



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 425 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**MAURICE WEKESA MANG'OLI .....CLAIMANT**

**-Versus-**

**NZOIA SUGAR COMPANY LIMITED ..... RESPONDENT**

**RULING**

This suit was filed by the Claimant on 10th December, 2015 contesting a retirement notice issued to him by the Respondent, his employer, on 22nd April, 2015. Together with the Memorandum of Claim he filed a motion under certificate of urgency seeking an order barring the Respondent from retiring him on 1st January, 2016 instead of his retirement date of 28th November, 2016.

On 17th December, 2015 parties appeared before me through their respective counsel. Mr. Situma appeared for the Claimant while Mr. Masinde appeared for the Respondent. By consent of the parties, the Claimant's termination was stayed pending further orders of the court vide a status of quo order of that date and the case fixed for mention by consent on 10th February, 2016. The orders were extended on 10th February, 2016 following adjournment at the request of the Respondent for more time. The orders were further extended on 22nd February, 2016 when the court further directed that the Respondent who by then in default of the Court order retired the Claimant should either reinstate the Claimant to work or reinstate his salary with immediate effect.

On 10th March, 2016 when the case came up for mention, the court was informed that the firm of Wekesa Simiyu Advocates had taken over the matter from Masinde and Company Advocates and had on 8th March, 2016 filed the application dated 7th March 2016, now before me for determination.

The Application seeks the following orders:-

- 1) **THAT** this application be certified as urgent, service of the same be dispensed with, and the same to be heard *ex parte* in the first instance;
- 2) **THAT** this Honourable Court be pleased to issue an interim order of stay of execution of the *status quo* order made on 17/12/2015, as well as any other consequential orders issued herein pending the hearing and determination of this application *inter partes*.
- 3) **THAT** this Honourable Court be pleased to issue an interim order of stay of execution of the *status quo* order made on 17/12/2015, as well as any other consequential orders issued herein pending the hearing and determination of the Claimant's/Respondent's application dated

02/12/2015 and or main suit *inter partes*;

4) **THAT** in the alternative and without prejudice to the foregoing, this Honourable Court be pleased to interpret the meaning of the *status quo* in relation to the retirement notice issued by the Respondent/Applicant to the Claimant/Respondent on 22/04/2015.

5) **THAT** this Honourable Court be pleased to review and or set aside the *status quo* order made on 17/12/2015 and all other proceedings herein premised on misrepresentation of the Respondent's/Applicant's position.

6) **THAT** this Honourable Court be pleased to issue any such other or further orders as it may deem fit and necessary to grant in the interests of justice, fairness as well as safeguarding constitutionalism and the rule of law in Kenya.

7) **THAT** the costs of this application be in the cause.

It is supported by the grounds on the face thereof and the affidavit of BENSON KHWATENGE the Respondents' Company Secretary. The application was argued on 31st May, 2016.

Mr. Simiyu who appeared for the Respondent Applicant stated that the orders of 17th December, 2015 were made as a result of a misrepresentation of facts by the Respondent's previous counsel, that the Counsel was instructed to proceed with the application but sought adjournment and conceded to retention of the Claimant in employment. He submitted that the Respondent only became aware of those orders when they were served on 22nd January, 2016 upon service of court order. That subsequent to that the court directed that the orders be complied with until reviewed or set aside and that the Respondent has been paying the claimant pursuant to the court order. He submitted that the order is very harsh because the Claimant is earning a salary but not working. He proposed that the order be substituted with an order for deposit of the Claimant's salary in court or in an interest bearing account in the joint names of counsel for the claimant and the Respondent up to 28th November, 2016 when the Claimant will formally be retired. He submitted that the fact that the Respondent has in good faith been paying is sufficient security.

Mr. Simiyu submitted that there is only one issue for determination which is a determination of the Claimant's date of birth and age. He submitted that the Respondent's position is that the Claimant's date of retirement only came to their attention after issuing him with the notice of retirement. Mr. Simiyu relied on the decision of the court in **RUFUS OSOTSI OLEFA v NAIROBI CITY WATER & SEWERAGE COMPANY LTD [2015]eKLR**.

