



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 346 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**MONICA A. OTIENO & 32 OTHERS.....CLAIMANT**

*VERSUS*

**JARAMOGI OGINGA ODINGA UNIVERSITY OF**

**SCIENCE AND TECHNOLOGY.....1<sup>ST</sup> RESPONDENT**

**BONDO TEACHERS TRAINING COLLEGE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The application before me for determination is dated 4<sup>th</sup> November 2015 and seeks orders setting aside or vacating the orders withdrawing the claim and for the court to reinstate the same.

The grounds in support of the application are that the applicants/claimants did not give instructions to their erstwhile counsel to withdraw the suit and were not aware of the withdrawal until 3<sup>rd</sup> October 2015. Upon becoming aware of the withdrawal they appointed their current counsel and instructed him to file this application. They state that counsel's mistake should not be visited upon them, that they will suffer irreparable loss should their application not be allowed and further that the application is brought in good faith.

These grounds are reiterated in the joint supporting affidavit sworn by MONICA A. OTIENO and ELIUD OGWAYO OGUTU, the 1<sup>st</sup> and 2<sup>nd</sup> claimants respectively. In the affidavit they have attached the authority of the 31 co-claimants, notices and minutes of meetings held by the claimants to discuss the issue.

The 1<sup>st</sup> respondent opposed the application and filed grounds of opposition as follows –

1. That the suit is time barred with respect to Section 90 of the Employment Act Cap 226.
2. That there is no suit capable of being revived in law.
3. That this application is misconceived in law, frivolous vexatious.
4. That the said application is an afterthought and is made in bad faith.
5. That advocates act on instruction and not otherwise.
6. That the plaintiff is non suited as against 1<sup>st</sup> respondent.

The 2<sup>nd</sup> respondent also opposed the application and filed the following grounds of opposition –

1. That the application is devoid of merit, frivolous, misconceived an abuse of court process.
2. That the suit was wholly withdrawn by the advocate acting as an agent and on instructions.

3. That there is not existing suit upon which the application can be predicated.
4. That the application raises issues of professional negligence and or misconduct that do not concern the 2<sup>nd</sup> respondent.
5. That the suit is time barred with respect to Section 90 of the Employment Act.

Parties agreed to dispose of the application by way of written submissions. However upon considering the pleadings and the parties written submissions, the court was of opinion that the ruling would serve no purpose and persuaded the parties to discuss and agree on a resolution given that the issue in dispute is provided for in the statute that established the 1<sup>st</sup> respondent which took over the assets of the 2<sup>nd</sup> respondent.

The parties were however unable to agree. The court thereafter summoned the Registrar, Planning and Administration of the 1<sup>st</sup> respondent to explain the position with regard to transitioning of staff of the 2<sup>nd</sup> respondent who were taken over by the 1<sup>st</sup> respondent. With the consent of the parties it was resolved that the court make a final determination of the issues raised in both the application and the claim.

### **Claimant's Submissions**

The claimants filed two sets of submissions dated 9<sup>th</sup> May 2016 and 21<sup>st</sup> April 2017 respectively. It is the submissions of the claimants that they learnt about the withdrawal of the suit on 3<sup>rd</sup> October 2015 upon perusal of the court record after severally inquiring about the case from their erstwhile counsel without success. It is therefore their argument that the withdrawal having been without their consent and/or authority is not binding upon them.

They argue that mistake of counsel should not be visited upon client and the suit should be allowed to be heard on the merits.

The claimants relied on the case of **Westward Properties Limited -V- Chezer Investments Limited [2016] eKLR**.

In the submissions dated 21<sup>st</sup> April 2017 the claimants submit that the claim as brought by the claimants has certain facts on which all parties are in agreement: -

1. That the claimants were employees of Bondo Teachers Training College.
2. That Bondo Teachers Training College was taken over or converted to Jaramogi Oginga Odinga University.

That at the time of the takeover, Bondo Teachers Training College had both assets and liabilities that were handed over to the Jaramogi Oginga Odinga University. The said Bondo Teachers Training College as per the assertion of the Registrar one Ms Ngesa came into existence in the year 2009 and became Jaramogi Oginga Odinga University in February 2013.

That Bondo Teachers Training College does not exist but the facilities were taken over by the University College and hence it started to meet the obligations of Teachers Training College.

That the employees who voluntarily joined the University from Bondo Teachers Training College were accepted and given appointment letters. Some joined the pensions scheme and the rest enrolled with the NSSF.

They urge the court to consider the legal notice that mandated the takeover of Bondo Teachers Training College by Jaramogi Oginga Odinga University. The university took over all the liabilities of the Bondo Teachers Training College and thus cannot be presumed to exclude the employees who were then under Bondo Teachers Training College. That the claimants have a legal right to be paid by Jaramogi Oginga Odinga University and not a nonexistence entity, namely Bondo Teachers Training College.

### **1<sup>st</sup> Respondent's Submissions**

The 1<sup>st</sup> respondent filed two sets of submissions with leave of the court dated 23<sup>rd</sup> May 2016 and 25<sup>th</sup> September 2017 respectively.

In the submissions dated 23<sup>rd</sup> May 2016 the 1<sup>st</sup> respondent submits that once counsel is retained by a party such counsel is always deemed to act and represent the interests of the party until such a time that the advocate ceases to act or is otherwise removed by the client. It is submitted that the only occasions when the client can challenge the actions of the advocate is where there is irrefutable evidence that the advocate ignored instructions and went outside the scope of such instructions.

That in this case the claimants have not exhibited any proof. It is submitted that the claimants must have changed their minds about the instructions to withdraw the claim. The 1<sup>st</sup> respondent further submits that there is no proof of mistake of counsel in the withdrawal of the case, that if the advocate acted without authority the claimants would have filed a complaint to the Advocates Disciplinary Tribunal.

The 1<sup>st</sup> respondent further submits that the claim herein is statute barred as it relates to claims dating back to 2010 when their services were moved from the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent thus the claim is barred by the 3 year limitation period under Section 90 of the Employment Act.

The 1<sup>st</sup> respondent further submits that the notice of withdrawal extinguished the claimant's suit and the only remaining action is the taxation of costs, that the claim having been extinguished there is no claim that is capable of reinstatement.

In the submissions dated 25<sup>th</sup> September 2017 the 1<sup>st</sup> respondent submits on want of jurisdiction and relies on the case of Owners of **Motor Vessel's Lillian -V- Caltex Oil (Kenya) Limited**, where Nyarangi J. A at page 15 observed as follows –

*“A question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obligated to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”*

The 1<sup>st</sup> respondent submits further that the claimants are not entitled to the claim of gratuity as it is time barred.

In the alternative and on a without prejudice basis the 1<sup>st</sup> respondent submits that the claim by the claimants is based on Legal Notice No. 56 of 11<sup>th</sup> May 2009 establishing Bondo University. They submit that under paragraph 3 (3) thereof it is stated –

*“(3) The university college shall be successor to the Bondo Teachers Training College.*

*(4) All rights, liabilities and assets held by or by anybody on behalf of the Bondo Teachers Training College, existing at the commencement of this order, shall be automatically and fully transferred to the university college.”*

The Registrar, Planning and Administration, Mrs Rosemary Ngesa on behalf of the 1<sup>st</sup> respondent stated in court on 23<sup>rd</sup> January 2017 that there was no formal handing over process initiated by the relevant government ministry to identify and hand over liabilities or assets to them. This can be explained by the fact that the 2<sup>nd</sup> respondent institution was not shut down. It simply relocated to a different site.

She stated that it was presumed that the university college would be a successor of the Teachers' College. This did not happen as the college exists to date. The 1<sup>st</sup> respondent submits that the term successor is defined as *“A person who take over the rank, office, duties or privileges of another; a corporation that through merger, buy out or any other means, acquires the duties, stock, rights and debts of another corporation, known as its predecessor.”*

The 1<sup>st</sup> respondent submits that it did not acquire the duties, rights or privileges of the 2<sup>nd</sup> respondent. That the condition precedent as spelt out in paragraph 3(3) of the Legal Notice No. 56 of 11<sup>th</sup> May 2009 did not happen. That it is presumptuous to assume that the 1<sup>st</sup> respondent could then have gone ahead to acquire liabilities and assets of the 2<sup>nd</sup> respondent.

It submits the claimant's suit is hopelessly bad in law and discloses no course of action and must be dismissed with costs.

