



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 125 OF 2015**

***(Before D. K. N. Marete)***

**KENYA PLANTATION &**

**AGRICULTURAL WORKERS UNION.....CLAIMANT**

**VERSUS**

**EASTERN PRODUCE KENYA LIMITED.....RESPONDENT**

**RULING**

This is an application dated 6th June, 2018 seeking the following orders of court;

- a) *This application be certified as urgent and service of this application be dispensed with in the first instance.*
- b) *The consent order herein plus all proceedings emanating there from be set aside in its entirety and varied with an order of depositing the decretal sum in court pending hearing and determination of appeal.*
- c) *That there be stay of execution of the decree of the court herein pending hearing and determination of this application inter partes and pending further orders of the court.*
- d) *That this court be pleased to grant orders as per prayer (c) above ex-parte in the first instance.*
- e) *That such other orders be made in the interest of justice as may be expedient.*
- f) *Costs be in the cause.*

It is grounded as follows;

- a) *The parties herein entered into consent on 14<sup>th</sup> May 2018 to have decretal sum of Kshs.173,182.22 be deposited in Joint interest earning account of Advocates for the Respondent and that of the Claimant Union within 21 days in default execution to issue.*
- b) *The Respondent approached their Bank particularly KCB Bank (K) Limited with a view of opening a joint interest earning account in the name of both parties.*
- c) *The Bank subsequently gave a list of requirements to both the Claimant Union and Advocates for the Respondent to enable opening of the said account.*
- d) *The Claimant Union has since been unable to comply with the requirements to enable opening of the said account and time to comply has lapsed.*
- e) *In the circumstances the Respondent wishes the consent order adopted on 14<sup>th</sup> May 2018 be set aside and varied with an order that the decretal sum be deposited in court pending hearing and determination of appeal.*
- f) *This application has been made in good faith.*

g) *The Respondent has proceeded expeditiously.*

h) *This Honourable Court has discretion and is empowered to allow the prayers sought in the interest of justice.*

i) *The Respondent's application is merited all circumstances considered.*

The respondent in a Replying Affidavit sworn on 11th June, 2018 opposes the application. It is her averment that the application is based on falsehoods as the respondent never approached the claimant to provide details from KCB as alleged to enable it open a joint interest earning account. The allegations and assertions of the inability to comply are falsehoods and utter lies made under oath whose veracity shall be tested by cross-examination of L.J. Kipyego, advocate the adjutant.

This is further illustrated as follows;

10. ***THAT***, the Claimant was fully bound by the consent orders of the 14<sup>th</sup> May 2018 which was still in force and could not sign as it was being forced to vary an order it had not consented to and that was being made without the directions of the Court.

13. ***THAT***, the Honourable Court cannot issue order (b), (c), (e) and (f) sought in the Respondents application herein for the following reasons:-

a) *The Respondent advocate herein L.J Kipyego compromised the Respondents application seeking stay of execution in the terms and conditions set out in the consent of 14<sup>th</sup> May 2018 which was adopted as an order of the Honourable Court and the proceedings emanating there from cannot be set aside as sought in prayer (b) of Respondents application.*

b) *The Respondent has not demonstrated sufficient grounds set out in Law that the orders of 14<sup>th</sup> May 2018 was obtained by fraud, collusion, illegality, mistake, an agreement being contrary to the Court policy, absence of material facts and ignorance of material facts warrant variation or setting aside the same orders by the Honourable Court.*

c) *There is no any an iota of evidence before the Honourable Court from the Respondent to the Bank (KCB) or from the Bank (KCB) to the Respondent to show purported efforts being made to open a joint interest earning account and or the required bank details from both the Claimant and the Respondent herein for opening such an account.*

d) *The application lacks merit as it is filed way outside the 21 day period agreed by consent that lapsed on the 14<sup>th</sup> May 2018 and seeks to vary a consent order the Respondent has not complied with as agreed within the 21 days compromised period.*

14. ***THAT***, the application is frivolous, vexatious and is an abuse of the Court process as it seeks to obtain orders on basis of falsehoods and utter lies deponed to in paragraph 3, 4 and 5 of the affidavit of L.J Kipyego to the Respondents advocate with the conduct of this matter.

This to me is a storm in a tea cup. The application seeks to vary the terms of a consent order of court directing on a deposit of the decretal amount in a joint interest earning account pending appeal. The respondent/applicant cites a case of impracticability of execution of the consent order as it stands whereas the claimant/respondent denies this. She accuses the respondent/applicant of indulging in falsehoods – lies, in support of the application. This is a very serious allegation. It would require emphatic evidential support.

The respondent/applicant in her application proposes that the consent order be varied to allow a deposit of the decretal amount in court. Why would anybody create such hullabaloo over such triviality? To me, this is a matter that should have been settled by a chat *inter partes*. It does not warrant an exercise of prosecution like in the instant case.

Parties beware. The court process is a serious exercise. Parties are mandated to assist the court in a furtherance of its principle objective as set out in section 3 of the Employment and Labour Relations Court Act, 2014, to wit, enable the court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act. Is this the case here?

This application sounds like it is an abuse of the process of court. The only difference is that this appears to be occasioned by the claimant/respondent's desire to distance herself from sense and reality. This could have been avoided all together by the parties. I am therefore inclined to allow the application and order as follows;

i. That the consent dated 14th May, 2018 be varied with an order of depositing the decretal sum in court pending hearing and determination of the appeal.

ii. The parties shall bear their own costs of the application.

**Delivered, dated and signed this 20<sup>th</sup> day of June 2018.**

**D.K.NJAGI MARETE**

**JUDGE**

**Appearances**

1. Miss L. J Kipyego instructed by Kibichiy & Company Advocates for the respondent/applicant.
2. Mr. Khisa for the claimant union/respondent.