



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 672 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**RIFT VALLEY RAILWAYS WORKERS UNION (K).....CLAIMANT**

**VERSUS**

**RIFT VALLEY RAILWAYS (K) LIMITED..... RESPONDENT**

**AND**

**KENYA RAILWAYS CORPORATION.....INTERESTED PARTY**

**RULING**

The Claimant/Applicant, Rift Valley Railways Workers Union (K) filed a Notice of Motion Application dated 2<sup>nd</sup> May 2019 seeking orders that a Declaratory Order be issued to the effect that the Interested Party, Kenya Railways Corporation, be liable to pay the grievant, David Ogega Onditi, all the sums as awarded in the Judgement delivered in this suit on the 17<sup>th</sup> day of August 2018. It further seeks for costs of the application to be in the suit.

The Application is based on the reasons that: -

- 1. The grievant herein having been employed by the Interested Party on 17<sup>th</sup> June 1985, had initially worked for the said Interested Party before working for the respondent herein, both, for a total period of 29 years (21 years for the Interested Party and 8 years for the Respondent).*
- 2. The said Interested Party in November 2006, alleged to have transferred the grievants services to the respondent herein in an alleged Tour of Duty, a position that is untenable, and without any premise in law.*
- 3. The said respondent un-procedurally and unlawfully terminated the grievants services owing to the said grievants position and association with the Applicants legal activities, a right affirmed in the Supreme Law in Articles 36, and 41 and further buttressed in Article 2.*
- 4. Having filed the matter in Court in November 2015 for Wrongful and Unprocedural dismissal, the court finally determined the matter in favour of the grievant herein to the effect that the grievant be paid an Award of Kshs.725,447.70 and interests accruing, with the respondent being slammed with an additional costs of Kshs.100,000.00 to be paid to the Claimant in covering for the claimant's reasonable expenses for the suit.*
- 5. Following a Consent Order recorded in court by the respondent and the Interested Party on the 31<sup>st</sup> day of July 2017, the import of which was to have the existence of the Respondent terminated, it would only be safe and prudent to presume that the process that may have led to the recording of the said Consent Order must have of necessity, taken care of the position of Assets and the Liabilities accruing and how to have the said liabilities addressed.*
- 6. In a further Consent Order recorded in court by the parties to the dispute in the said Petition 76 of 2017, the Interested Party herein has unequivocally accepted to shoulder all the liabilities accruing from the take-over of staff from the respondent following the termination of the said Respondent's existence on the 31<sup>st</sup> day of July 2017.*
- 7. It therefore follows that having accepted to take back all the employees as were employed by the Respondent, through a Consent*

*Order recorded on the 29th day of November 2017, the Interested Party by implication must therefore be obligated to pay the grievant herein the said grievant's benefits accrued while serving the Respondent for the 8 years worked apart from the 21 years previously served by the grievant herein.*

8. *It is on the basis of the above reasons and as shall be staged in court that the Applicant/Claimant avers that the Interested Party herein is lawfully obligated to pay the grievant and or the claimant herein the sums as are stated in the Judgement delivered on 17<sup>th</sup> August 2018 with the interests and costs accruing.*

The Application is supported by the Affidavit sworn by the Applicant's Secretary General, Munayi Isaac Opondo who avers that the transfer of the grievant and other workers to the Respondent Company from the Interested Party in 2006 was a scheme to disenfranchise the grievant and other employees of their rightful terminal benefits. He attaches to his affidavit copies of the Consent Orders that are the subject of this application and avers that the Interested Party must of necessity have had knowledge of the obligations arising out of the said Consent leading to the termination of the Respondent's existence.

The Interested Party filed its Grounds of Opposition dated 22<sup>nd</sup> May 2019 opposing the application herein and stating that it is bad in law, fatally defective and discloses no reasonable cause of action as against the Interested Party. That the Interested Party was not a party to the alleged proceedings between the Claimant and the Respondent and cannot thus be liable for the judgement made against the Respondent. It denies it has taken over the debts of the Respondent and states that the relationship between it and the Respondent was governed by the Concession Agreement which indemnifies the Interested Party from the Respondent's liability. It states that the application is further misconceived, frivolous, vexatious, and incompetent and ought to be dismissed with costs to the Interested Party.