## **2<sup>nd</sup> Respondent's Submissions**

The 2<sup>nd</sup> respondent filed submissions dated 30<sup>th</sup> May 2016 in which it submits that the claimants willingly withdrew their suit against the respondents on 20<sup>th</sup> January 2015 and there is no evidence to show that their advocate acted without instructions.

They rely on the case of **KINUTHIA MAINA -V- COFFEE BOARD OF KENYA [2015] eKLR** in which the court quoted the case of **KCB LIMITED -V- SPECIALISED ENGINEERING COMPANY LIMITED**

**[1982] KLR 485** where in the court held *inter alia* –

*“A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side. 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 express direction, the order shall be binding.”*

The 2<sup>nd</sup> respondent further relies on the decision in **NEALE -V- LADY GORDON LENNOX [1902] 1 K.B 838**, where **Lord Alverstone, C. J** stated at page 843 –

*“I think it is now clearly established that counsel appearing for a party in an action is held out as having authority and has full authority as to all matters which relate to the conduct of the action and its settlement and further that notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement unless the fact that the counsel's apparent authority had been limited was communicated to the other side.”*

The 2<sup>nd</sup> respondent further relied on the provisions of Order 9, Rule 1 of the Civil Procedure Rules which provides that –

**[Order 9, rule 1.] applications, appearances or acts in person, recognized agent or by advocate.**

**1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in**

such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

Provided that—

(a) any such appearance shall, if the court so directs, be made by the party in person; and

(b) where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney-General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.

The 2<sup>nd</sup> respondent submits that the claimants are bound by the actions of their counsel and the suit was properly withdrawn.

The 2<sup>nd</sup> respondent further submits that the claimants relied on Order 25 which permits withdrawal of suit but does not provide for reinstatement of withdrawn suits. The 2<sup>nd</sup> respondent relies on the case **BETH NJOROGUE -V- SIMON NJOROGUE & ANOTHER [2015] eKLR** in which the court stated

*“...Order 25 does not make provisions for reinstatement of a suit. However this court has inherent powers under Section 31 of the Civil Procedure Act to make such Orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Nevertheless, this inherent power must be invoked judicially. The sole purpose for reinstatement of the suit is to deal with the issue of costs of the suit...”*

It is submitted that there is no suit in law that exists between the parties given that the suit was withdrawn on 20<sup>th</sup> January 2015. The 2<sup>nd</sup> respondent further relied on the case of **JUMA -V- KHAUNYA & 2 OTHERS [2004] eKLR** in which the court observed –

*“The applicant seeks to have the order withdrawing the suit set aside and for an order reinstating the former suit. I have already pointed out that the suit was withdrawn pursuant to the provisions of Order XXIV Rule 2(2) of the Civil Procedure Rules though the plaintiff did not cite the above provisions when making the application. It is in my humble view that a suit which has been withdrawn pursuant to the provisions of Order XXIV Rule 2 (2) of the Civil Procedure Rules cannot be reinstated. A party has the option of instituting a fresh action. This finding is on the basis of the provisions of Order XXIV Rule 4 of the CIVIL Procedure Rules which provides that if any subsequent suit shall be brought before payment of the costs of a discontinued suit upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid. The law under this order does not envisage a litigant to seek for an order of reinstatement.”*

The 2<sup>nd</sup> respondent further submitted that the application raises issues of professional negligence and or misconduct that do not concern the 2<sup>nd</sup> respondent and relied on the case of **HITEN KUMAR RAJA -V- GREENSPAN LIMITED & 4 OTHERS [2014]** in which it was held that –

*“An advocate acting for a party is clothed with general authority to represent the client and whatever actions he takes on behalf of the client as long as the same fall within the scope of his authority binds the client. If in taking the action the advocate acts negligently that cannot affect the validity of the action. In such a situation where an advocate acts negligently to the prejudice of the client such a client has a separate cause of action against the advocate for negligence and/or professional misconduct. Such action for negligence and/or professional misconduct cannot be properly prosecuted in the same suit where the advocate represented the client.”*

The 2<sup>nd</sup> respondent further submitted that setting aside the withdrawal notice will serve no purpose as the suit is statute barred. It is submitted that the transition from the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent took effect in 2001 and the suit was filed on 8<sup>th</sup> December 2014 more than 3 years later and thus is time barred. On this point the 2<sup>nd</sup> respondent relied on the decision in **FRED GOGO -V- G4S SECURITY SERVICE (K) LIMITED [2014] eKLR**.

