IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 267 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 2nd May, 2019)

PETER KIMEU MOSE & 13 OTHERS.....CLAIMANT

VERSUS

HOTEL MANG.....RESPONDENT

RULING

1. The Application before this Court is the Claimants' Application dated 14th September 2018 wherein, they seek the following reliefs:-

> ***1. THAT the application herein be certified and be heard ex parte in the first instance.***
>
> ***2. THAT this Honourable Court be pleased to enjoin the firm of Wangari Ndirangu & Company Advocates as Respondents to these proceedings to enable the Court to determine the issue herein.***
>
> ***3. THAT this Honourable Court be pleased to expunge the filed consent dated 27th January, 2016 from the court records.***
>
> ***4. THAT cost of this application be provided for.***

2. The Application is based on the ground that the Advocates did not state the Claimants were party to the consent. Further, they aver that they did not give any consent to have the decretal sum reduced.

3. The Application is supported by the Affidavit of Peter Kimeu Mose sworn on 12th September 2018. The Claimants aver that on 19th June 2015, judgment was delivered in favour of the Claimants for the sum of KShs. 4,417,422.15. However, their Advocate only paid them a sum of KShs. 2,000.000.00. They made inquiries as to what became of the balance but were never given an explanation.

4. Consequently, they wrote to the LSK vide the letter dated 27th September 2016 and were informed that their Advocates had filed a consent reducing the decretal amount. The Claimants aver that despite the parties' Advocates confirming that they signed a consent settling the matter, they did not instruct their Advocates to file or sign the same and neither has it been indicated anywhere that they were a party to the consent.

5. They unsuccessfully instructed their current Advocates to follow up on the matter but their efforts proved futile. The consent was confirmed to have been filed thus barring the Claimant from filing a Notice to Show Cause or executing for the balance.

6. The Respondent's Advocates opposed the Application vide the Grounds of Opposition dated 6th November 2018, on the following grounds:-

> ***1.*** **THAT** ***the Application as filed is mischievous, frivolous, amounts to abuse of the court*** **process** ***and should be dismissed forthwith.***
>
> ***2.*** **THAT the** ***instant application is fatally defective as the Claimants' Advocates are not*** **properly on** ***record. The suit having being settled by way of a judgment delivered on 19th*** **June 2015, failure of** ***the Claimants' Advocates to seek leave to enter appearance, or procure*** **the consent of** ***the previous Advocates on record, offends the provisions of Order 9 Rule 9 of the Civil Procedure Rules.***

3. THAT the instant *application has been filed extremely late in the day, the suit having being* concluded 3 *years ago. No valid explanation has been offered for this undue delay.* This application *therefore offends the maxim of law that equity does not aid the indolent and* as such should be dismissed.

4. THAT the Claimants lay blame on their previous Advocate for recording a consent without their authority. The Claimants have not provided proof of any disciplinary action that they have initiated as against the said previous Advocate thus making the allegations unsubstantiated and mere afterthoughts. The Claimants ought to have a pursued a disciplinary action against them.

5. THAT the 1st Claimant has executed the instant Application's Supporting Affidavit without proof of authority from the rest of the Claimants. The averments contained in paragraph 1 of the Supporting Affidavit are therefore false, misleading and amounts to the 1st Claimant perjuring himself.

6. THAT the Claimants' application cannot succeed as the same does not raise sufficient grounds and/or meet the mandatory criteria to grant orders for setting aside of consent orders/judgment.

7. THAT granting of orders sought by the Claimants herein will greatly prejudice the Respondent, taking into consideration the age of the Claim and the fact that the Respondent has already closed operations. The Respondent shall therefore be hard-placed to re-institute a defence in light of the effluxion of time, in the event that the original judgment is reinstated which prejudice should not be visited upon the Respondent as a result of the Claimants' indolence and recklessness.

7. Wangari Ndirangu and the Claimants' former Advocate who is the subject of the instant Application, opposes the Application vide her Replying Affidavit sworn on 19th October 2018. She admits that she was the Claimant's former advocate but contends that there was no cause of action against her hence she should not be enjoined to this suit as the subject matter of this suit was the relationship between the Claimant and the Respondent.

8. She avers that the Claimants instructed her to enter the consent, however, the same has never been adopted. She contends that the Claimants gave her clear specific verbal instructions to accept KShs. 2,000,000.00 on their behalf, hence entering into the consent subject to this Application. Thereafter, she paid all the monies to the Claimants and accepted a lesser fee as opposed to what she would have been entitled to had the Respondent paid the full sum.

9. It is her position that since the consent was entered into by her as well as the Respondent's Advocates, they too should be joined to these proceedings. However, she contends that she exercised due diligence in acting for the Claimants and who were hellbent on settling for half the amount rather than pursuing the matter to its logical conclusion.

Submissions by the Parties

10. The Application was disposed of by way of written submissions. The Applicants filed their submissions on 20th February 2019, Wangari Ndirangu & Company Advocates filed theirs on 26th February 2019, while the Respondent filed its submissions on 5th March 2019.

11. The Applicants in their submissions dated 18th February 2019, submit that their Advocates are properly on record as a consent between its former and current Advocates was filed on 14th March 2017. They further submit that the 1st Claimant was authorized to file the present case and the same authority is valid.

12. They also submit that they never gave their former Advocates the consent to enter into the impugned consent. There was no written consent and neither did they sign the consent. Immediately they learnt about the consent, they filed a complaint at the LSK on 28th September 2016 which culminated into them withdrawing their instructions from their Advocate. The matter is still pending awaiting parties' discussion or consent if any.

13. They maintain that the disputed consent was filed after the final award had been made for the sum of KShs. 4,417,422.15. In their view, their Advocate colluded with the Respondent's Advocate.

14. Wangari Ndirangu & Company Advocates in their submissions dated 26th February 2019 submit that they should not be enjoined to these proceedings because the cause of action before this court is between an employer and employee and they submit that they are neither.

15. Further, joinder is unnecessary and a waste of court's time as the Application has been filed 3 years late without any explanation given. Further, the subject of this Application falls within the purview of the LSK. A complaint has been filed there and no action was taken against the firm since no cause of action was found. They rely on the case of **Lucy Nungari Ngigi & 128 Others vs. National Bank of Kenya Limited & Another [2015] eKLR** where the Court stated:-

"But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties."

16. They submit that the Claimants did give them verbal instructions to enter into the consent, their acceptance of the consent amount was a clear indication that they were aware of the fact of the matter, and they have not proved that the consent was obtained by fraud or collusion.

They further submit that the Claimants have not met the threshold for setting aside of a judgment. They rely on the case of ***Kenya Commercial Bank Ltd vs. Specialised Engineering Company Ltd [1982] KLR 485*** where it was held 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 where the consent was given without sufficient material facts or misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.***
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> ***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.***

17. The Advocates posit that all their instructions, even their instructions to commence these proceedings were oral.

18. The Respondent in its submissions dated 5th March 2019 submit that the Claimants' Advocates are not properly before this Court as they have never been filed with a consent between the Claimants' former and current Advocates.

19. They further aver that no written authority by the other 13 Claimants has been annexed to the Application, donating powers to the 1st Claimant to swear their supporting affidavit as required by Order 1 rule 13 of the Civil Procedure Rules. As such, the same is defective and should be struck out. In their view, the document containing the Claimants' signatures that was used to lodge a complaint at the LSK does not meet the requirements of the Rule, which requires the authorization to be executed and filed.

20. The Respondent submits that the Claimants have not proven their case for setting aside of the consent judgment. They have not prove fraud or collusion between the parties advocates, their former advocate swore an affidavit to the effect that she was given instructions to record the consent and have not taken any action against their advocate on account of fraud. The Respondent relies on the Court of Appeal case of **SMN vs. ZMS, MWS, DPP and Others [2017] eKLR** where the Court stated 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 those claiming under them ….. And cannot be varied or changed unless obtained by fraud or collusion, or by an arrangement contrary to the policy of the court. ……or if consent was given***
>
> ***without sufficient material facts or in misapprehension or ignorance of such material facts, or in general for a reason which would enable the court to set aside an agreement."***

21. The Court further held that:-

> ***"The court cannot set aside a consent judgment where there is nothing to show that counsel has entered into it without instructions. Furthermore, that even in cases where advocate has no specific instructions to enter a consent judgment but has general instructions to defend the 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."***

22. The Respondent submits that the Claimants' Application is an afterthought as it was filed 3 years after the receipt of the award. They posit that the general principle regarding costs is that they must follow the event. In their view, the Application is frivolous and vexatious and as such costs should be awarded to them.

23. I have examined all the submissions and averments of the Parties. The issue of this application concerns joinder. The Applicant seeks joinder of their Counsel after judgement on 27/1/2016 on the ground that the Court judgement was entered without their consent.

24. From the record, the official judgement is dated 22/1/2016 and there is no indication that there was any other judgement consented to on 27/1/2017 if at all. If however there is such a judgement, then, this needed to be endorsed and be changed by Court.

25. It would therefore be important for the Counsel who alleges such a consent to be enjoined to explain if there is such a consent and in this case, this is the Respondent herein who alleges she was given instruction to accept 2 million on behalf of the Claimants which she did enter consent with the Respondents.

26. The Respondent's Counsel has contended that the Counsel making this application are not properly on record. I do agree that after judgement, the new Counsel would only be properly on record after proper authority from Court or by agreement with the former counsel. As this has not been done, I agree that the application is not properly before Court. I will proceed and strike it out. The Applicants are free to refile the application after following the correct procedure. There will be no order as to costs.

Dated and delivered in open Court this 2nd day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Njiru for Claimant – Present

Annie Kaduma holding brief Njoroge for Respondent – Present