For the Claimant Mr. Situma relied on the replying affidavit of the Claimant and submitted that on 17th December, 2015 the court made an order of status quo meaning that the Claimant be retained on the payroll of the Respondent and that the two advocates agreed on the orders of status quo after looking at the records. He submitted that page 13 of the Claimant's bundle indicates that his date of birth is 28th November, 1956 as at 1st December, 2009 while page 12 of the bundle also states the same and indicates the Claimant's date of retirement as 28th November 2016. He states these are Respondent's documents. He submitted that the Respondent has not filed any contrary information. He stated that an identification card or birth certificate may have a mistake. He submitted that the Claimant's passport also bore his date of birth as 28th November, 1956.

Mr. Situma submitted that there is no error on the face of the record and the submission of the Respondent was not aware of the orders is its own problem. He submitted that the Respondent's counsel's prayer that the money be deposited in a joint account is not contained in the application. He also submitted that the Respondent's position that it has been paying the Claimant's salary in good faith is not true as all payments have been made late after his intervention.

Mr. Situma submitted that on 28th January, 2016 the court clarified the orders of 17th December 2015 and there is nothing to be reviewed.

He prayed that the claimant be paid until retirement date.

## **Determination**

The circumstances upon which this court may review its orders are provided under Rule 32 of the Industrial Court (Procedure) Rules, 2010 as follows:-

### *32. Review.*

*(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—*

*(a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or*

*(b) on account of some mistake or error apparent on the face of the record; or*

*(c) on account of the award, judgment or ruling being in breach of any written law; or*

*(d) if the award, the judgment or ruling requires clarification; or*

*(e) for any other sufficient reasons.*

Misrepresentation by an advocate does not constitute a sufficient ground to reverse the courts order of 17th December 2015. An advocate is deemed to have ostensible authority to bind his client on matters the advocate is handling in court.

The extent of authority of a solicitor to compromise is set out in a passage in the **SUPREME COURT PRACTICE 1979 (VOL 2) PARAGRAPH 2013 PAGE 629** as follows :-

*Authority of Solicitor - a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction;*

*...No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice - see **Welsh v Roe 1918 - (9) All E.R. Rep.620.***

In the case of **Kenya Commercial Bank v Specialised Engineering Company Ltd 1982 eKLR** the court of Appeal held that;

*"A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement."*

The court further held that:-

*"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 proof of any express negative direction, the order shall be binding."*

The Respondent has not demonstrated any fraud or bad faith on the part of its erstwhile counsel. It has not demonstrated any negative authority given to the said counsel in respect of the consent order.

On the contrary Mr. Situma has indicated that they agreed after considering what was on the record.

The foregoing notwithstanding, I have looked at the documents on record. I note that the claimant's identity card states the year of birth and not the date. The Respondent has not stated whether there is a policy that in such event 1st January of that year is considered to be the date of birth or why not other date was chosen like the middle or end of such year.

Further to the foregoing, the claimant produced records of the Respondent's retirement scheme as far back as at June 2002 showing that the Claimant's date of birth is 28th November, 1956 and his date of retirement is 28th November 2016. This is repeated in the records from the Respondent's Retirement Benefits Scheme for the subsequent years including those of 2014.

The Claimant also annexed a copy of birth certificate obtained in 2000 and a copy of pass port issued in October 2002 bearing the date of birth.

There is thus overwhelming evidence that the Claimant's retirement date is 28th November 2016 and not 1st January, 2016 as alleged by the Respondent.

The Respondent argued that the Claimant is earning a salary while he is not working. This is by choice of the Respondent. The Court had upon being informed that the Respondent had retired the Claimant in spite of the consent court order of 17th December 2015, given the Respondent the option of reinstating the Claimant or paying the salary, it opted to pay. It cannot be heard to mourn about that choice.

The upshot is that I find the application without merit and dismiss it with costs to the Claimant.

**Dated, Signed and Delivered this 30th day of June, 2016**

**MAUREEN ONYANGO**

**JUDGE**