



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISC. APPLICATION NO. 57 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

PHILIP MUTINDA.....APPLICANT

VERSUS

LADY LORI (KENYA) LIMITED.....RESPONDENT

RULING

The Application before me is the Claimant's Chamber Summons dated 21st September, 2020. It is brought under paragraph 11 of the Advocates (Remuneration) Order and seeks for the following Orders **THAT**:-

- 1) There be stay of execution of the Certificate of Taxation issued on 8th September, 2020 pending the hearing of the reference;
- 2) The ruling of Hon. Noelle Kyanya of 8th September, 2020 on the Bill of Costs dated 3rd June, 2020 to be set aside and struck out;
- 3) The Respondent's Bill of the Costs dated 3rd June, 2020 be taxed before a different taxing master.
- 4) The costs of this application be awarded to the Applicant.

The Motion is premised on the grounds set out in the body of the Motion and is Supported by the Supporting Affidavit sworn on 21st September, 2020 by RAJAB SUMBA, an Advocate practicing as such under the firm of CHAUDHRI & ASSOCIATES ADVOCATES, on record for the Claimant herein.

The applicant contends that Hon. Noelle Kyanya ordered that the parties had consented to the Bill of Costs dated 3rd June 2020 to be allowed. A copy of the Certificate of Taxation is Annexed as Exhibit 'RS1'. The applicant states that the Bill of Costs was contested and the respondent filed a Notice of Objection and submissions which the court failed to consider before granting the impugned orders. The applicant contends that the respondent is intent on levying execution against the applicant.

The Respondent on the other hand opposed the Application and filed a Replying Affidavit sworn by **PHOEBE MWANIKI**, counsel on record for the Respondent herein on 9th October, 2020. She avers that the application is misconceived, baseless and an abuse of the court process as the same is intended to mislead the court and deny the respondent the awarded costs. The affiant contends that the court observed that the applicant did not object to the issues raised by the respondent in the submissions. That on that ground the court inquired from counsel who was present for the Applicant Miss Masawa if the Bill of Costs could be allowed by consent, which she agreed to.

The Respondent urges the court to dismiss the application with costs to the Respondent.

Applicants Submissions

It is the Applicant's submission that the Taxing Master erred in law and in fact by allowing the Bill of costs by consent which had been opposed and submissions filed. The applicant states that the Bill of Costs dated 3rd June 2020 was contested and submissions filed but the court disregarded the same and ruled that the parties had consented to allow the Bill of Costs. The applicant states that there was never a consent between the parties. That due to the above the ruling was erroneous and greatly prejudiced the applicant as it is not based on any principle of taxation or a sound discretionary authority by the taxing officer in matters taxation.

The applicant urges the court to allow the reference and submit the Bill of Costs for proper taxation.

Respondent's Submissions

The Respondent in its submissions reiterated and relied on the averments made in its Replying Affidavit.

It further contends that the ruling by the Hon. Noelle Kyanya was by consent and the court will not interfere with the consent judgment unless the applicant proved valid grounds for varying or rescinding a contract between parties.

The respondent relied on the case of **Janet Moraa t/a Jannettes caterers v Helma Intimates EPZ Ltd (2019) eKLR** in which Odunga J. relied on the case of **Diamond Trust Bank of Kenya Ltd v Ply & Panels Limited & Others Civil Appeal No. 243 of 2002(2004) 1 EA 31** in which the learned Judge Githinji (as he then was) stated;

“So long as counsel is acting for a party in a case and his instructions have been terminated, he has full control over the conduct of the trial and has apparent authority to compromise all matters connected with the action.... The compromise of a disputed claim made bonafide is a good consideration and the court cannot interfere with it unless in the circumstances which would afford a good ground for varying or rescinding a contract between parties...”

The Respondent claims the Applicant has not demonstrated any good ground for setting aside the consent ruling.

The Respondents further states that the applicant has not demonstrated a reason why the Bill of Costs should be taxed before a different Taxing Master and urges the court to decline the Respondent's prayer. In conclusion, the Respondent urged this Court to dismiss the instant Application with costs.

Analysis and Determination

Having carefully considered the chamber summons motion, affidavits for and in opposition to the application and written submissions filed by the parties the only issue for determination is whether the consent ruling dated 8th September should be set aside.

In **Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd [1982] KLR 485**, Harris J. 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.”

In the Ugandan case of **Lenina Kemigisha Mbabazi Star Fish Limited v Jing Jeng International Trading Ltd [HCT-00-MA-344-2012]** summarised the grounds upon which a consent may be varied or set aside as follows:

- “i. Where the consent was obtained fraudulently*
- ii. In collusion between affected parties*
- iii. Where an agreement is contrary to the policy of the Court*
- iv. Where the consent is based on insufficient material facts*
- v. Where the consent is based on misapprehension or ignorance of material facts*
- vi. Any other sufficient reason...”*

Upon perusal of the pleadings, dated 8th September 2020 it is evident from the record of that day that Ms Masawa was holding brief for Rajab Chumba while Ms Mwaniki was holding brief for Kimathi. The purpose of the day's mention was to confirm filling of submissions. Ms. Mwaniki confirmed that the Respondent had not been served with any submissions and prayed for a ruling date. Ms Masawa in a rejoinder sought for a ruling date and further indicated that they did not object to the applicant's bill and the same can be adopted by consent. Her specific words as per the record are “We pray for a ruling date. We don't object to their bill. The same can be adopted by consent.”

The Deputy Registrar then recorded: By consent, Bill of Costs dated 3rd June 2020 is adopted.”

From the foregoing, the applicant has not demonstrated that the consent adopted in court was without instructions. The application does not meet the threshold for setting aside a consent as outlined in **Lenina Kemigisha Mbabazi Star Fish Ltd (supra)** where the court stated:

“The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it

without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”

For the foregoing reasons I find no merit in the application with the result that the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF APRIL 2021

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE