



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 861 OF 2019 AS CONSOLIDATED WITH
KISUMU CMELRC 408 OF 2019

KENYA UNION OF COMMERCIAL FOOD AND

ALLIED WORKERS..... 1ST CLAIMANT/1ST RESPONDENT

CLAIMANTS IN KISUMU CHIEF MAGISTRATES COURT IN EMPLOYMENT

CASE NO. 408 OF 2019.....2ND CLAIMANT/2ND RESPONDENT

VERSUS

CHOPPIES ENTERPRISES

KENYA LIMITED..... 1ST RESPONDENT/APPLICANT

MR. PARIN BHARATKUMAR PATEL.....2ND RESPONDENT/APPLICANT

MR. ASHWIN KSHEMENDRAN..... 3RD RESPONDENT/APPLICANT

MR. MITHUN CHULLIPARAMBIL

GOPALAKRISHNAN..... 4TH RESPONDENT/APPLICANT

RULING NO. 2

1. Vide an application dated 1st April 2021, the Applicants seek the following orders: -

(1) *Spent;*

(2) *THAT the firm of MAKENA KINOTI & COMPANY ADVOCATES be granted leave to formally come on record as the Advocates for the Respondents/Applicants;*

(3) *THAT the Notice of Change of Advocates attached herein be deemed as dully filed and served;*

(4) *THAT this Honourable Court be pleased to order extension of stay of execution of the Ruling delivered on 5th March 2021 pending the inter-parties hearing of this Application;*

(5) *THAT this Honourable Court be pleased to order extension of stay of execution of the Ruling delivered on 5th March 2021 pending the hearing and determination of this Application;*

(6) THAT the said Ruling delivered on the 5th March 2021 by this Honourable Court against the Respondents/Applicants herein be reviewed, varied, vacated and/or set aside.

(7) THAT this Honourable Court be pleased to expunge and/or strike out the names of the 2nd, 3rd and 4th Applicants/Respondents from the records as Respondents in this Claim.

(8) THAT Costs for this application be provided for.

(9) Any other remedy that the Court deems fit and just to so grant.

2. Prayer 2 was granted following the Applicant's further application dated 8th April 2021 in which a letter for Onyony and Company Advocates, the previous Counsel for the Respondents dated 7th April 2021 was attached. In the letter the said firm authorised Makena Kinoti and Company Advocates to take over the matter and surrendered its office file in respect of this matter to the said firm coming on record.

3. The prayers for consideration in this ruling are therefore prayers 4 to 8 of the application.

4. The application is brought under brought Order 45 and Order 51 of the Civil Procedure Rules, 2012, Sections 1A, 2A, 3A, 80 of the Civil Procedure Act-, Article 159(2)(a) of the Constitution of Kenya, 2010 and all other enabling Sections)

5. The application is supported by the grounds on the face thereof and the affidavit of Joseph Ondari Onchienku, an Accountant of the 1st Respondent in which he reiterates the grounds on the face of the application.

6. In a nutshell, the grounds are that the 2nd 3rd and 4th Respondents were wrongly enjoined to this suit.

7. The 1st Claimant, the Kenya Union of Commercial Food and Allied Workers was on 2nd June 2021 discharged from further proceedings in this matter following an application by Mr. Nyumba, its representative, to be released from further participation as it had no further claims in the suit.

8. The 2nd Respondent, the original Claimants in Kisumu Chief Magistrate Employment Case No 408 of 2019 before consolidation with the instant suit, filed a replying affidavit of Bernard Odhiambo, one of the Claimants herein. In the affidavit he states that Joseph Ondari Onchienku had not filed any authority to represent the Applicants and neither does he have legal capacity to swear the affidavit as he is not in any managerial position of the 1st Respondent.

