



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 41 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOHN OCHANDA AND 996 OTHERS.....CLAIMANT**

**VERSUS**

**TELKOM KENYA LIMITED.....RESPONDENT**

**RULING**

The Application before Court for determination is a Notice of Motion filed on 9<sup>th</sup> July 2019. The applicant seeks orders that:

1. The firm of Ng'ania and Company Advocates do come on record for Selestine A. Mboss, Joyce Orlale, Zilpa Okeyo, Stephen Kerandi Oyando, Alima Hassan Ibrahim, Wilberforce Maghas, Alfred Kisanya, Cornel Nyanunga, Ayoyi Obonyo and Anthony K. Mutua in place of the firm of Letangule and Company advocates.
2. The costs of the application be provided for.

The application is premised on grounds that:

1. This matter was settled by a Consent Order recorded on 15<sup>th</sup> December 2015 and a Decree extracted in terms of the said Consent order.
2. The Respondent has since failed to pay the following claimants; Selestine A Mboss, Joyce Orlale, Zilpa Okeyo, Stephen Kerandi Oyando, Alima Hassan Ibrahim, Wilberforce Maghas, Alfred Kisanya, Cornel Nyanunga, Ayoyi Obonyo and Anthony K. Mutua arising from the Consent Order.
3. The foresaid Claimants have since appointed the firm of Ng'ania and Company Advocates to act for them in place of Letangule and Company Advocates and that the latter firm can only come on record with leave of Court Judgment having been entered.

The application is supported by the Affidavit of Stephen Kerandi Onyando sworn on 8<sup>th</sup> July 2019 in which they reiterate the grounds set out in the application.

In response to the application, the Respondent filed Grounds of Opposition on 19<sup>th</sup> September 2019 stating that:

1. The Applicants listed therein were never part of the original Claimants in the instant suit and were therefore not part of the consent recorded in Court settling the matter.
2. An application under Order 9 Rule 9(b) of the Civil Procedure Rules, 2010 can only be brought by an Advocate on behalf of the Applicants who were original Claimants in the suit. As such the intended firm cannot come on record under the said provisions
3. The application if allowed will have the effect of joining the Applicants therein as parties in the original action, which they were not.
4. No evidence was adduced confirming that the deponent of the Supporting Affidavit was authorised to swear the affidavit on behalf

of the other intended Claimants.

The application was heard by way of oral submissions.

### **Submissions by the Parties**

Counsel Wairegi submitted that they seek to come on record for the Claimants listed as numbers 427, 503, 504, 538, 760, 810, 884, 885, 886 and 915. He submitted that the grounds of opposition must fail as these Claimants were in the original claim.

In respect of the authority to swear by the other applicants, he submitted that Courts when faced with a similar issue have taken a liberal approach. In support of this position, he relied on the decision in *Suraya Property Group and another v W&K Estates Ltd & 2 Others [2019] eKLR*.

Counsel Rabut for the Respondent submitted that the matter proceeded to hearing and Judgement entered against the Respondent who appealed to both the Court of Appeal and the Supreme Court. He submitted that the parties thereafter were successful in their negotiations culminating to recording of a Consent filed on 10<sup>th</sup> September 2015 and adopted by the Court on 15<sup>th</sup> December 2015 as a Judgment of this Court.

He avers that the then advocates representing the parties agreed on a schedule of Claimants in the consolidated suit who were subject of the consent. He submitted that it is on this basis that he submitted that the parties listed were never part of the Claimants as agreed by the parties at that time.

He submitted that should the applicants have been represented by the Advocates their names would have appeared in the schedule. He argued that since the intended Claimants were not parties to the suit Order 9 Rule 9 of the Civil Procedure Rules can not apply. He submitted that the intention of Order 9 Rule 9 was expounded in the *Suraya Properties Case* [supra] where the court held that court can deviate from strict rules of procedure in favour of wider interest of dispensing justice, and allowed K'Opere and Company Advocates to come on record for the defendants thus the application should not be allowed as the intended claimants were not party to the suit.

He submitted that the authority to swear must be given and that Stephen Kerandi has not provided the form in which he received the instructions to act on behalf of the Claimants. He urged the Court to dismiss the application.

Counsel Opola holding brief for Ms. Nduta for the original Claimants submitted that following the consent, the case was marked as closed and settlement amounts paid in 2016. He submitted that the applicants have delayed for 3 years and now seek to vary the terms of the consent through the backdoor. He submitted that reopening the file would be prejudicial and any further settlement can only be made through a fresh suit. He further submitted that a consent cannot be varied on the grounds envisaged by the applicant. In conclusion, he urged the Court to dismiss the application.

In rejoinder, Counsel Wairegi submitted that the court was not given a list setting out the applicants who had withdrawn from the suit. He submitted that a consent Judgment that does not include all parties is not a consent. He submitted that this application only seeks orders for Counsel to come on record and that it has not been disputed that the applicants were Claimants. He urged the Court to allow the application.