The Application proceeded by way of written submissions. The Respondent did not participate in the application

### **Claimant/Applicant's Submissions**

The Claimant/Applicant submits that in the Consent Order recorded in **Commercial Suit Number 136 of 2017**, the Respondent and the Interested Party consented to have the Concession Agreement terminated, the import of which was to have the existence of the said Respondent terminated. That in the subsequent Consent Order recorded in **Petition 76 of 2017** wherein both the Respondent and the Interested Party were involved, the Interested Party agreed to employ all the employees as were employed by the Respondent so that had the grievant herein not been un-procedurally terminated by the said Respondent, he would have been the Interested Party's employee on the predicate of the Consent Orders as recorded in the two suits.

The Applicant further submits that following the Interested Party's own admission to pay the grievant herein, the Interested Party be directed by the court to ensure that the said award in the Courts' Judgement in the matter herein be urgently satisfied. It thus prays for the urgent disposal and or execution of the Orders as were directed in the said Judgement of 17<sup>th</sup> August 2018.

### **Interested Party's Submissions**

The Interested Party submits that at the time of Judgment in this matter, the Respondent had been wound up and had ceased operations in Kenya. It admits that the same was captured in the recorded consent order of 31<sup>st</sup> July 2017 between the Respondent and the Government in **HCC No. 136 of 2017 Rift Valley Railways (Kenya) Ltd v Kenya Railways Corporation & Another**. Further, that when the said consent order was being recorded the grievant had long ceased being the Respondent's employee as his contract of service had been terminated sometime in 2014.

It submits that it is a separate and distinct entity from the Respondent and that it will be unfair and unjust to have the Corporation shoulder the liabilities of an entity to which it has no relation. That it only became aware of this suit when it was served with the present application on 10<sup>th</sup> May, 2019, close to a year after this court had delivered its judgment. That there is no relief that draws from the Interested Party to the Claimant and it should thus not be held liable to pay the judgment debt. That the Claimant is erroneously relying on the Consent Order recorded in **HCCC No. 136 of 2017** to further its claim on the unfounded belief that the consent provided for transfer of the liabilities of the Respondent to the Interested Party and that a proper reading of the said order clearly shows no such provision or any obligation for it to take up the Respondent's liabilities. That **Paragraph 2** of the Consent Order recorded in **HCCC No. 136 of 2017** provides:

*“That the parties will within thirty (30) days effect the orderly transfer of employees and assets and agree on modalities of handing back all the property to Kenya Railways and the Government.”*

It also submits that the consent order made in **Petition 76 of 2017** is different and distinct from the present matter as the order required the petitioners who were transferred from the Respondent to the Interested Party to execute employment contracts and report to their assigned work stations in order to be remunerated. That neither did the said consent order in **Petition 76 of 2017** therefore provide for the Interested Party to take up any of the Respondent's liabilities.

The Interested Party submits that the prayers sought in the present application are not proper as the Claimant is inviting this court to make a conclusive determination through an interlocutory application. That this Court must tread with caution given the grave repercussions that such an order may have and considering that the application is pegged on a suit that has already been determined by this Court. It prays that the Court finds that the Interested Party should not be held liable to pay the judgment debt.

It is the Interested Party's submission that it was improperly enjoined as a party to this suit by the Claimant after close of the main proceedings as the Claimant union did not seek leave to enjoin the Interested Party nor did this court move to enjoin the Interested Party of its own accord. It relies on the case of **Zephir Holdings Limited v Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya [2014] eKLR** where it was held that:

*“Any party, who comes in a proceeding after pleadings have been closed, will only join on except where the court makes the joinder suo moto or the party comes as an objector to attachment of the suit property.”*

That the Claimant has not met the test for enjoining a party as per **Order 1, Rule 10 of the Civil Procedure Rules, 2010** and which test was enunciated in the case of **Kenya Railways Corporation v Development Bank of Kenya Interested Party Erdemann Property Limited & another [2019] eKLR** where the Court cited the case relied upon by the plaintiff therein of **Werrot and Company Ltd and Others v Andrew Douglas Gregory and Others, Nairobi (Milimani) High Court Civil Case No. 2363 of 1998 [1998] LLR 2848** which held:

*“For determining the question whom is a necessary party there are two tests:*

- i. There must be a right to some relief against such party in respect of the matter involved in the proceeding in question; and*
- ii. It should not be possible to pass an effective decree in the absence of such a party.”*

It beseeches this Court to find that the Interested Party was wrongly enjoined and should be struck out from these proceedings to protect it from experiencing injustice and unfairness.

### **Analysis and Determination**

The issues for determination are:

1. Whether the Interested Party was properly enjoined to this suit.
2. Whether the Interested Party (Kenya Railways Corporation) unequivocally accepted to shoulder all the liabilities accruing from the take-over of staff from the Respondent (Rift-Valley Railways Ltd) in the Consent Orders recorded in HCCC No. 136 of 2017 and Petition 76 of 2017.

The Interested Party raised the issue of its improper joinder to the suit in its submissions and because the same could affect the application herein if successful, it ought to be determined first. Joinder of an interested party to a suit is governed by Order 1 Rule 10 (2) of the Civil Procedure Rules which provides:

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

In the case of *Benson Mwangi Wangai v Ibrahim Ndwiga & Another [2005] eKLR*, the Court held that:

*“Under Order I Rule 10(2) the court has unfettered discretion to order that any party who ought to have been joined either as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all question involved in a suit be joined. It can even do so on its own motion.*

From all the pleadings on record and in various documents produced by both the applicant and the respondent in this matter and other related matters and especially the leave in respect of the suit premises, it is apparent that Ibress Motor Agencies Ltd. was an integral party thereto.”

In the present case, no application has bene made to join the Interested Party. The application herein only sought a declaration to the effect that the Interested Party ought to assume and make good the decree herein. Having not been joined as a party to the suit, the Court would have no basis to make orders against a party who has not been formally joined in the suit.

On the second issue for determination, first, the Consent Order that was recorded in HCCC No. 135 of 2017 before Nzioka J. on 31<sup>st</sup> July 2017 was between the Respondent herein on one hand and the Interested Party herein and the Government on the other. It was agreed therein that the Concession Agreement dated 23<sup>rd</sup> January 2006 be terminated and parties were to effect the orderly transfer of employees and assets and further agree on modalities of handing back all properties to Kenya Railways and the Government. The import of the second Consent Order recorded in Petition 76 of 2017 before Mbaru J. on 21<sup>st</sup> November 2017 was for the petitioners to execute employment contracts issued by Kenya Railways to facilitate payment of their salaries and further required the petitioners not at work to resume work pending hearing of the said Petition.

I do not agree with the Applicant’s submission that the take-over of the Respondent’s employees and assets led to the presumption that the Respondent’s liabilities were also taken over by the Interested Party. The Respondent is a limited liability company and a separate legal entity from the Interested Party. There is no evidence on record that the Interested Party took up the liabilities of the Respondent after it was wound up. The Court also notes that the Claimant/Applicant was terminated in 2014 while the concession agreement was terminated in 2017 and therefore the Respondent is the rightful judgment debtor. When the Claimant/Applicant was awarded judgment by this Court in 2018, the Interested Party had taken over some of the staff. If the applicant wishes that this court determines whether the Interested Party is obligated to pay the judgment debt due to the Claimant/Applicant, it should have been the subject of a fresh suit as the court is functus officio in this suit, having determined all the issues in dispute and delivered a final judgment. A new party cannot be enjoined to a suit that has been finalised.

For these reason I find no merit in the application and dismiss it with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF OCTOBER 2020**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**