



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 118 OF 2012
TRANSPORT & ALLIED WORKERS
UNION.....CLAIMANT

VERSUS

COMARCO PROPERTIES EPZ LIMITED.....1ST
RESPONDENT

PETER JOHN PHILLIPS (*Managing Director Comarco Singapore branch*)...2nd RESPONDENT

SIMON FRAZER PHILLIPS (*Managing Director Comarco Indian/supplies*)...3RD RESPONDENT

RULING

1. The application before me is the claimant's Notice of Motion dated 27/2/2017. It seeks the following orders.

(a) That the matter should be heard interparty on priority basis and on merit.

(b) That both 2nd and 3rd respondent be summoned in court to explain the instructions they had issued to their Advocates representing the company on 5/1/2017 for pretrial regarding payment of 2% commission, Peter John Phillips authorized for payments to the grievant Onesmus Njimia Mureithi per emails dated 18/11/2008 on record.

(c) That the said Peter John Philips and Simon Frazer Philips be ordered to deposit ksh.9,504,938 commission 2% plus interest, with the court as security pending hearing and determination of the matter as provided in Employment Act 23 and CPO 42 rule 6(4) for foreign managed companies.

2. The Motion is supported by the affidavit of the grievant to the suit Mr. Onesmus Njimia Mureithi. The gist of the affidavit is that on 18/11/2008 the CEO of the respondent Mr. John Philips approved the payment of 2% of contract value as commission for every contract secured by the grievant as proposed by the Board of Directors on 23/10/2008. That on 20/1/2009, the grievant secured a contract worth ksh.231,594,123.70 for rehabilitation of Lamu jetty but his commission of 2% of the contract value was not paid. Consequently he prays for order that the said John Philips pays him the commission on contract amounting to ksh.2% because he has never denied it.

3. The Motion is opposed by the respondents vide the grounds of opposition filed on 24/4/2017. The gist of the said objection being that the suit herein is finalized and the court is *fuctus officio*. In addition, the

respondent is of the view that the Motion is incompetent, defective, bad in law, abuse of the process of the court and it seeks orders against persons who are not parties to the suit. Finally the respondent prays for the Motion to be dismissed for lack of merits.

4. When the Motion came up for hearing the respondent never attended court to oppose the motion. Mr. Mokuu, a Trade Unionist prosecuted the motion on behalf of the applicant. He submitted that all what the grievant was seeking was that the court awards him 2% commission out of the total contract price to be paid by Mr. John Philips on behalf of Comarco Properties Limited (EPZ) which has since ceased operations in Kenya.

ANALYSIS AND DETERMINATION.

5. The issues for determination herein are:

- (a) Whether the suit is finalized and the court is *functus officio*
- (b) Whether the motion is incompetent and bad in law.
- (c) whether the motion has merits.
- (d) Whether the orders sought should issue.

Finalized suit/*functus officio* court

6. I delivered judgment in this suit on 7/10/2016 by which I awarded the grievant ksh.1,382,652 as his employment terminal benefits. I however dismissed the claim for 2% commission on grounds that it was directed against the wrong defendants. The said decision brought the proceedings in this suit to close and the court became *functus officio*. I will therefore not entertain the revival of the already finalized suit and on that ground alone the Motion stands dismissed.

Incompetent Motion

7. There is no dispute that the motion is directed against persons who were not parties to the suit before judgment. No leave for joinder of new defendants was sought and obtained. It is obvious that the Motion is brought through a procedure which is foreign to the rules of procedure of this court. It is therefore incompetent and bad in law and it must fail.

Merits.

8. For the reasons that the suit herein was finalized by a judgment that has not been challenged in any manner, and the fact that the orders sought are directed to strangers to the suit, I find that the Motion is bereft of merits and it must fail.

DISPOSITION

9. For the reasons stated above, the Notice of Motion dated 27/2/2017 is dismissed. No orders as to costs.

Dated, signed and delivered this 29th September 2017

O.N. Makau

Judge