



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
ELRC. CAUSE NO. 1315 OF 2013

UNION OF NATIONAL RESEARCH AND ALLIED INSTITUTES

STAFF OF KENYA (UNRISK).....CLAIMANT

-VERSUS-

KENYA MEDICAL RESEARCH INSTITUTE (KEMRI).....RESPONDENT

AND

OKIYA OMTATAH OKOITI.....1ST PROPOSED INTERESTED PARTY

NYKINA GISEBE WYCLIFFE.....2ND PROPOSED INTERESTED PARTY

RULING

1. On 19.18.2013, the claimant union brought this suit seeking for orders to compel the respondent to implement the Government Circular NO. MSPS 2/6/4a Vol. X/127 OF 25.6.2012 which awarded all the employees of the respondent extraneous allowance. The Claimant further sought all accrued arrears to be paid to the said employees.

2. On 31.3.2017, the court entered judgment as prayed by the claimant in favour of all the staff of the respondent. On 6.2.2019 the parties filed a consent order on the mode of executing the judgment and decree in favour of all the staff of the respondent.

3. On 24.5.2019, Mr. Omtatah Okoiti and Mr. Nyakima Gisebe Wycliff filed the instant application dated 16.5.2019 seeking the following orders:

(a) to be enjoined as interested parties to these proceedings.

(b) Upon joinder, the decree/orders of this court in its judgment dated and delivered on 31.3.2017 be enforced in full and beyond doctors, nurses, clinical officers, veterinary officers and lab technologists, to include all public health workers employed by the respondent such as engineers, biomedical and social research scientist, and their support staff (drivers, administrators, secretaries etc.).

(c) The consent agreement signed between the claimant and the respondent on 4.7.2019 be set aside in terms of paragraph 3, 4, 5 and 7.

(d) Costs

4. The application is premised on the grounds on the body of the motion and it is supported by affidavit of Mr. Okiya Omtata Okoiti sworn on 16.5.2017.

5. The Claimant and the respondent have opposed the application by their grounds of opposition dated 20.12.2019 and 22.12.2019 respectively. The application was canvassed by written submissions.

APPLICANTS CASE

6. The applicants case is that they filed petition no. 134 of 2018 and Radido J delivered judgment and whereby it was held that the subject

matter in the petition had been determined by judgment delivered herein on 31.3.2017. The applicants contended that one of the reasons for filing petition 134 of 2018 was that the judgment herein excluded some employees of the respondent. They argued that the judgment dated 31.3.2017 should be enforced in full and beyond doctors, nurses, clinical officers, veterinary officers and lab technologists to include all staff of the respondent even those stationed outside the Centre for Clinical Research.

7. The applicants further ordered that the consent agreement dated 4.7.2018 should be set aside because paragraph 3 is vague and omits accrued arrears; paragraph 4 changes the effective date from 1.12.2011 to 1.7.2019; and paragraph 5 and 6 fails to acknowledge that court orders need to be obeyed and there is no need to seek approval from any other body or authority.

8. According to the applicants, this court has unfettered powers and jurisdiction to grant the orders sought; and that it is in the interest of justice that the orders sought are granted.

CLAIMANT'S AND RESPONDENT'S CASE

9. The Claimant and the Respondent's contended that the court is *functus officio* and it lacks jurisdiction to determine the instant application because the suit is fully determined; that the applicants are strangers to the suit coming too late and they have not disclosed valid or legal interest they have in the suit; that there are no legal or valid grounds to show for setting aside the consent agreement; the application is frivolous, vexatious and an abuse of court process. Consequently, they prayed for the application to be dismissed with costs.

ISSUES FOR DETERMINATION

10. Upon careful consideration of the application and the rival submission, the main issues for determination are:

- (a) Whether the court lacks jurisdiction to determine the instant application.
- (b) Whether the applicants should be enjoined as parties to the suit.
- (c) Whether the consent agreement dated 4.2.2019 should be set aside in terms of paragraph 3,4,5 and 6.

JURISDICTION.

11. In **Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others [2012]eKLR** the Supreme Court of Kenya held that:

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. . .”

12. The present application seeks for a joinder of parties and setting aside of a consent order recorded and adopted by this court after the judgment. In addition the applicants pray for the judgment to apply to all employees of the respondent as opposed to just some of them.

13. Order 1 Rule 10(2) of the Civil Procedure Rules provides that, the court may at any stage of the proceedings, either on its own motion, or on application by either party, join a person who is necessary to the proceedings. Again rule 32 of the ELRC Procedure Rules 2016, provides that a person who is aggrieved by a decree or order may apply to the court for review based on thresholds set out under the said rule.

14. It is therefore clear from the said provisions of the law that the court has jurisdiction to allow joinder of new parties and also review its decrees or orders even after judgment.

JOINDER OF PROPOSED INTERESTED PARTIES

15. The threshold for joinder of a new party to a suit is set out under Order 1 Rule 10 (2) of the Civil Procedure Rules, that is if the presence of the person before the court is necessary in order to enable the court effectively and completely adjudicate upon and settle all the questions involved in the suit. In this case, it is common ground that the dispute has already been fully adjudicated between the claimant and the respondent as per the judgment rendered on 31.3.2017 and consent agreement dated 4.2.2019.

16. As noted herein above the suit sought for implementation of the two Governments Circulars on the doctors and other Public Health Officers' extraneous allowances and emergency call allowances. In the judgment delivered on 31.3.2017, Aboudha J held that:-

“The court therefore directs that the respondent implements the two Government Circulars on its employees affected by the circular and further that the accrued arrears be budgeted for and paid in the succeeding financial year in line with Treasury’s Fiscal Policy and Financial Apportionments for the Governments recurrent expenditure.”

17. The circulars dated 12.1.2012 and 29.2.2012 affected the following employees:

“All doctors, Dentists and Pharmacists, Anaesthetists, Clinical Officers, Nurses, Technologists and Technicians other paramedics, drivers, Mortuary Attendants and Support Staff”.

18. The applicants want to be enjoined to the suit, I believe to agitate for the interests of the employees who according to them have been excluded from the judgment dated 31.3.2017. However, from the foregoing analysis it is clear that all the employees of the respondent are covered by the said judgment as beneficiaries of the two circulars. It follows therefore that the matter is fully adjudicated and a consent agreement on how to settle the arrears was voluntarily executed by the parties and adopted by the court on 4.2.2019. Consequently, the applicants are not necessary parties to these proceedings and their request for joinder is declined.

SETTING ASIDE OF CONSENT AGREEMENT

19. The joinder of the proposed interested parties having been rejected, court having found that all the employees are covered by the judgment dated 31.3.2019, the application and all the orders including setting aside of the consent agreement dated 4.2.2019 falls on its face. Without prejudice to the foregoing, the court is satisfied that the applicants have not established any sufficient cause to warrant review and setting aside of the consent agreement dated 4.2.2019. In the court's view, the agreement was voluntarily entered into.

20. In conclusion, the court finds no merits in the application dated 16.5.2019 and is dismissed with no costs.

Dated, signed and delivered at Nairobi this 22nd day of January, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE