



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 115 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DAVID NYONGA ONYANGO.....CLAIMANT

VERSUS

ELDOMATT HYPER LIMITED.....RESPONDENT

RULING

The Application before the Court is dated 2nd May 2017, wherein the Applicant/Claimant is seeking for orders that the Honourable Court do allow him to proceed with the matter to full hearing. The Application is premised on the grounds:

1. That the Claimant was unlawfully, unfairly and unprocedurally terminated from Eldomatt Hyper Limited sometime in 2015 and launched a case in court through the firm of NYAMWEGA OSORO & COMPANY ADVOCATES to act on his behalf.
2. That he testified in court on 1st December 2016 and since then the advocate in conduct of the case has been saying the matter is pending for defence hearing.
3. That he later learnt that the same had been concluded since the respondent herein entered into a consent with his advocates and agreed to settle the matter out of court.
4. That he has a good cause of action to pursue against the respondent if accorded a chance.
5. That it is in the best interest of justice that the application is allowed.
6. That it is in the interest of natural justice that the applicant is granted a chance to be heard.
7. That the court has unfettered discretion to grant the prayers sought exparte.

The Application is supported by the Claimant's affidavit wherein he avers that after he was heard on 1st December 2016, he was called by his counsel on 7th April 2017, to inform him that judgment in the matter had been entered and an award of Kshs.40,000/= was to be shared equally between him and his advocate.

That immediately he proceeded to the Court registry to peruse the file whereupon he learnt that no proceedings had taken place since he testified. That this prompted him to proceed to the Respondent's premises where the manager informed him that they had already settled the matter out of Court with his Advocate at an agreed sum of Kshs.100,000/=.

That his Advocate had only paid him Shs.5,000/= by mpesa and no other amount. He avers that he reported the matter to the Chairman LSK North Rift expressing his complaint on the same.

The Applicant alleges that the allegation in his advocates letter of response stating that a consent of Kshs.40,000/= was entered into was not true and he does not agree with it.

The Application is opposed and the firm of Nyamwega Osoro and Company Advocates has filed a replying affidavit sworn by Gladys N. Nyamwega wherein she states that the application is made in bad faith, is incompetent and lacks merit. She avers that there is no pending suit to enable the applicant to proceed as prayed in the application.

She further avers that the application is spent, as the Applicant was aware that a consent judgment was filed and the Respondent paid the monies as agreed. That if a judgement is already on record the only way to proceed is by setting aside the judgment.

Ms. Nyamwega avers that the firm had been in constant talks with the Applicant until 22nd March 2017, when he asked to be sent Kshs.5,000 vide Mpesa as he was in urgent need of cash. That the firm requested the Applicant to go to the office to collect the payment and it was agreed that he would go on 12th April 2017, so that he can acknowledge receipt of the cash in writing.

That the Applicant did not turn up as agreed but instead the firm received a letter of complaint from Law Society of Kenya North Rift. That upon receipt of the said letter the firm tried reaching the Claimant on phone to no avail.

Ms. Nyamwega also avers that on 29th April 2017, the Applicant went to their offices at about 14.45 pm, she drew a cheque for Kshs.34,940/= in favour of the Claimant but he refused to sign for it. She states that the Application is malicious, is an afterthought and is without basis and prays for the Application to be dismissed with costs.

The firm of Kitiwa and Company Advocates on record for the respondent also filed a Replying affidavit sworn by Godfrey Nathan Kitiwa wherein he states that the claimant instructed the firm of Nyamwega Osoro and Company Advocates to act for him and as such, the said firm had lawful authority to enter into a consent and settle this matter.

That the parties in the instant suit negotiated and agreed on a settlement and as far as the Respondent is concerned this matter is fully settled and the Claimant has already received part payment from his advocate. He states that the dispute herein is between Advocate and the client over how to share the decretal sum and they should proceed to tax the advocate-client bill of costs. Furthermore, the Claimant has not stated that the Advocate did not have authority to record the consent or that the sum was not sufficient. He prays for the application to be dismissed with costs.

The application was canvassed orally on 18th September 2017, where the claimant reiterated the contents of his application and the supporting affidavit. He stated that the application should be allowed for the reason that his advocate cheated him that Court had given judgment, which was not the case and the Court to order the matter to proceed to full hearing.

The respondent reiterated the averments in the replying affidavit and added that the Claimant is not saying that there was no consent but he is disputing the amount he was to receive from his counsel. They urged the Court to dismiss the application and order the Claimant to pursue taxation of the advocate-client bill of costs.

Determination

The issue for determination in the application is whether the applicant is bound by the consent entered into by his advocate. This issue was considered at length by the court in the case of **KENYA COMMERCIAL BANK LIMITED -V- SPECIALISED ENGINEERING COMPANY LIMITED [1980] eKLR** and the court citing **WELSH -V- ROE [1918] 87 LJ KB52** set the principle as follows –

“...After the commencement of an action, the solicitor for a party has an implied general authority to compromise and settle the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the notice of the other side and the solicitor acts bonafide and not contrary to express negative directions.”

In the case of **FLORA WASIKE -V- DESTINO WAMBOKO [1982 – 1988] I KAR 625** the court stated –

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

In **BROOK BOND LIEBIG -V- MALLYA [1975] EA. 226** the court held–

“A consent judgment may be set aside for fraud, collusion, or for any reason which would enable the court to set aside an agreement.”

In the case of **KAFUMA -V- KIMBOWA CONTRACTOR 1974 EA**, the court held that in a situation where the advocate has no authority at all to enter consent judgment, the consent judgment will be a nullity.

In the present case, the claimant’s evidence was taken on 1st December 2016 and the case was adjourned to 22nd February 2017 for hearing of the Defence Case. According to the claimant applicant, his counsel called him on 7th April 2017 and informed him that judgment had been entered in the sum of Kshs.40,000 to be shared equally between him and the advocate. It is only after he inquired from the respondent’s Manager that he learned that judgment had been entered in the sum of Kshs.100,000.00 which was paid by two cheques of Kshs.50,000 each on 15th and 31st March 2017.

It is clear from the foregoing that the applicant did not instruct counsel to compromise the case and was not aware about the compromise, and secondly that the advocate did not disclose the true position of the case to the applicant. The advocate was not bonafide and acted without the knowledge of the client following which the advocate misrepresented the facts to the client. I find that this case qualifies for setting aside of the consent judgment applying the decision in **KAFUMA -V- KIMBOWA CONTRACTORS** (supra).

The respondent will not suffer any prejudice by the setting aside of the consent judgment.

For the foregoing reasons I set aside the consent judgment entered on 23rd March 2017 and direct that parties take a date for hearing of the defence case.

The erstwhile counsel for the claimant shall refund all monies received from counsel for the respondent less Kshs.5,000 paid to the claimant.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF SEPTEMBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 4TH DAY OF OCTOBER 2018

MATHEWS NDERI NDUMA

JUDGE