REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.25 OF 2015

(Before D. K. N. Marete)

FRANCIS KIMUTAI BII…….....….....CLAIMANT

VERSUS

KAISUGU (KENYA) LTD.....RESPONDENT

R U L I N G

This is an application by way of Notice of Motion dated 1st December, 2015 and brought to court under Certificate of Urgency of even date. It seeks the following orders of Court;

a) That the application be certified urgent and service thereof be dispensed with in the first instance.

b) That the firm of M/s E.M.Orina & Co.Advocates be granted leave to come on record in place of the firm of M/s Kiplenge & Kurgat Advocates.

c) That pending the hearing and determination of the present application this Honourable Court be pleased to order for a stay of execution of the judgment and decree arising from the consent order dated 4th September, 2015 and adopted as a judgment of the Court on 8th September 2015 and all consequential orders.

d) That this Honourable Court be pleased to set aside the judgment and decree arising from the consent order dated 4th September, 2015 and adopted as a Judgment of the court on 8th September 2015 and all consequential orders.

e) That this honourable court be pleased to direct that the orders granted herein do apply to the series in causes nos. 26 of 2015 to 95 of 2015.

f) That costs of this Application be provided for.

and is grounded as follows;

i. That the Judgment and decree arising from the consent orders dated 4th September, 2015 and

adopted as a judgment of the court on 8th September 2015 is due for execution upon the expiry of the thirty (30) days stay of execution granted by the Honourable Court on 3rd November, 2015.

ii. That the said consent order is defective the same having been executed by a person who lacked capacity and had no authority to execute the same.

iii. That the said consent order was irregularly and unlawfully entered into on the basis of misrepresented facts hence the same is null and void ab initio.

iv.That the cause has thereafter proceeded on a misguided impression that the consent was validly entered.

v. That unless the orders herein are granted the respondent/applicant is likely to be prejudiced and thus suffer loss and damages.

The matter came to court on 2nd December, 2015 whereby the following orders were issued;

i. That the application is be and hereby certified as urgent and service be dispensed with in the first instance.

ii. That the law firm of M/s E.M.Orina & Company Advocates is granted leave to come on record in place of M/s Kiplenge and Kurgat Advocates.

iii. That pending the hearing and determination of this application there be a stay of execution of the judgment and decree arising out of the consent order dated 4th September, 2015 and adopted as Judgment of court and on 8th September, 2015 and all consequential orders hereof.

iv. That this application be served onto the claimants forthwith but not later than close of the day on 2nd December, 2015.

v. That the orders of court herein be served in terms of order No. (iv) above.

vi.That the claimant be and are hereby ordered to make, file and serve their response to this application within five (5) days of today's date.

vii. That hearing of the application be on 9th December, 2015 at 0900 hours.

The claimant/respondent in a response Replying Affidavit sworn on 4th December, 2015 rubbishes the application and prays that it be dismissed with costs.

The respondents/applicants case is that the claimant and sixty-nine others filed various claims against herself on account of unlawful termination and the matters proceeded appropriately to hearing and orders for filing of written submissions by the parties. It is the applicants further case that before the matter came up for confirmation of filing of written submissions, the claimant's counsel prepared a consent order dated 4th September, 2015 and presented the same to the respondent/applicants Human Resource Officer, one, Henry Cheruiyot for signature on behalf of the law firm then on record. This was duly executed by the said Human Resource Officer on the misguided belief that the same had been agreed on by the law firm. This was not the case.

It is the respondents/applicants further case that since the consent order was executed by a person who had no authority or capacity to execute the same, the same is irregular, unlawful and or null and void and that it ought to be set aside, including all consequential orders relating to it. Upon filing and record of the consent order, the law firm proceeded to tax the bill of costs arising out of the defective court order. The consent judgement, taxation of bill of costs and taxation are all bereft of consultations by the law firm then on record. This bill is unconscionably high and exaggerated as the same smacks of lack of due diligence and or fraud in the taxation and prays that the same be set aside. The claimant/respondent has,

as a consequence of the defective judgement of court, menacingly demanded payment and in cowardice, ignorance, intimidation and fear of execution has made part payment of the decretal sum.

The applicant in the penultimate prays that the consent order dated 4th September, 2015 and the subsequent order dated 8th instant be set aside as these have the effect of prejudicing the applicant to loss and damages.

The claimant/respondents position is that upon leaving court on 24th July, 2015, counsel for the parties entered into consent and efforts of negotiation towards an out of court settlement. This involved Mr. Henry Cheruiyot whereby several meetings were held at Sunshine Hotel, Kericho leading to the signing of the consent judgement now in dispute. Upon adoption of the consent by court payments totaling Kshs. 1.6 million were made in two installments on 25th September, 2015 and 30th October, 2015 while the third and last installment is due. It is the claimants/respondents case that this application is an abuse of the process of court and intended to facilitate their abscondment from their known and accepted responsibility and should be dismissed with costs.