9. He deposes that upon institution of this suit the 2nd, 3rd and 4th Respondents did not object to their joinder in this suit, that by paragraphs 3, 5, 6, 12 and 14 of the affidavit of JOSHUA D. WERE sworn on 6th May 2020, it was acknowledged that the 2nd, 3rd and 4th Respondents were lawfully enjoined to the set. That again the 2nd Respondent in the affidavit sworn on 17th June 2020 acknowledged he was a Director of the 1st Respondent. That at paragraph 6 of the affidavit, he consented to the suit being transferred to Nairobi and consolidated with the instant suit. That there are further acknowledgments at paragraphs 10, 22 and 43 of the said affidavit by the 2nd Respondent that he was one of the persons who attended the meeting with the 1st Claimant to resolve the dispute.

10. It is deposed that the application is coming too late, after hearing and determination of the suit, and further that lack of financial strength (which in any event, has not been proved by the Applicants) is not a ground for grant of the orders sought.

11. It is further deposed that the Applicants have not complied with previous Court orders, have not explained the position of the accounts frozen by KRA and the whereabouts of motor vehicle KCN 968S valued at Kshs.7 million which was sufficient for the deposit ordered by the Court in Kisumu.

12. The application was disposed of by way of written submissions.

13. The issues for determination are whether the Applicants have met the threshold for review of this Court's orders and whether the 2nd, 3rd and 4th Respondents are liable for the decree herein by virtue of consolidation of Kisumu ELRC No. 408 of 2019 with Nairobi ELRC No. 861 of 2019.

Whether the application meets the threshold for review

14. Review is provided for in Rule 33 of the Employment and Labour Relations Court Rules as follows –

33. Review

(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.

15. It is the Applicant's position that the review herein is made under Rule 33(1)(c) on the basis that they seek clarification of the ruling.

16. In the ruling of 5th March 2021, the Court entered judgment in favour of the 2nd Claimant who were all Claimants in Kisumu ELRC 408 of 2019, the claim between the Respondents and the 1st Claimant having been fully resolved.

17. Kisumu ELRC 408 of 2019 was between **Stephen Juma Wangira & 21 Others v Choppies Enterprises Kenya Limited** who are collectively referred to as "2nd Claimant" in the consolidated suit which is the instant suit.

18. The 2nd, 3rd and 4th Respondents were not parties to the said claim and were only enjoined by virtue of Cause No. 861 of 2019 which has been resolved.

19. In the ruling of the Court sought to be reviewed, all that the Court stated was that –

***"Judgment is therefore entered of the 2nd Claimant in the sum of Kshs.751,617.37/=*"**

20. As is further evident from the opening paragraph of the ruling, the entire ruling was in respect of – ***"the second set of Claimants, that is Claimants in Kisumu Chief Magistrates Court Employment Cause No. 408 of 2019 referred to herein jointly as 2nd Claimant ..."*** There is therefore no doubt as to who the ruling referred to.

21. I thus agree with the submissions of the Applicants that consolidation did not infer that the parties departed from their pleadings, which in this case was against the 1st Respondent only. Refer to **Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR** where the Supreme Court stated that –

"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it."

22. Further and again as submitted by the Applicants, the suit was against a limited liability company which has powers to sue and to be sued in its corporate name as was held in the celebrated case of **Salomon v Salomon [1897] AC 78** where the Court

held that –

"The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act".

23. The 2nd, 3rd and 4th Respondents were not employers of the Claimants and therefore do not have privity of contract with the Claimants to justify their being held liable for the debts owed to employees of the 1st Respondent. As stated in **Chitty on Contracts, 2004 Edition**

"The common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it."

24. This was reiterated in **Agricultural Finance Corporation v Lengetia Ltd [1985] KLR**

"As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

25. For the foregoing reasons, the application succeeds but only to the extent that the ruling is clarified to refer to the 1st Claimant only.

26. The prayers in respect of expunging the names of the 2nd, 3rd and 4th Respondent for the proceedings are thus redundant.

27. The prayers for stay of execution, having been made to the extent only to the date of hearing and determination of this application will also lapse upon delivery of this ruling.

28. Each party shall bear its costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF DECEMBER 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