



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 513N OF 2009
NATIONAL UNION OF WATER
& SEWERAGE EMPLOYEES..... CLAIMANT

VERSUS

REGISTRAR OF TRADE UNIONS RESPONDENT

AND

JAMES MUTHEE NDIRANGU 1ST INTERESTED PARTY

SIMON MAINA WANJIKU 2ND INTERESTED PARTY

PAUL KIPKOECH KOECH 3RD INTERESTED PARTY

ELIJAH OTIENO AWACH 4TH INTERESTED PARTY

DANIEL O. RAKORO (T/A

RAKORO & CO. ADVOCATES) 5TH INTERESTED PARTY/APPLICANT

PAUL NJAHI MICHUKI 6TH INTERESTED PARTY/APPLICANT

ASSA ASHOKI 7TH INTERESTED PARTY

MARY NDUNGE MUTUKU 8TH INTERESTED PARTY/APPLICANT

RUFUS OLEFA OSOTSI 9TH INTERESTED PARTY/APPLICANT

SOLOMON O. DAVID 10TH INTERESTED PARTY/APPLICANT

PHILEMON OTIENO ATIK 11TH INTERESTED PARTY/APPLICANT

JOEL K. TUWEI 12TH INTERESTED PARTY/APPLICANT

PETER KOI MBUTHO 13TH INTERESTED PARTY/APPLICANT

ESTHER NYAMBURA 14TH INTERESTED PARTY/APPLICANT

PATERICK KAMAU MUNI 15TH INTERESTED PARTY/APPLICANT

ZIPORAH KIENDE MWIRIGI 16TH INTERESTED PARTY/APPLICANT

DENIS OKWAYO 17TH INTERESTED PARTY/APPLICANT

RULING

1. Serving before court is a notice of motion application dated 12th November 2015 filed on 13th November 2015 which seeks the court to vacate and / or set aside the consent order recorded in court and issued on 30th April 2013 and all the consequential extracts issued by the Registrar of trade unions showing the individuals named in the extract dated 3rd November 2015 as the officials of the claimant.
2. The court be pleased to issue a declaration that the bonafide officials of the claimant are those named in the extract dated / issued on 24th September 2012 and 21st March 2015.
3. That the court do injunct the 1st, 2nd, 3rd and 4th respondents together with all the other persons named in the extract dated 3rd November 2015 from representing themselves as officials of the claimant union and from carrying out any duty or function whatsoever for or on behalf of the claimant union.
4. The applicants submit that the 6th to 17th interested parties claim to be the officials of the claimant by virtue of being validly elected to be the officials during the free, fair and democratic elections conducted at the claimant's National Delegates Conference (NDC) held on 19th April 2010 in accordance with Article 11(a) and (d) of the claimant's constitution as well as section 34(1) and 34(2)(b) of the Labour Relations Act, 2007.
5. The application is further supported by an affidavit of Philemon Otieno Atik the 11th applicant on behalf of 6th to 17th interested parties who purport to have been elected on 9th April 2010. The affidavit sets out the history of the dispute culminating in the consent recorded on 30th April 2013 by the 4th interested party.
6. The applicant states the effect of the consent was to ostensibly oust the bonafide elected officials from the office and replace them with new officials. The consent was filed together with an extract dated 2nd May 2012 from the respondent that bore names of other illegitimate persons claiming to be officials of the union hence the filing of this application.
7. Following a decision of the court of appeal in **Civil Application No. NAI 243 of 2012 (Cr, 174/2012) between James Muthee Ndirangu, Simon Maina Wanjiku, Paul Kipkoech, Elijah Otieno Awach –vs- Registrar of Trade Unions and National Union of Water Sewerage Employees**, in which the application was dismissed for non-attendance by the applicants, the applicants herein were reinstated as the bonafide officials of the union on 24th March 2015 and the Registrar informed the 4th interested party on the same day of the new development.
8. On 26th March 2015, the Registrar of trade unions issued the applicants with extract reflecting their names as bonafide officials of the claimant. See *POA'18'*.

