



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 2212 OF 2012

(Formerly High Court Civil Case No.548 of 1995)

(Before Hon. Justice Hellen S. Wasilwa on 31st July, 2018)

WOI SAMUEL CHEGE GITAU

AND 283 OTHERS.....CLAIMANTS

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

RULING

1. The Application in Court is the one dated 14/2/2018 and is brought under order 10 rule 11 of the Civil Procedure Rules Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the Law seeking orders:

a. That this application be certified urgent and be heard on priority.

b. That the Honourable Court do review its orders of 21st of September 2017 of excluding and removing the Applicants from the claim herein and do include Corporal Stanley Njogu Kamanu Ngaruiya–Service Number 021789 and reinstate him as Claimant and therefore beneficiary of the judgment delivered at Nairobi on 21st September 2017 by the Principle Judge M.N.Nduma J.

c. That any other relief this Honourable Court may deem fit and just to grant.

d. That costs of this application be provided for.

2. The Application which is supported by the affidavit of one Corporal Stanley Njogu Kamanu Ngaruiya is premised on the grounds:

1. That the Claimant applicant has all along followed up his claim knowing that the Court will sign the judgment to receive his compensation.

2. That during the hearing of the claim herein, the Claimant supplied his service number and his discharge certificate as a basis in which claim was quantified as per the copy of the of the judgment on quantum which was unsigned until when it was signed is when the Claimant's name was removed from the claim with remarks "claim withdrawn".

3. That the Claimant was a loyal member of the Respondent's employees of the Kenya Airforce and therefore entitled to the remedy as claimed herein.

4. That the Claimant has never been compensated in whichever manner reason why his name from part of the list of Claimants and therefore beneficiaries of judgment by the Honourable Court herein.

5. That the inclusion of the name of the Claimant herein will never prejudice the Respondents as this will only facilitate the fair trial and compensation of the Respondent's employees by including all claims not to allow other claims thereafter to save the Court's time.

6. That it is only fair and just that this Honourable Court do grant the Claimant his prayers as his claim is the same with the other (280) Claimants and if the Claimant is not a beneficiary he stands prejudiced greatly as it has been quite a long time since he irregularly lost his employment and he was part of the Claimants who filed this claim being Claimant No. 65 in the list.

7. That the Applicant has never withdrawn his claim from herein.

3. The Application was also supported by the Supporting Affidavit of one Corporal Stanley Njogu Kamanu Ngaruiya who avers that he is Claimant No. 65 in the claim herein and competent to swear this affidavit. He has averred that his name was removed from the list unanimously and no good reason was given for the same.

4. The Respondent filed their Grounds of Opposition where they opposed the Application stating that:

1. That the Court lacks jurisdiction to entertain the Application.

2. That the Claimants withdrew their claim and the matter proceeded in their absence.

3. The Claimants seek to be enjoined in the matter after the suit has been concluded and the court rendered its judgment.

4. The Claimants seeks to enjoy the fruits of judgment where they did not tender any evidence in support of the claims.

5. The application lacks merit and ought to be dismissed with costs.

Submissions

5. The Claimants filed their submissions in support of their Grounds of Opposition where they submit that the court already delivered a judgment on 22nd September 2017 by the Principal Judge M.N.Nduma J. The Court after delivering this judgment became functus officio to determine any other issue arising from those proceedings. They sate that the Court cannot reopen the case when in the first place the Applicant withdrew from the case and judgment has been made and doing so would amount to unjust enrichment.

6. They also submit that the applicants sought to be heard on the same issues as these ones in the matter of **Peter Ngari Kagume & 7 others Vs Attorney General (2009) Eklr** where Justice J.G Nyamu dismissed their Petition on 31st January 2009. The Applicants were held in general to have delayed to come to Court and the Court found that this amounted to abuse of Court process. The orders sought in the above cases are similar to this one and this amounts to res judicata under S7 of the Civil Procedure Act chapter 21 of the laws of Kenya.

7. They aver that Order 19 of the Civil Procedure Rules, 2010 provides for rules of drawing Affidavits which were not adhered to in this case as it is clear from the affidavit sworn on 10th October 2017 which is sworn by 3 of the 4 Applicants.

8. They submit that there is no written authorization by WO II Thomas Joshua Were for the 3 to swear the affidavit on his behalf making the affidavit defective.

9. Order 1 Rule 13 of the Civil Procedure Rules, 2010 provides that such an authority has to be in writing, signed by the person giving it and filed in Court. They relied on the case of **Ndungu Mugoya & 473 Others Vs Stephen Wangombe & Others (2005) Eklr**.

10. They further aver that Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides that once a judgement has been delivered and a party wishes to change advocates or act in person such change has to be with the leave of Court after serving all the parties concerned or with consent of concerned advocates.

11. The firm of Osoro Juma & Company Advocates did not comply with the mandatory requirement to come on record and to apply for reinstatement after judgment hence the firm lacks locus standi to represent the Applicants. There was also no consent given by the other advocates for the firm to represent the Applicants. They relied on the case of **Amina Hassan Ahmed Vs Returning Officer Mandera County & Another (Garissa) High Court Election Petition No.4 of 2013 (uR)**.

12. They therefore submit that this application be dismissed for lack of merit, is defective, vexatious, frivolous and is an abuse of the Court process. They submit that the Applicants are bound by the maxim of equity that they have come to Court with unclean hands and the Court is not here to cure their delay.

13. The Respondents have not filed their submissions.

14. I have considered the averments of both parties. This application was filed by the Applicant through the firm of Osoro & Company Advocates on 14/2/2018. The Claimants have submitted that the firm of Osoro & Company Advocates is not properly on record and so could not bring the application on behalf of the applicants. The firm of Osoro & Company Advocates came on record in this case on 14/2/2018. Judgment in this case was delivered on 15/4/2016.

15. Under Order 9 Rule 9 of the CPR.2010:-

“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 parties; or

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

16. In the current case, Osoro & Company Advocates came on record and filed this application without any order of this Court and without consent of the parties. It therefore follows that the application is improperly before this Court. For the above reason, I will not delve into the merits or otherwise of the application. I therefore strike out this application with no order as to costs.

Dated and delivered in open Court this 31st day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muchoki for 1st, 2nd to 4th, 8th, 10th, 12th to 16th, 18th, 21st, 22nd, 48th, 67th, 217, 270, 283 Claimant/Respondents and holding brief Esuchi for 17th Claimant/Respondent – Present

Miss Musembi holding brief for Ojwang – Agina for 226 Claimants/Respondents – Present

Nyambura holding brief for Osoro for Claimant/Applicants – Present

Nyonge holding brief Mugiira for Respondents – Present