The parties again came to court and on 11th December, 2015 and agreed to dispose the application by way of written submissions and therefore this ruling.

In her written submissions, the respondent/applicant reiterates her case as hereto before presented. The respondent emphasizes that the consent order was irregular in that it was not executed by their counsel on record but by one, Henry Cheruiyot, the respondent's Human Resource Officer who had no authority or competency to do the same. This nullifies the consent as the respondent had not by then filed an application to act in person as would be required by the law.

It is also the respondents submission that the affidavit by counsel for the claimant/respondent in evidence should be struck out on the authority of **Regina Waithira Mwangi Gitau v Boniface Ngenthe (2015**) eKLR where Justice A. Aburili cited the case of **Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd 1998** eKLR in which it was decided that it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit, thus the affidavit sworn by the advocate ought to be struck out. She also sought to rely on Order 9 rule 8 (1) of the Advocates practice rules which provides for the need for parties to issue a notice to act in person.

The claimant/respondent in his written submission justifies the affidavit in opposition of their application as sworn and filed by their counsel and also poses several questions relating to this cause;

> *a) Why didn't the respondent's human resource manager sign the said consent 'on behalf of,' instead of signing as Kiplenge & Kurgat, advocates for the respondents.?*
>
> *b) Why didn't the said firm of Kiplenge and Kurgat file the submissions in this cause as directed by the court.?*
>
> *c) Why in this era of mobile communication, didn't the said human resource manager call their advocates or his seniors to confirm whatever instructions before signing?*
>
> *d) Why didn't the firm of Kiplenge and Kurgat raise the issue of consent when they were served with the order of court FKB-1 or when they were served with the bill of costs and further, why did they participate in the taxation?*
>
> *e) How are my advocates on record or even the court supposed to know the signatures of all the associates and partners in the firm of Kiplenge & Kurgat advocates so as to compare to that in the consent!*
>
> *f) And finally, why hasn't the said firm of Kiplenge & Kurgat raised the issue of the consent with my advocates, Meroka & Company Advocates or even reported my advocates to the advocates complaints commission.?*

The issues raised by the claimant/respondent are as perturbing as they are curious. This is more so coming from a party who was always in the frontline and abreast of the proceedings of court. They do not assist his case.

The issues for determination in the circumstances of this application are;

1. Whether the consent dated 4th September, 2015 and adopted as a judgement of court on 8th September, 2015 should be upheld and sustained as a valid judgement of this court.

2. Whether the affidavit of one, Isaac Meroka Oyugi. Advocate and counsel for the claimant/respondent is sustainable in the circumstances of this application.

3. Whether the consent judgement as obtained and entered in court is a valid judgement of court.

The first issue for determination is whether the consent order dated 4th September, 2015 and recorded as orders of court on 8th September, 2015 stand the test of law and justice. The respondent/applicant disagrees with the validity of the consent judgment and submits that the execution of the consent by Mr. Cheruiyot on behalf of the acting law firm of Kiplenge & Kurgat Advocates was irregular as he did not have the capacity or competency to deal as such. Further, no notice of intention to act in person as envisaged by Order 9 Rule 8 (1) of Civil Procedure Rules as hereunder;

> *"8 (1) where a party, after having sued or defended by an advocate, intents to act in person in the cause or matter, he shall give a notice to act in person and giving a notice stating his intention to act in person and giving an address for service within the jurisdiction of the court in which the cause or matter is proceeding, and the provisions of this order relating to a notice of change of advocates shall apply to a notice of intention to act in person with necessary modifications."*

The same was obtained without authority and the same is null and void. She also sought to rely on the authority of **Flora Wasike Vs Destino Wamboko (1982-88) 1KAR** where it was held that a consent judgment can be set aside on grounds like that of setting aside a contract as in fraud, mistake or misrepresentation.

The respondent/applicant also presented various authorities as here below in which she demonstrated that it is indeed bad law and practice for counsel appearing in a matter to depose to evidentiary facts and thus the affidavit by Mr. Meroka should be struck out. These are firstly, **Nicholas Kipchirchir Kimaiyo vs Wilson Kibet Kimutai & Another (2014) eKLR** where it was held that;

> ***"****The advocate, Mr. Jonah K. Korir, has sworn an affidavit on contentious matters. In fact, he has sworn an affidavit based on information he obtained from other persons. In my honest evaluation of the contents of the affidavit, I find that they are matters about which the deponent cannot give first-hand answers. By referene to "first hand answers", I mean answers about matters which the person providing the answers, had experienced n person. In this case, the deponent did not effect service of the orders in issue. That was, reportedly, done by a licensed process server. The advocate was only "instructed" about the alleged removal of wood fuel, aboard a vehicle registration KBS 940D. Similarly, the advocate was not involved in the confiscation of the vehicle or the subsequent detention of that vehicle, by the police. Those steps were taken by his client, with the aid of the police and the court bailiff. To that extent that the affidavit is substantively by a person relying on reported speech; and also because that person was the advocate representing the Applicant in this case. I find that the affidavit is incompetent. Accordingly, the supporting affidavit is hereby struck out forthwith."*

Again, in **Barrack Ofulo Otieno vs Instarect Limited (2015) eKLR** where the court observed as follows;

> ***"****The learned authors of Halsbury's Laws of England, 3rd Edition, Paragraph 845 say as follows with regard to affidavits:-*

"Affidavits filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that, in interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided the sources and grounds thereof are stated...For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties but are made for the purpose of keeping things in status quo till the right can be decided, or for purpose of obtaining some direction of the court as to the conduct of the cause."

However, under our law (Advocates Practice Rules) Rule 9 Advocates are not permitted to swear affidavits in contentious matters. The issue of whether security for costs should be paid is a contentious matter. I think it was improper for Counsel to have sworn the Supporting Affidavit."

In **Regina Waithira Mwangi Gitau vs Boniface Nthenge (2015)** eKLR this issue was handled as hereunder;

"On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which is he handling merely as an agent which practice is irregular. In Simon Isaac Ngugi Vs. Overseas Courier Services (K) Ltd 1998 eKLR and Kisya Investments Ltd & Others Vs Kenya Finance Corporation Ltd, it was held that

"..... it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit."

In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate's affidavit creates a legal muddle with untold consequences.

However, where an affidavit by an advocate raises issues of law and fact which are within his knowledge having been an advocate handling the suit on behalf of the party on whose behalf the affidavit is sworn there is absolutely no mistake or error in the affidavit that can render it defective."

These clearly illustrate the law of the subject and I am persuaded to follow them in drawing a conclusion on this issue.

The claimants/respondent in their written submissions oppose the argument and the position of the respondent/applicant but unfortunately for their case, there is overwhelming evidence in support of the respondents case. This is to the extent that this cause has now been disposed off on the basis of a contested consent judgement in which the executioner of the consent and the respondent have now recanted their authority and competency in dealing on the same. The respondent disowns the same as a consequence of mistake, misrepresentation and or fraud and prays that the same be annulled and set aside. All cardinal parties to the consent, Mr. Cheruiyot and Mr. Morintat have also disowned the same. This consent is therefore unsustainable and I rule as such.

The second issue for determination is whether the replying affidavit of Isaac Meroka Oyugi, counsel for the claimant/respondent is sustainable in the circumstances of this case. As submitted by the claimant/applicant it is trite law and practice that an advocate cannot and should not depose or engage himself in the realm of evidence in a matter he is appearing. This is more particularly in exercise of deposing on contentious issues thereon. As earlier intimated, the replying affidavit by Mr. Oyugi sworn on 4th December, 2015 cannot stand. It is therefore struck out of the record of court.

The last but uncanvassed issue is whether the consent judgement as obtained in court is a valid judgement of court. This issue is not canvassed by the parties, or at all. Perhaps, this could be attributed to ignorance on the practice in the area of Employment and Labour Relations as set out by the constitution and statute.

This also bears in mind that the inception of the Employment and Labour Relations Court in the Judiciary is a recent development and therefore the lapses in familiarity of law and practice.

It is not in dispute that this court is a creation of Article 162 (2) (a) of the Constitution of Kenya, 2010. Article 162 (3) empowers parliament to determine the jurisdiction and functions of this court. This is as follows;

> Article 162 *(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*
>
> *(a) employment and labour relations; and*
>
> *(b) .....*
>
> Article 162 *(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*

In exercise of the mandate awarded by Article 162 (3) aforecited, parliament has enacted the Industrial Court Act, 2011 whose preamble is as follows;

> *"An Act of Parliament to establish the Industrial court as a superior court of record; to confer jurisdiction on the Court with respect to employment and labour relations and for connected purposes."*

Section 5 (1) of the Act provides for the composition of the court as follows;

> *(1) The Court shall consist of-*
>
> *(a) the Principal Judge; and*
>
> *(b) such number of Judges as the President may, acting on the recommendations of the Judicial Service Commission, appoint*

This essentially means that proceedings in this court shall be presided over by the Principal Judge or a judge of court as so appointed or elected or both. Section 29 of the Act further provides additional power to the Chief Justice to designate a judge in a county as a judge for the purposes of this Act. This also applies to the appointment of certain magistrates to preside over matters employment and labour relations in any area of the country.