Finally the 2<sup>nd</sup> respondent submitted that the application is an abuse of court process, that having withdrawn the case voluntarily, served the notice of withdrawal on the respondents, the claimants cannot seek reinstatement of the suit without valid reason. That the supporting affidavit does not explain how the claimants waited for a whole year without obtaining instructions from their advocate, that the said advocate was not enjoined to this application to shed light on what transpired.

The 2<sup>nd</sup> respondent prayed that the application be dismissed with costs.

#### **Determination**

I have considered the submissions of the parties and the pleadings in general. The issues for determination are first, whether the claimant is entitled to reinstatement of the suit which was withdrawn by its erstwhile counsel. Together with this issue is the issue whether there is a suit to be reinstated.

Should I find in favour of the claimant I would then have to determine if the suit is statute barred as averred by the 2<sup>nd</sup> respondent and finally as agreed by the parties should I find that the claim is not time barred I would determine who between the 1<sup>st</sup> and 2<sup>nd</sup> respondents is liable to pay the terminal dues for the claimants.

Before I consider the issues in dispute I need to dispose of the issue of jurisdiction which was raised by the 1<sup>st</sup> respondent in the submission filed on 25<sup>th</sup> September 2017. The 1<sup>st</sup> respondent submitted that the claim by the claimants having arisen in 1990 and the payments sought having been due in 2010 when their services were transferred from the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent, the claims are statute barred under Section 90 of the Employment Act. Section 90 provides that no civil action or proceedings based on or arising out of a contract of service shall lie or be instituted after the laps of 3 years.

I hold a different opinion from the 1<sup>st</sup> respondent. What the claimants are seeking is not based or arising out of a contract of service. It does not arise from an act, neglect or default. This claim arises out of a statutory obligation of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as current and/or former employers of the claimants. In addition, what the claimants are seeking is terminal benefits which do not accrue until after the date of retirement. At the time of filing suit they were still in-service

I therefore find that the claim is not statute barred and is competently before this court.

### **Reinstatement of Suit**

The general rule is that actions taken by counsel on behalf of a client is binding on the client. This was the decision in **Kinuthia Maina -v- Coffee Board of Kenya, KCB Limited -v- Specialised Engineering**. This position is provided for under Order 9, Rule 1 of the Civil Procedure Rules which provides that –

### **Order 9, Rule 1**

**Applications, appearances or acts in person, recognized agent or by advocate.**

**1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:**

**Provided that—**

**(a) any such appearance shall, if the court so directs, be made by the party in person; and**

**(b) where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney-General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.**

However there are exceptions to this rule. In the case of **Westward Properties Limited -v- Chezer Investments Limited** the court stated that the orders of withdrawal of suit may be set aside for fraud, misrepresentation, collusion or mistake.

I have considered the application and the documents filed therewith. The notice of withdrawal is dated 20<sup>th</sup> January 2015 and filed on the same date. In the affidavit supporting the motion herein, the deponents have stated that they were not aware the suit had been withdrawn. They attached minutes of a meeting held on 26<sup>th</sup> September 2015 in which the claimants noted that the case was taking too long. They also attached minutes of a meeting held on 3<sup>rd</sup> October 2015 at which the following deliberations took place –

### **Min. 6/10/FBTC/G/2015 – Preliminaries**

#### *1. The Chairman*

*i) Welcomed all to the meeting and thanked the members and leaders for sacrificing their weekend time to attend the meeting.*

*ii) Explained to the members that the purpose of the meeting is to clearly chat an action plan for resolving the issue of the gratuity which has since dragged for long.*

#### *2. The Secretary, KUSU JOOUST Branch*

*i) Confirmed that*

*a) The former Bondo TTC staff had requested the union to follow up the gratuity issues for the members.*

*b) The union had requested the advocate to find the status and advice accordingly.*

*ii) Urged the members to ensure honesty and be open in their deliberations on their gratuity issues.*

### **Min. 7/10/BTC/G/2015 – Reports**

*The advocate reported that:*

1. HAYANGA filed the case on 29<sup>th</sup> January 2015 representing the 2<sup>nd</sup> respondent.
2. The claimant withdrew the suit wholly on 20<sup>th</sup> January 2015 dated 20<sup>th</sup> January 2015.
3. The 1<sup>st</sup> respondent represented by Olel, Onyango, Ingutish and Company filed notice on 14<sup>th</sup> January 2015 dated 12<sup>th</sup> January 2015.

