



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO. 124 OF 2017

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

KONGONI RIVER FARM (STAR DIVISION).....RESPONDENT

RULING

The claimant filed application dated 20th January, 2010 seeking for orders that the court be pleased to set aside and or vacate its directions dismissing the suit and reinstate it for hearing and determination on merit.

The application is supported by the affidavit of Clifton Saya and on the grounds that the matter was scheduled for hearing on 29th October, 2019 but parties requested the court to allow them to explore possibilities of a settlement out of court which had been initiated by the respondent vide letter dated 16th October, 2019 and the claimant responded vide letter dated 18th November, 2019.

The court directed the matter be mentioned on 3rd December, 2019 to confirm consent but the respondent failed to furnish the claimant with their proposal and the court directed the parties to file consent or the suit would stand dismissed on 2nd January, 2020.

To date the respondent has failed to furnish the claimant with their proposal and only fair that the order dismissing the suit be vacated to allow hearing on merit.

In reply the respondent filed the Replying Affidavit of Delbert Ochola advocate for the respondent and who avers that the claimant has filed its application and relied on documents shared without prejudice and the same should be dismissed. Parties were engaged in negotiations without prejudice and documents shared therefrom should not be relied upon by the claimant. The attached annexures should be expunged.

Ochola also avers that on 3rd December, 2019 the court directed parties to file consent by 2nd January, 2020 or the suit would stand dismissed and in light of the various adjournments and given the age of the matter. Both parties were represented in court when these orders were issued.

The claimant has not demonstrated what loss or damage shall be suffered if the orders sought are not granted and the application was filed with delay and should be dismissed.

Both parties made oral submissions in court.

Indeed documents exchanged between parties marked 'without prejudice' should remain so – without prejudice. These are not to be shared by third parties. The rule on 'without prejudice' apply to allow parties to negotiate freely and openly and without the fear that the shared matter/material is not to be used outside of such negotiations for any other reason whatsoever.

In the case of **Samuel Gicheru Njora versus Equatorial Commercial Bank Ltd [2014] eKLR** the court held that;

.....the “without prejudice” rule is founded on public policy to enable parties to negotiate freely and if negotiations fail, neither party can rely on admissions made by the other. The rationale of the “without prejudice” rule is to encourage parties to negotiate freely and frankly without fearing that any statements made in the course of negotiations may be used against them later in any court proceedings. ... the fact that no agreement was entered into between the Plaintiff and the Defendant to have part of the suit property sold by way of private treaty, this court cannot re-write the contract. ...

The rationale is that the offer made on a without prejudice basis is not an agreement capable of being enforced. In **Mumias Sugar Co. Ltd &**

another v Beatrice Akinyi Omondi [2016] eKLR the court held that;

.....a communication made "without prejudice" are admissible when there has been a binding agreement (emphasis mine) between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible.

In this regard, the letters and communication shared by the parties and noted as 'without prejudice' and the same relating to alleged negotiations to settle the matter(s) herein did not result in an agreement to apply herein as confirmation of any matter(s) under negotiations. Such records are improperly shared herein.

All the annexures to the affidavit of **Cliffton Saya dated 20th January, 2020** and marked 'without prejudice' are hereby expunged. Such are not to be used herein or applied herein.

With regard to the issue at hand, on the application seeking to have the suit reinstated following directions of 3rd December, 2019 and consent be filed on or before 2nd January, 2020 and which was not done, the claimant asserts that the parties have been engaged in negotiations and this was not achieved and that the claimant is still keen to have the matter heard and determined on the merits.

The claim herein was filed on 17th January, 2017 and where the claimant also filed a Notice of Motion under Certificate of Urgency and the respondent proceeded and filed PPLICTION AND Notice of Motion dated 27th March, 2017. The court delivered ruling delivered on 14th July, 2017 and held the claimant's application had been compromised by consent and the dismissed application by the respondent.

There was inaction from 14th July, 2017 to 9th April, 2018.

The claimant applied to amend the claim. The respondent opposed leading to hearing and ruling delivered on 17th July, 2018.

This was followed with inaction until 18th March, 2019 when parties attended and hearing directions issued for 29th October, 2019. A mention date was agreed by consent for 3rd December, 2019.

On the due date the claimant's representative submitted that parties were negotiating. There was confirmation by the respondent.

Taking into account allocated hearing date, the mention taken by consent, the age of the file the court directed the parties to file consent on or before the 2nd January, 2020 failure to which the suit should stand dismissed and file closed.

There was no action taken. The suit lapsed on the orders of 3rd December, 2019 and file closed.

Is there good cause to re-open the file and reinstate the suit?

It is apparent to the court that the claimant has on several occasions taken effort to have the suit heard save for various lapses as noted above. The claim goes back to 17th January, 2017 where the issue in dispute is noted as a violation of action 20 and 21 of the Employment Act, 2007. These allegations are serious and requires the court to address on the merits as to do so there shall be development of the law, the practice and employment and labour relations and for connected purposes.

For these reasons therefore the file shall be re-opened and the suit reinstated save on condition the claimant shall commence the process of having the claim heard within the next 14 days and failure to which the respondent shall be at liberty to move the court for the dismissal of the suit.

Accordingly, application dated 20th January, 2020 is hereby allowed and the following orders are issued;

- (a) The file is re-opened;**
- (b) The suit dismissed on 2nd January, 2020 is hereby reinstated;**
- (c) The claimant has 14 days to move the court and have the matter heard; and**
- (d) Costs in the cause.**

Dated and delivered electronically this 11th May, 2020.

M. MBARU

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 the Order herein shall be delivered to the parties via emails. this 11th May, 2020.

M. MBARU

JUDGE