



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 525 OF 2019

KENYA ELECTRICAL TRADES & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED.....RESPONDENT

RULING

1. The Application before me is the Claimant's Notice of Motion dated 11th November, 2019 brought under section 12 of the Employment and Labour Relations Act (ELRC Act) and Rule 17 and 25 of the ELRC Procedure Rules. It seeks the following Orders **THAT**: -

- a) This Application be certified as urgent.
- b) The Honourable Court hears and determines this Application ex-parte in the first instance and service of the Application be dispensed with.
- c) The Orders made and/or directions by the Honourable Judge Onesmus Makau on 23rd October, 2019 be vacated and in lieu thereof, main suit be heard and determined by way of oral evidence.
- d) The main suit being Nairobi Cause No. 525 of 2019 be set for pre-trial date and the matter be determined by way of viva voce evidence with parties at liberty to call witnesses.
- e) The costs of this Application be provided for.
- f) Such further and other reliefs be granted to the Applicant as this Court deems fit and expedient in the circumstances.

2. The Application is premised on the following grounds set out on the body of the motion including: -

- a) The Advocates for the Applicant, upon consultations with the Applicants identified issues that ought to be cross examined hence the need to fix the matter for Pre-trial and later for hearing.
- b) There are various supporting documents filed by the parties that ought to be proved and;
- c) Section 62 of the Evidence Act, Cap 80 (Laws of Kenya) provides that "all facts, except documents may be proved by oral evidence"
- d) Notice of intent to proceed with the hearing through oral evidence was served upon the Respondent's Advocates on 28th October, 2019.
- e) There has been no unreasonable delay in making this Application.
- f) This Application was brought timeously prior to parties filing their written submissions and after notice of intent to proceed vide viva voce evidence has been served to the Respondent's Advocates.
- g) The Respondent is bound to suffer no prejudice or injustice if the parties proceed with the hearing of the Claim through viva voce evidence.

h) It is in the interest of justice that the matter be set for Pre-trial and thereafter proceeds for oral hearing.

3. The Application is supported by the Affidavit of Mr. **Cyprian Onyony**, Counsel for the Claimant sworn on 11th November, 2019, whereby he reiterates the above grounds. He further deposed that his clients were not present in Court when the impugned consent was entered, and it has since instructed him to seek setting aside of the consent order so that the suit proceed by way of taking *viva voce* evidence; that the matter is complex and contentious in nature and it is only just and prudent that the same proceeds by way of *Viva voce* evidence as opposed to written submissions; and finally, the respondent will suffer no prejudice if the Orders sought in the instant Application are granted.

4. The respondent has opposed the Application by the Replying Affidavit sworn on 28th November, 2019 by **Mr. Patrick Lutta**, counsel for the Respondent in which he deposed that the impugned consent order to proceed by written submissions was recorded following negotiations between the parties and was made to compromise the respondent's Preliminary Objection dated 20th September, 2019 against the Claimant's Application dated 9th August, 2019; that there was no fraud or misrepresentation to warrant the setting aside of the Consent of 23rd October, 2019 as the Claimant was duly represented by its Counsel on record; that there is sufficient material before this Court to enable it determine the matter conclusively; and finally, the instant Application is frivolous, vexatious and an abuse to the Court process and urged this Court to dismiss the same with costs to the Respondent.

5. In a brief rejoinder the Applicant filed a Further Affidavit sworn by **Mr. Kosgey Kolil**, the National Deputy General Secretary on 20th December, 2019, in which he avers that the impugned consent was just an agreement between the parties on the mode of proceeding with the matter in line with the provisions of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and that no consent order was executed by the parties; that as the consent was recorded in the Claimant's absence and immediately it was informed of the consent it insists that the matter must proceed by way of *Viva voce* evidence; that the Respondent will not suffer any prejudice as the Orders sought are in the best interest of all parties since they all have a right to be heard as envisaged under Article 50(1) of the Constitution of Kenya; and finally, proceeding without oral evidence will prejudice the claimant since the material before the Court is insufficient.

Submissions by the parties

6. The applicant submitted that this Honourable Court owes her as well as other litigants a duty to do justice and accord all parties a proper opportunity to put their cases for it to decide on matters on merit. It further submitted that one of the issues raised is that of fraud which can only be determined by way of *viva voce* evidence. To buttress this argument, the Applicant relied **Kenya Ports Authority Vs Fadhil Juma Kisuswa (2017) eKLR** where the Court of Appeal held that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular case. It further relied on Section 62 of the Evidence Act which in its view advocates for matters to proceed by way of oral evidence.