*The members confirmed that:*

1. They were not consulted for the withdrawal of the suit.
2. They are not party to the withdrawal of the suit whatsoever.

#### **Min. 8/10/BTC/G/2015 – Resolutions**

*The members:*

1. Observed clearly that there is conflict of interests by the advocate whom they had earlier engaged.
2. Agreed in unison that:
  - a) Ken Omollo and Company Advocates fully takes over the case accordingly.
  - b) They (members) shall
    - i) Fully co-operate with Ken Omollo and Company Advocates to this end.
    - ii) Avail the relevant documents.

It is clear from those minutes that the claimants were not consulted and were not aware of withdrawal of the suit.

I find that there is sufficient ground to reinstate the suit which was obviously withdrawn by the claimant's erstwhile counsel without authority, without the knowledge of the claimants and without informing them. It is clear that they had no intention to withdraw to suit and were in fact seeking information why the suit had taken too long to be finalised when they were informed that it had been withdrawn.

For the foregoing reason I hereby set aside the order of withdrawal and reinstate the claim.

#### **Who between the 1<sup>st</sup> and 2<sup>nd</sup> respondent is liable to pay**

There is no dispute that the claimants were originally employees of Bondo Teachers Training College, the 2<sup>nd</sup> respondent. Vide Legal Notice No. 56 the then President of Kenya, Retired President Mwai Kibaki made the BONDO UNIVERSITY COLLEGE ORDER, 2009.

Section 3 of the Order established Bondo University College as a constituent college of Maseno University, subsection 3 (3) and 3 (4) thereof provide as follows –

**(3) The University College shall be the successor to the Bondo Teachers Training College.**

**(4) All rights, liabilities and assets held by or by anybody or behalf of the Bondo Teachers Training College existing at the commencement of this order shall be automatically and fully transferred to the University College.**

On 23<sup>rd</sup> January 2017, Ms Rosemary Ngesa, Registrar, Planning and Administration of Jaramogi Oginga Odinga University of Science and Technology appeared in court in answer to summons and stated that–

*“Bondo University College came into existence in 2009. It became university in February 2013. When Bondo University came into existence Bondo TTC was relocated to a new site in Bakanyago Bondo TTC did not cease to exist. The facilities were given to Bondo University College. Bondo started employing its employees. Employees from Bondo TTC who voluntarily wanted to join Bondo University College were given letters of appointment and effective dates were given in the letter and they had the pension scheme or NSSF.”*

Based on the foregoing it is clear that some employees continued as employees of the 2<sup>nd</sup> respondent while others opted to join the employment of the 1<sup>st</sup> respondent and were issued with fresh letters of appointment. It is also clear that during discussions on sharing of

assets and liabilities between the 1<sup>st</sup> and 2<sup>nd</sup> respondent institutions, the parties did not discuss the issue of transfer of services of the staff, an omission that has resulted in the present situation where some of the employees have reached retirement age and do not know who between the 1<sup>st</sup> and 2<sup>nd</sup> respondents is responsible to pay their pension and/or gratuity.

Taking into account that the claimants were put into the present situation by the failure of the respondents to address their fate and taking into account the fact that the 1<sup>st</sup> respondent issued fresh letters of appointment to those employees of the 2<sup>nd</sup> respondent who wished to join its service, further taking into account the provisions of subsections 3 (3) and 3 (4) of Legal Notice No. 46, it is the court's opinion that the 2<sup>nd</sup> respondent is responsible for the gratuity/pension of the employees up to the date of their employment by the 2<sup>nd</sup> respondent, while the 2<sup>nd</sup> respondent is responsible for the gratuity/pension from the date on which they took over the services of the employees.

Each of the respondents will in consultation with counsel for the claimants and the claimants' representatives work out the pension/gratuity of the claimants for the periods served under them and the same shall become due and payable upon the claimants attaining retirement age.

These are the orders of the court.

**DATED AND SIGNED AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF JUNE 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 5<sup>TH</sup> DAY OF JULY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**