Further, Section 9 of the Act further provides for the appointment of the Registrar of the Court as follows;

> *"(1) The Judicial Service Commission shall appoint the following officers of the Court-*
>
> *(a) the Registrar;*
>
> *(b) the Senior Deputy Registrar, one or more Deputy Registrars and one or more Assistant Registrars, as the administration of justice requires; and*
>
> *(c) Such other officers of the Court as may be necessary for the proper functioning of the Court.*
>
> *(2) The officers of the Court shall perform the administrative functions of the Court under the supervision and control of the Registrar.*
>
> *(3) The Senior Deputy Registrar, Deputy Registrar or Assistant Registrar of the Court may perform such other functions of the Registrar as the Registrar may delegate generally or specifically.*

(4) The Senior Deputy Registrar, Deputy Registrar of the Court or if there is more than one, the most Senior Deputy Registrar shall act as Registrar of the Court whenever-

(a) the Registrar is for any reason, temporarily unable to perform the functions of the registrar; or

(b) the office of the Registrar is vacant.

(5) The Registrar may delegate his or her administrative function to any member of staff of the Court."

It is notable that the tone of the provisions of the law, particularly at Section 9 (1) (a), (b) (c) and (d) clearly spells out that the function of the office of the registrar is only to undertake the administrative functions of the court. Indeed, this has been and still remains the practice in the Kenya judicial system. This is further enjoined by Section 11 of the Act as follows;

(1) In relation to the proceedings before the Court, the Registrar shall act in accordance with the instructions of the Chief Registrar and shall, in particular, be responsible for—

(a) the establishment and maintenance of the Register;

(b) the acceptance, transmission, service and custody of documents in accordance with the Rules;

(c) the enforcement of decisions of the Court;

(d) certifying that any order, direction or decision is an order, direction or decision of the Court, the Chief Justice or a Judge, as the case may be;

(e) causing to be kept records of the proceedings and minutes of the meetings of the Court and such other records as the Court may direct; and

(f) undertaking any other duties assigned by the Court for the benefit of the Court.

(2) The Registrar, the Senior Deputy Registrars, the Deputy Registrars, the Assistant Registrars and other officers of the Court shall exercise such powers and perform such duties as may be conferred upon them by this Act, the rule of the Court or any other written law

In the instant case, the consent judgement now in contention was entered and recorded by, one, George Ong'ondo, Senior Principal Magistrate, a judicial officer in his own right. The short of this, however, is that Hon. Ong'ondo is not an appointed registrar or deputy registrar of this court in accordance with Section 9 of the Act. He is not a designated officer or even a member of staff of this court as established. Even if he was, and indeed a deputy registrar of this court, he still would not have the power, authority and competence to enter a judgement of this court. This is strictly the province of the judges of court.

The practice of the honourable Senior Principal Magistrate is rare and to say the least strange. It is unprecedented and therefore the need to address it substantively. Administrative investigations into the matter point out to a case of inadvertent inaction borne out of ignorance of process and law on labour relations. This is not unusual bearing in mind that the practice of employment and labour relations has for a long time been, to a large extent out of the domain of the judiciary. However, this does not ameliorate the situation and the consent judgement remains a non starter for having been recorded by a person without the requisite authority, competency and jurisdiction.

What we have in the instant case is not a judgement of court. It is a strange element in the proceedings of this court. It is in my view made and entered into by a stranger. This was done *per incuriam*. It is unfortunate. Adequate operational consultations would have cured this but these were not had.

The essence of industrial relations practices as is clearly enunciated in the preamble to the guiding statute, the Industrial Court Act, 2011 is to proffer appropriate latitude for best practices in this area. Acrimony, like in the present case is not our mainstay. This is because society has everything to lose if labour relations exercises, which wholly touch on the economic mainstay of all outstanding civilizations, would be jeopardized by such inaction. This explains why parliament has come up with an elaborate statute that clearly defines offices and their respective functions and roles in the industry.

The upshot of our findings on the issues for determination points out to one thing; that this application overwhelmingly succeeds. I therefore allow the application and order as follows;

i. That the judgement arising out of the consent dated 4th September, 2015 and adopted as a judgement of court on 8th September, 2015 and all decrees and orders arising thereof be and are hereby set aside.

ii. That the orders of court granted in this application do and hereby apply to causes No's 26 of 2015 all the way to 95 of 2015.

iii. That all actions and or inactions derived from the consent judgement be and are hereby declared null and void.

iv. That all payments made by the respondent to the claimants in execution and terms of the consent judgement be and are hereby nullified.

v. That a refund of all payments in respect of the consent judgement made by the respondent to the claimant be made by the claimant within fourteen (14) days of these orders of court.

vi. That the costs of this application shall be borne by the claimant/respondent.

Delivered, dated and signed this 28th day of January 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Orina instructed by E.M.Orina & Company Advocates for the Respondent/Applicant.

2. Mr. Meroka instructed by Meroka & Company Advocates for the Claimant/Respondent.