



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 67 OF 2013**

**KENYA CHEMICAL & ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**PACKAGING MANUFACTURERS.....RESPONDENT**

**RULING**

1. The application before me is the Notice of Motion dated 13/10/2016. It is brought by the grievants in the suit and it seeks the following orders:

(A) That this honorable court be pleased to grant leave to the applicant/intended claimant to substitute a party.

(B) That this honourable court be pleased to substitute Kenya Chemical allied Workers and the claimant herein with Cyrus Mulwa Mutinda the applicant/Intended Claimant herein.

(C) That the firm of JM Makau & Co. Advocates do formally come on record as advocates for the Applicant/Intended Claimant.

(D) That the cost of this application be provided for.

2. The Motion is supported by the affidavit sworn by Cyrus Mulwa Mutinda on 13/10/2016. The gist of the affidavit is that the grievants were represented by the claimants union herein in this suit and ELRCC 130 of 2013 in which they were claiming arrears of benefits under a new CBA and terminal dues for the 161 grievants who had been dismissed. That on 4/11/2013, the claimants union and the respondent recorded consent order by which it was agreed that this suit had been compromised by payments of ksh.5,754,177. However the applicants are not satisfied with that settlement and are demanding ksh.30,272,772 more on ground that the settlement by the claimant union was erroneous, incorrect and inaccurate. They are therefore asking for leave to substitute the union in the suit and get counsel to represent them.

3. The claimant has no objection to the Motion. According to the claimant, she negotiated settlement on behalf of the claimants at ksh.5,754,177 in good faith and the matter ended on 4/11/2013. It is also the claimant's case that the grievants are no longer her members.

4. The respondent has however opposed the Motion through the replying affidavit sworn by her HR Manager Mr. Olweny Adams on 30/1/2017. It is the respondents case that on 2/10/2013, the parties agreed to settle this suit at ksh.5,754,177 and ELRCC 130 of 2013 at ksh.15,489,491. That on 4/11/2013

the parties marked this suit as settled after it was confirmed that she had paid the ksh.5,754,177 to the grievants. That the judgment debt in Cause No. 130 of 2013 plus costs of ksh.500,000 have also since been paid and the suit marked as settled. The respondent therefore contends that the suit herein was finalized on 4/11/2013 and the Motion herein has no merits.

#### APPLICANT'S SUBMISSION

5. The applicants have submitted that the law empowers a trade union to sue on behalf of their members like in this as long as the members have not exercised their right to resign from the union. In their view, the applicants have argued that after ceasing membership they are entitled to act independent of the union including taking over proceedings in a suit and prosecuting the same on their own.

6. The applicants have further submitted that a dispute arose between them and the respondent and they were represented by the claimant who brought this suit on their behalf. The claimant later negotiated settlement on their behalf at ksh.5,754,177. According to the applicants, the said sum was less than their expectation and it was calculated by the respondent without involving them. In their own calculation, the settlement agreement was ksh.30,272,772 less.

7. The applicants have further submitted that the reason for accepting the ksh.5,754,177 was because it was a temporary solution to pacify the concerns that payments was taking too long. According to them therefore, the consent order recorded on 4/11/2013 between the claimant union and the respondent to mark the suit is settled at ksh.5,754,177 was erroneous, false, mistake and or malicious. They have asked the court to note that similar mistake was made in ELRCC 130 of 2013 when a consent was recorded for settlement of the suit at ksh.15,489,491 but later the figure was enhanced by ksh.19,728,599 plus advocates costs of ksh.500000. They now want the court to repeat the same in this suit and enhance the award by ksh.30, 272,772.

#### RESPONDENT'S SUBMISSIONS

8. The respondent submitted that on 2/10/2013, the claimant told the court that if she paid ksh.5, 754,177, the same would be accepted as full settlement of this suit. As a result she paid the said sum and when the suit came up for mention on 4/11/2013, the parties recorded consent that the suit be marked as settled. That the said settlement was in respect of service pay, notice and 2 months compensation for loss of employment and it was in consideration that the claim for rest days and the 13.1% remuneration had already been paid as confirmed by the claimants in the replying affidavit paragraph 7.

9. The respondent therefore submits that the suit was fully settled by the consent order dated 4/11/2013 and the court is now *fuctus officio*.

#### ANALYSIS AND DETERMINATION

10. There is no dispute that on 4/10/2013 the claimant made an undertaking that if the respondent paid ksh.5,754,177, the same would be taken as full settlement in this case. There is further no dispute that the said sum was in respect of service pay, notice and compensation for loss of employment and it was in addition to earlier payment made in respect of rest days and 13.1% minimum remuneration. There further no dispute that the respondent paid the said ksh.5,754,177 and on 4/11/2013, the parties recorded a consent order that the suit be marked as settled. The issues for determination are:

- (a) Whether the suit is *fuctus officio*
- (b) Whether the application herein has merits
- (c) Whether the orders sought should issue.

***Fuctus officio***

11. The applicants allege that the settlement recorded on 4/11/2013 was erroneous, malicious, inaccurate and a mistake and it should be set aside because the suit was not fully settled. However the claimant who represented them in the suit and the respondent who paid, have contended that the suit was fully settled starting with claim for rest days and 13.1% salary underpayment then followed by the ksh.5,754,177 in respect of service pay, notice and 2 months salary compensation for loss of employment. The applicants have not denied the alleged earlier settlement of their claim for rest days and underpayment. The claimant has maintained that she acted in good faith in negotiating the said settlement on behalf of the applicants.

12. After careful consideration of all the material presented to the court and after perusing the court record in this suit and suit number 130 of 2013, I have formed the opinion that the respondent and the claimant have proved on a balance of probability that the settlement agreement recorded in court on 4/11/2013 left no claims undetermined. I therefore hold that this suit was fully settled by the said consent order and this court is now *fuctus officio*.

### **Merits**

13. All what the applicants are alleging is that their union never involved them in negotiating the said settlement and as a result they got a bad bargain. I will however not entertain that contention because they surrendered their right to representation to their union through membership and allowing the employer to accord recognition to the union. It is trite that a recognition agreement accords the union the right to represent her members in all labour disputes with their employer. In this case, the claimants were members of the clamant union which had negotiated CBA with the respondent on their behalf. In exercise of the said mandate, the claimant negotiated the settlement herein in good faith which brought the suit to an end. There is nothing in this suit that is remaining undetermined to warrant the exercise of my discretion in the manner requested by the applicants herein.

14. In addition, the judgment under review is a consent judgment which has the same status as a contract which cannot be set aside or varied unless there is evidence that it is vitiated by mistake, fraudulent misrepresentation, duress or undue influence. In this case the parties to the consent judgment are in agreement that the judgment was reached in good faith and in full settlement of the suit. Consequently the allegation of mistake, inaccuracy and malice by the applicant is neither here nor there.

### **DISPOSITION**

15. For the reason that the suit was fully settled on 4/11/2013 and the court is now *fuctus officio*, I dismiss Notice of Motion dated 13/10/2016 with no order as to costs.

Dated, signed and delivered this 13<sup>th</sup> October 2017

O. Makau

Judge