7. The claimant further submitted that she has a right to hearing as protected by the Constitution of Kenya, 2010 and therefore urged this Court to allow the instant Application as prayed. For emphasis the Claimant cited the Court of Appeal decision in the case of **Richard Ncharpi Leyagu Vs Independent Electoral and Boundaries Commission & 2 Others (2013) eKLR** where the Court held that one's right to a hearing is a well-protected one in the Constitution and is also the cornerstone of the Rule of Law. Further, in its exercise of its inherent jurisdiction to dismiss suits courts are bound to exercise this power with proportionality as it balances protection of the integrity of the Courts and justice.

8. The Claimant further submitted that there is no consent in existence since on 23rd October, 2019 parties just reached an agreement on how to proceed with the matter and the Court gave directions by dint of Rule 21 of the Employment and Labour Relations Court Procedure Rules directed that the matter proceeds by way of written submissions. For emphasis the Claimant relied on **Mbaimai Mukomambo Brighton Vs Attorney General & 2 Others (2018) eKLR** where the Court of Appeal found that there was no consent order executed by the parties for the disputed sum before the trial court.

9. The Claimant further submitted that she has demonstrated good grounds for setting aside the purported consent order and urged this Court to allow the same as prayed. For emphasis the Claimant relied on **Timothy Manyara & 144 Others Vs Pyrethrum Board of Kenya (2005) eKLR** where court discussed the law as regards the circumstances in which a consent judgment may be interfered with.

10. The Claimant further submitted that given that this matter is yet to proceed for hearing and therefore urged this Court not to shut it out and allow her exercise her right to be heard and cross examine the Respondent for the Court to determine this matter on merit. To buttress this argument, the Claimant relied on **Rosemary Wanjiku Murithi Vs George Maina Ndinwa (2014) eKLR** where the Court held that an allegation of fraud must be determined on merit failure to which such a claim fails for want of evidence. It urged this Court to allow her Application and grant the orders sought therein.

Issues for determination and analysis

11. It is common ground that the counsel for the two parties herein recorded a consent Order on 23rd October, 2019 to the effect that this suit be disposed of by way of written submissions. The only issue for determination is whether the court can set aside the said consent order.

12. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated in an array of case law. It is trite law that a Court of law will not interfere with any consent except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court. In **Flora Wasike v Destino Wamboko (1982 – 1988) 1 KAR 625** the Court held that:

“A Consent is binding on the parties like a contract and like a contract it can only be set aside on grounds of fraud or mistake.”

13. The foregoing position was clearly affirmed in **Setton on Judgments and Orders (7th Edn), Vol.1 page 124** as follows-

“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 on those claiming under them... 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 general for a reason which would enable the court to set aside an agreement.”

14. In the instant case it is clear from the record that on 23rd October 2019, Ms. Onyiego holding brief for Mr. Onyony for the Claimant and Mr. Lutta for the Respondent attended court for Pre-trial conference and they agreed to dispose of the suit by way of written submission, which agreement was adopted by this Court and set time lines for filing of the said submissions. The question that arises is whether the Claimant can now validly claim that it is opposed to the consent as entered on 23rd October, 2019 because she was not present in court?

15. It is now trite that 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. Therefore, it is in my view that the claimant cannot validly and it is indeed estopped from claiming that the impugned consent order ought to be set aside for the reason that she was not present when the same was recorded.

16. I gather support from **Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd [1982] KLR 485**, where the court held that: -

“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 or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts or in general for a reason which would enable the court to set aside an agreement.”

17. It follows that the applicant has not met the threshold required for this court set aside the impugned consent order. In addition, I have carefully read through the application and the affidavits in support and I did not see any indication of the kind of evidence which is intended to be brought out by way of oral testimonies. I have also perused the Memorandum of Claim filed by the claimant and found that the main issue is recognition of the claimant by the respondent for purposes of collective bargaining. The issue of recognition is all about numbers which are pleaded and substantiated by documentary evidence. The claimant does state that it intends to introduce more documents.

18. Having found that the application has failed to meet threshold for interfering with a consent order and that the counsel had considered and rightfully deemed that the matter should be disposed by written submissions, I return that the instant Application is bereft of merit and it stands dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 30th day of July 2020

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 Rule28(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