termination and terminal dues computed to a total of Ksh. 566, 225/=.
4. The proceedings before the Industrial Court relevant to this appeal were as follows:
 - *On 14th March, 2013, the learned Judge ordered that the local representative of the claimant's*

union (Kudhehia), Mr. Gatere, to appear before the court to explain/brief the court on what attempts the Union had made to resolve the instant dispute.

- **On 27th May, 2013, the court recorded consent to the effect that the parties had agreed to amend and register a signed consent on the claims in question for Mr. Samuel Wambugu and both parties agreed that the consent be entered as the award of the court.**
 - **On 5th June, 2013, the consent recorded by the parties before the Deputy Registrar on 27th May, 2013 was adopted as the order of the court save that the amount payable to the claimant was corrected to read Kshs. 98,675/=. On this day, Mr. Gatene from Kudhehia appeared for the claimant.**
5. By Notice of Motion dated 17th July, 2013, the appellant moved the Industrial Court seeking Kshs. 300,000/= as compensation for unlawful dismissal of his services by the respondent. He also sought Kshs. 55,000/= as costs of the suit.
 6. The Motion came before the honourable Judge (Aboudha, J.) on 3rd October, 2013, who made the following order which is the subject of this appeal: -

“This matter having been settled by consent of the parties, the court sees no reason to reopen the same and Notice of Motion dated 17th July, 2013 is hereby dismissed with costs”.

7. Aggrieved by the dismissal of the Motion, the appellant has moved to this Court citing various grounds in his memorandum of appeal. The main ground of appeal is that the learned Judge erred in dismissing the Notice of Motion with costs without a fair hearing and further, the respondent never gave any credible reason why the appellant deserved to be dismissed from employment.
8. At the hearing of the appeal, the appellant acted in person while the respondent was represented by learned State Counsel, Mr. Muthuri A.N.
9. The appellant in his submissions stated that the report by the conciliator did not indicate that he was seeking compensation for unlawful termination of employment. He further submitted that the consent filed in court was done without his knowledge and signature and it was therefore not binding UPON him. It was submitted that he raised these issues before the learned Judge who referred the matter to the conciliator but the conciliator indicated that the appellant was not entitled to any more monies. The appellant submitted that he had not been paid the amount agreed upon during the conciliation meeting and his current claim was for Kshs. 600,000/= for unlawful termination.
10. Counsel for the respondent adopted the submissions made in a related appeal being ***Civil Appeal No. 6 of 2014***. It was submitted that a consent dated 23rd May, 2013, was duly signed by Kudhehia as the Union representing the appellant and the State for the respondent; that the consent was filed and adopted as the award of the Industrial Court. It was submitted that at no time did the appellant raise the issue that the consent was made by fraud or mistake. That money due and owing to the appellant as per the consent filed in court had been paid. The respondent cited the case of ***Kenya Commercial Bank Limited – vs- Benjoh Amalgamated Limited & another -Civil Appeal No. 276 of 1997***, in support of its submissions.
11. We have considered the record of appeal and examined the ruling made by the learned Judge on 3rd October, 2013. The main issue in this appeal is whether the learned Judge erred in dismissing the Notice of Motion dated 17th July, 2013, on the basis that the dispute between the parties had been settled by consent. It is the appellant’s case that the consent filed and recorded before the Industrial Court is not valid since he was not personally present in the conciliation meeting and he never personally signed the consent. In addition, it is the appellant’s case that the consent is not valid as it does not address the issue of his compensation for the unlawful termination of his employment.
12. On record there is a written consent dated 23rd May, 2013, duly signed by Mr. Samuel Gatene, the branch secretary for Kudhehia which represented the appellant in this matter as the claimant. For the respondent, the consent is signed by a State Counsel. Pursuant to this signed and filed consent,

the learned Judge endorsed the terms of consent as award of the court. The issue in this appeal is whether this consent can be set aside to allow the parties to litigate afresh.

13. **Section 22** of the **Industrial Court Act**, 2011 provides that:

“In any proceedings before the Court or a subordinate industrial court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party’s trade union or employer’s organization and if the party is a juristic person, by a director or an employee specifically authorized for that purpose”.

In the instant case, the appellant was represented by Mr. Samuel Gatene who is an official of Kudhehia. At paragraph 10 of his Statement of Claim, the appellant reported the dispute he had with the respondent to his Union (Kudhehia). In the entire proceedings before the conciliator and the Industrial Court, the appellant was represented by the Union. It is our considered view that the appellant having chosen to be represented by his Union is bound by the actions of the Union. We find and hold that the consent dated 23rd May, 2013, duly signed by the Union on behalf of the appellant is valid and binding upon the appellant.

14. Circumstances under which a consent judgment may be interfered with were considered in the case of ***Brooke Bond Liebig (T) Limited – vs- Maliya (1975) E.A. 266***. It was stated 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 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 ignorance of material facts or in general for a reason which would enable the court to set aside an agreement. In the instant appeal, the appellant has not alleged fraud, collusion or any of the reasons that can justify the setting aside of the consent order made on 23rd May, 2013. The Notice of Motion and record before the learned Judge did not disclose facts that prove any of the grounds for setting aside a consent judgment.

15. We note that the appellant was represented by his Union and we further note that the appellant received payment pursuant to the consent judgment. A consent order has a contractual effect upon the parties. It is our considered view that the conduct of receiving money pursuant to the consent judgment operates as an estoppel against the appellant and prevents him from challenging the terms of the consent.

16. We note that in the memorandum of appeal, the appellant asks this Court to order compensation to be paid to him for unlawful termination of employment. The issue before us is whether the learned Judge erred in law in dismissing the Notice of Motion dated 17th July, 2013. The issue of compensation is a matter of fact that was compromised by the consent order made by the parties before the industrial court.

17. In totality, we find that this appeal has no merit as the appellant was ably represented by his Union and the consent order made on 23rd May, 2013 binds the appellant; no ground for setting aside a consent order was laid before the learned Judge; and the appellant is also estopped from denying the terms of the consent judgment . This appeal is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 18th day of June, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR