REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 269 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ERIC KINOTI.....CLAIMANT

VERSUS

SOCIETE PETROLIERE KENYA LIMITED....RESPONDENT

RULING

On 29th January 2019, the County Labour Officer's recommendations were adopted as the judgment of the Court, by consent of parties. The recommendations were that the Claimant be awarded the following –

a. 3 months' salary in lieu of notice at Kshs.2,100,000.

b. Accrued salaries for April to August 2013 in the sum of Kshs.3,500,000

Consequently, the Court entered judgment for the Claimant in the sum of Kshs.5,600,000 together with costs to be agreed upon by the parties or taxed. The parties also agreed that there will be stay of execution for 45 days and that interest on the decretal sum would start accruing if payment is not made within the 45 days.

However on the 21st February 2019 the Respondent filed the instant application seeking the following orders-

1. That the firm of Kibatia and Company Advocates come on record for the Respondent in place of the firm of Were and Oonge Advocates.

2. That pending the *inter partes* hearing and determination of this Application this Court be pleased to grant a temporary stay of execution of the judgment and orders in ELRC Cause 206 of 2014.

3. That the Court be pleased to review its judgment in this matter made on 29th January 2019.

4. That the Court be pleased to grant the Defendant leave to file its objection to the decision of the labour officer and the same be considered by this Court.

5. That in the alternative to 3 above the Court be pleased to issue orders to reopen this case allowing the Respondent an opportunity to be heard.

6. That the Plaintiff be ordered to pay the Defendant's costs of the application and costs of the suit.

The Application is supported by the grounds that failure to grant the orders for stay will render the review or reopening of the case an exercise in futility due to the impending execution. It is applciant's position that it already paid the Claimant USD 5,000.00 which was not taken into consideration in the computation by the labour officer and failure to do so by this Court will amount to double compensation. Further, that the labour officer and the Court failed to take into account the effect the negotiations would have on the amendment of Claimant's terms of employment.

The Respondent has instructed the firm of Kibatia and Company Advocates to represent it in the matter. It is the Respondent's case that its former advocates did not make any effort to object to the Labour Officer's recommendations despite being given the opportunity to do so and

despite having instructions to do the same.

The Claimant opposed the Application vide grounds of opposition arguing that the motion is misconceived, scandalous vexatious and an abuse of the court process as it seeks to review an order which was entered by consent yet there is no error on the face of the record nor was it obtained by fraud.

It is his position that the Respondent's motion has been made so as to unreasonably delay the conclusion of this matter thus defeating the overriding objective. Further, that no justifiable explanation has been given to warrant the issuance of the orders sought. He urged this Court to dismiss the application with costs.

The Application was canvassed through oral submissions. Only the Respondent attended court and made oral submissions.

Analysis and Determination

The issues for determination are whether the firm of Kibatia and Company Advocates should be granted leave to come on record for the Respondent and whether the Respondent has established sufficient grounds for the issuance of orders sought.

Under Order 9 Rule 9, when there is a change of advocate by a party having previously engaged an advocate after judgment has been passed, such change shall only be effected by order of the court—

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

The Court in ***S. K. Tawadi vs. Veronica Muehlemann*** **[2019] eKLR** highlighted the importance of order 9 rule 9 as follows:

"In my view, the essence of order 9 rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgment has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished

away…"

In this case, none of the conditions in order 9 rule 9 were met. No affidavit of service or consent from the Respondent's previous advocates is on record. Further, the Respondent has levelled some serious allegations against former advocates which they ought to have been accorded audience to respond to. The applicant has not as much as served the application upon the said applicant's erstwhile advocates. In view of the foregoing, the Respondent's prayer to have the firm of Kibatia and Company Advocates has failed to comply with the procedure for a new advocate to come on record after judgment.

The court thus declines to grant leave to the said firm to come on record.

Review

Under Rule 33(1) of the Employment and Labour Relations Court Rules—

> ***"A person who is aggrieved by a decree or an order from which an appeal is allowed but 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."***

Further, the law on review of a consent judgment is now settled; since it has a contractual effect, it can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts as was the holding in ***Samuel Mbugua Ikumbu -V- Barclays Bank of Kenya Limited [2015] eKLR***. The Court further stated—

> *"…where the Advocate has no authority at all to enter a consent judgment, the consent judgment will be a nullity…This, however, cannot be construed to mean that the general authority given to an Advocate to act on behalf of his client in a matter allows for his conduct in all matters with an exception to entering consents. As adopted from common law, an Advocate who is duly instructed to act on behalf of his client has authority to act in every single thing that pertains to that matter even, enter consents on his or her behalf."*

In the case of ***Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd [1982] KLR 485*** 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 by an agreement contrary to the Policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement … An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding".*

On 21st January 2019, Mr. Muriungi holding brief for Mr. Oonge, communicated to Court that Mr. Oonge had an objection to the tabulation of terminal dues by the Labour Officer and was granted leave to file the objections by close of 25th January 2019. However, when the matter came up on 29th January 2019 for mention to confirm the filing of the objections, Mr. Muriungi conceded that no objection had been filed and that he and the Claimant's advocate, Mr. Okach, had agreed to adopt the Labour Officer's recommendations. The Respondent has not demonstrated that its advocate, Mr. Muriungi, had no authority to enter into the recorded consent. Instead, the Respondent has cast aspersions alleging that Mr. Muruingi ought to have objected to the recommendations as those were the instructions, and that the court had given him the opportunity to do so. Further, the Respondent claims to have varied the Claimant's employment contract and paid him USD 5,000.00. These averments are not supported by any evidence hence remain to be mere allegations.

The applicant has further not produced any instructions it gave to its advocates that is contrary to the consent order that the said counsel entered into. It is mischievous that the Respondent did not serve its former advocate yet the said advocates have been accused of not taking applicant's instructions.

The application is without merit and borders on abuse of court process. It is accordingly dismissed with costs to the Claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE