



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 370 OF 2015

(Before Hon. Justice Mathews N. Nduma)

KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT

VERSUS

MIGORI COUNTY GOVERNMENT.....RESPONDENT

RULING

1. The respondent brought a notice of motion application dated 15th October 2018 praying for orders:
 - (a) That the Honourable court be pleased to set aside the consent judgment entered into on 5th July 2015 in Kisumu ELRC 370 OF 2015.
 - (b) That the respondent be granted leave to enjoin the Intergovernmental Relations Technical Committee as a 3rd party and further, leave to issue a third party notice to the committee be granted.
2. The application is grounded on facts set out on the face of the Notice of Motion and numbered (a) to (m) that may be summarized as follows:
3. That a dispute ensued regarding enforcement of the Collective Bargaining Agreement leading to the Applicant/Respondent filing Kisumu E&LRC cause no. 370 of 2015.
4. That the parties entered a consent that was adopted by the court as its judgment on 5th July 2016 in Kisumu E&LRC cause No. 370 of 2015.
5. In terms of the consent judgment, the Respondent/Applicant was ordered to pay all outstanding salaries and arrears payable to the Claimant/Respondent members who were employed by the defunct municipal council of Migori within two (2) succeeding years with effect from the financial year beginning 2016-2017. That in terms thereof, the decretal amount was Kshs. 134,743,591.60 payable in two instalments of Kshs. 67,000,000 with respect to the 1st instalment payable before 30th June 2017 and Kshs. 67,743,591.60 payable before June 2018.
6. That the Respondent/Applicant made partial payment of Kshs. 28,000,000.
7. That Applicant now pleads discovery of new material information to wit Gazette Notice No. 858 and 2701 of 2017, in terms of which modalities of settlement of liabilities incurred by the defunct Local Authorities was put in place. That the new procedure in terms thereof is that liabilities in question have to be verified by the County Assets and Liabilities Committee which sends a report to the Intergovernmental Relations Technical Committee before being authorized for payment by the National Treasury.
8. That the Applicant has since followed the procedure and the debt was verified and evaluated by the County Assets and Liabilities Committee and awaits settlement upon further authorization by the other entities for payment.
9. The Applicant is apprehensive that the Claimant/Respondent has since filed ***Kisumu JR Miscellaneous Application No. 6 of 2018*** seeking to compel the Applicant to settle the decretal sum in terms of the consent judgment.
10. The applicant prays that the consent judgment be set aside since the same conflicts with the procedural requirement aforesaid for settlement of debts owed by defunct Local Authorities.

Replying Affidavit

11. The application is opposed vide a replying affidavit of Roba Duba sworn to on 25th October 2018. The deponent is the Secretary General of the claimant union.
12. The deponent states that funds for the settlement of the decretal sum were set aside in the County budget for the years covered by the consent judgment. The Applicant does not state where funds already set aside in the respective budget is going to be utilized. That the aforesaid Gazette notice and procedure does not override a decree of the court.
13. That the judgment was entered into willingly and no grounds known in law to cause a consent judgment to be set aside have been advanced by the applicant.
14. That no case has been made out for joinder of the Inter-governmental Relations Technical Committee as a 3rd party in this matter since all the respondent needs to do is pay the arrear salaries first and claim indemnity from the National Government.
15. That the application is bad in law, lacks merit and it be dismissed.

Determination

16. In the case of **Goodman Agencies Limited vs Attorney General and Another (2012) UGCOMMC 178**, the High Court of Uganda sitting at Kampala held as follows:

“As far as judicial precedents are concerned, I would refer to the case of Brooke Bond (T) Limited vs Mallya (1975) E.A 256 where Law Agp agreed with the principles quoted at page 269 of the judgment that

“a consent judgment made in the presence of and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of court or where the consent was given without sufficient material facts, or is in misapprehension or ignorance of material facts or in general for any reason which would enable court to set aside an agreement between the parties”

17. In the present case, the consent judgment in which the County Government agreed to pay arrear salaries in respect of employees of the defunct Municipal Council was entered into on 5th July 2016. Nothing has been advanced by the applicant that would have hampered entry of the consent judgment at the time in terms of the principles advanced above.
18. The applicant advances subsequent Gazette notices No. 858 and 2701 of 2017 as external interventions that have made the consent judgment voidable and therefore amenable to be set aside.
19. The Applicant has however in its grounds in support of the application conceded that, it had subsequently presented a report on assets and liabilities to the County Assets and Liabilities Committee which report has since been verified and evaluated by the committee.
20. The applicant has not alleged that the arrear salaries owed to the former employees the subject of the consent judgment were disputed in any manner by the County Assets and Liabilities Committee. Instead the Applicant confirms that the said debt was verified and only awaits clearance for payment by the National Treasury.
21. It is also not in dispute that the County Government has since budgeted for the payment of the arrear salaries in terms of the consent judgment, which budget was submitted to the Treasury for approval and the National Assembly.
22. The applicant has not alleged that any queries were placed at all on the said budgetary request. To the contrary and as deposed to in the replying affidavit the said budgetary requests were approved as seen in the minutes of a consultative meeting between the County Government and the union in which the County Secretary informed the meeting that

“the last disbursement was already factored and reflected in the current main budget financial year 2017/2018”
23. In short, the applicant has not demonstrated that the Consent Agreement in any way violated the subsequent legislation providing the distribution of Assets and Liabilities by defunct local Authorities in the transition period.
24. The applicant has simply not demonstrated that the consent judgment was obtained by fraud or collusion or the same violated policy of court in that same was obtained without sufficient material facts, or in misapprehension or ignorance of material facts. In short nothing has been presented before this court to warrant the setting aside of the consent judgment.
25. It is also material that the consent judgment has been partially settled and the balance decretal sum has been lawfully budgeted for thereby giving room to the national government to weigh in on the budgetary request before same is approved.
26. The applicant has not indicated that the budgetary request was questioned or rejected.
27. The case of **County Secretary, County Government of Kakamega vs Republic Exparte Ali Adan and another (2017) eKLR**, in which

the Court of Appeal reversed the decision of the High court which issued an order of mandamus compelling the respondent to pay the decretal sum stating that it was not within the authority of the respondent, County Government to make this payment is distinguishable in every respect with this matter.

28. The Court of Appeal did not deal with the matter of factors that may lead to setting aside of a consent judgment that has been partially settled and a budgetary approval obtained for payment of the balance of the decretal sum.

29. The consent judgment in question was entered into before the legislation weighed upon by the Court of Appeal was enacted. Furthermore the court is satisfied that the respondent has taken all necessary steps to validate the consent judgment in terms of the new legislation.

30. The Application lacks merit therefore and is dismissed with costs.

Ruling Dated, Signed and delivered this 10th day of December, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Gekeria for Respondent/Applicant.

Mr. Yogo for claimant/Respondent

Chrispo – Court Clerk