### **Determination**

The issues for determination are whether Stephen Kerandi Oyando

had authority to swear the affidavit on behalf of the applicants and whether the firm of Ng'ania and Company Advocates can come on record for the applicants.

### **Whether the deponent has authority to sign the affidavit**

The deponent Stephen Kerandi Onyando deposes at paragraph 2 of his Supporting Affidavit sworn on 8<sup>th</sup> July 2019 that he had received instructions on behalf of the other applicants to swear the affidavit. The Respondents aver that the application is defective as there is no authority to swear.

Order 1 Rule 13 of the Civil Procedure Rules provides:

**(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.**

**(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.**

Rule 9(2) of the Employment and Labour Relations Court (Procedure)

Rules 2016 also provides that where a suit is filed by several persons a letter of authority should be signed by all other parties. It is true that there is no authority filed with the application in terms of either Order 1 Rule 13 of the Civil Procedure Rules or Rule 9(2) of the Employment and Labour Relations Court (Procedure) Rules. This means that the deponent can only swear for himself and not for the other applicants who have not given him authority or whose authority has not been filed on record.

In *Hezekia Kipkorir Maritim & 10 others v Philip Kipkoech Tenai & 2 Others [2016] eKLR* the Court held:

*“In view of the foregoing decisions of the High Court, it is quite clear that the High Court appears to exhibit a conflicting position on whether a party acting on behalf of others without an express written authority renders a suit a nonstarter. However, the Court of Appeal appears to have settled the foregoing issue when it held in the case of **Research International East Africa Ltd V Julius Arisi & 213 Others [2007] eKLR, Nairobi Civil Appeal No. 321 of 2003** that the superior judge had discretion and jurisdiction not to strike out a plaint where the verifying affidavit was sworn without the authority of other plaintiffs, but to allow the parties to remedy the situation by complying with the rules of procedure...”*

I therefore do not find that the application is defective for failure to have authority to swear on behalf of the other applicants. The affiant however has to obtain the consents of others before he is allowed or recognised as acting on their behalf.

#### **Whether the firm of Ng’ania and Company Advocates should come on record for the applicants**

This Application is brought under Order 9 Rule 9(a) of the Civil Procedure Rules, which states thus:

**When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

#### **(a) upon an application with notice to all the parties;”**

The applicants aver that they were previously represented by the firm of Letangule and Company Advocates and now seek to have the firm of Ng’ania and Company Advocates come on record. They aver that they were not paid pursuant to the Consent order. The Respondents and other Claimants aver that the applicants are not parties to the suit as their names were not included in Schedule A to the consent order.

The Consent dated 10<sup>th</sup> December 2015 and filed on 15<sup>th</sup> December 2015 provides at paragraph 1 that:

*“The Defendant, Telkom (Kenya) Limited hereby agree to fully and finally settle all the claims by the Plaintiffs in the above proceedings, the full list of which is annexed in the schedule hereto marked “A” by paying them a lump sum amount of Kenya Shillings Five Hundred Million (Kshs.500,000,000) (the “Settlement Amount”). All applicable taxes are included in the settlement Amount and no other payment shall be made by the Defendant”*

The Consent was signed by the firm of Oraro and Company Advocates, A. T. Oluoch and Company advocates and S. M. Kitonga and company Advocates. However, when the parties appeared before the Court on 15<sup>th</sup> December 2015, Counsel Koech held brief for Letangule and he confirmed the terms of the consent.

Schedule A annexed to the Consent listed the claimants and payments due to each of them pursuant to the consent. The Respondent alleges that the Claimants were not included in the Schedule to the Consent. Counsel for applicants submitted that the applicants are numbers 427, 503, 504, 538, 760, 810, 884, 885, 886 and 915 in the list. He did not specify which list.

According to the settlement list and all other lists, I have looked at in the file these numbers are assigned to the following names –

427 – S. B. Oduku

503 – M. D. Kakhaguli

505 – J. O. Otwala

538 – M. A. Mkutsa

760 – J. Murgor

810 – Akuka J. O

884 – A. Nakhungu

885 – R. O. Okoth

886 – L. Odipo

915 – S. C. Chacha

In view of the fact that the applicants have failed to prove that they were parties to this suit, I agree with the submissions by Mr. Rabut for the respondent that the application would not succeed. I further agree with submissions by Counsel Opola that the consent compromised the entire suit and for the application to succeed, Counsel must prove the preconditions for setting aside consent judgments, which include fraud, collusion, agreement contrary to policy, misapprehension or ignorance of material facts, or other sufficient good.

Further, there is no consent by Letangule and Company Advocates for the firm of Ng'ania and Company Advocates to come on record for the applicants in terms of Order 9 Rule 9(a) of the Civil Procedure Rules.

For the foregoing reasons the application is dismissed.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF NOVEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**