9. On 17th April 2015, the application by the 6th – 17th interested parties was dismissed on the basis that they had not been enjoined in the proceedings as interested parties. The application was not determined on merits. See POA 19820.
10. Following this ruling, the Registrar of trade unions reversed the extract issued on 24th March 2015 and reinstated the 1st to 4th interested parties as the officials of the union. See extract 'POA 21' issued by the Registrar on 3rd November 2015.
11. The applicants state that their election to office has never been challenged to date yet the 1st to 4th interested parties purport to take over leadership of the claimant union.
12. That the Labour Relations Act, 2007 and the claimant's constitution envisage that officials may assume office by virtue of an election but not by fiat of a court order or by Registrar of trade unions. It is inconceivable how the consent order of 30th April 2013 became a basis of the 1st to 4th respondents assuming office. The order purports to reinstate two applications which had been dismissed and at the same time all the proceedings in the suit were struck out by consent and matter was closed. The consent does not reverse the results of the election conducted on 9th April 2010. The consent does not mention installation of new officials. That section 34 of the Labour Institution Act, 2007, as well as Article 11(a) and (d) of the claimant's constitution provide for persons to become officials of the union vide an election.
13. The consent is therefore illegal, null and void for purporting to override the express provisions of statute. The consent purportedly was made by the Registrar of Trade Unions and the 4th interested party who was purportedly holding brief for Mr. Ochieng who was his advocate on record. The 4th interested party is not an advocate and was incompetent, lacked capacity to hold brief for the advocate on record.
14. Judicial time is being spent on crafty and illegal acts of the 1st to 4th interested parties in conjunction with their colleagues.
15. The matter is not *resjudicata* viewed against the application dated 14th February 2014 which was dismissed because the reliefs sought are different and the parties to the applications are equally different. In any event the application dated 14th February 2014 was not determined on merits.
16. The 6th to 17th applicants wished to first get joined in the proceedings in order to ventilate the issues on merits. Consequently, they filed an application dated 31st August 2015 seeking for joinder in these proceedings as interested parties. The said application was heard and allowed by the court in its ruling on 22nd October 2015.
17. It is in the interest of justice that the application be heard on the merits so that applicants may continue serving members of the claimant and commence arrangements for conducting the next elections slated for April 2016. The 3rd interested party has denounced the impugned consent vide a replying affidavit dated 2nd February 2016 and in written submissions filed on 16th February 2016. The 3rd interested party states that the consent letter dated 17th April 2013 was procured without his consent yet he was a party to the suit. The 3rd interested party did not therefore execute the consent nor authorize filing of the same.
18. The 3rd interested party was at all material times represented by Nyabena and Co. Advocates until the change of advocates was filed on 4th February 2016.
19. The firm of Ochieng Omolo and Co. Advocates were never on record for the 3rd interested party.
20. The ruling of Hon Wasilwa J. dated 18th September 2012 clearly shows at page 39 that the 2nd and

4th interested parties were represented by Ochieng Omolo. That application was never served on the 3rd interested party or his counsel.

21. The consent sought to terminate a case where the 3rd interested party has substantial interest without involving him.

22. The 3rd interested party prays that the consent be set aside relying on the case of **Republic –vs- The Disciplinary Committee, Law Society of Kenya ex-parte Wanje G. Wambugu t/a Wambugu and Co. Advocates**. The court held as follows:

“this case is not solely between the ex parte applicant and the respondent. It also involves the interested party. The interested party is not a mere passenger in these proceedings. A consent can only become valid when the same is signed by all parties in a case. In this case, the ex parte applicant and the respondent have proceeded to enter consent and ignore the interested party. This is wrong the consent has clearly locked out the interested party and justice demands that the interested party should have been involved in the crafting of the said consent.”

23. The court is urged to adopt the above ruling and vacate the consent dated 17th April 2013 as the same was procured illegally.

24. Notice of preliminary objection

The application is opposed vide preliminary objection to the effect;

1. the court lacks jurisdiction to entertain the matter or the application by the interested parties dated 12th November 2015 or howsoever otherwise since there is no suit before court;
2. the application herein and all proceedings / orders thereto contravene section 8 of the Labour Relations Act;
3. the application is misconceived, incompetent, scandalous, trivial and vexatious and an abuse of the process of court.

25. The parties have filed submissions on the preliminary objection and the issues for determination are as set out in the notice of preliminary objection.

26. Jurisdiction

It is submitted by the claimant that there is no suit before court for determination in that the previous **Cause No. 513N of 2009** brought by the claimant union has been wholly determined pursuant to the consent order dated 30th April 2013 and a subsequent application filed on 17th February 2014 was dismissed by Nduma J. on 17th April 2015.

27. That the 6th to 17th applicants were not parties to the struck out cause and by extension the consent.

28. The present application seeks the same orders the effect of which is to set aside the obtaining consent order, an issue the court has already heard on merits and determined with finality. The court is therefore *factus officio* and the instant application is *resjudcata*.

29. The court was referred to the case of **Darlgit Singh Theemar and others –vs- Surjit Singh Sago and 2 others (2004) eKLR** as follows;

“only parties to a suit have the right to go forward as they deem fit including compromising it. Only parties to a suit can complain and get relief.”

30. It is submitted that a consent has a contractual effect and is binding between the parties to the consent. A consent recorded between parties cannot be set aside / vacated by the court and the parties to the consent unless such factors as would justify the varying or rescinding of a contract are satisfied, or if certain conditions remain to be fulfilled, which are not carried out.

31. It was submitted reference being made to the case of **Road Market Limited –vs- Chester House Limited. HCCC No. 932 of 1976** cited in **Vol.II of GV Odungas digest at P. 979.**

32. That the consent was made with full knowledge to the parties with the intention to settle the entire suit and therefore the matter cannot legitimately be revisited by the court.

33. It is the court's considered view that the principal parties in the suit were the claimant and the respondent. The claimant and the 1st, 2nd and 4th respondents are supportive of the consent to compromise the suit. The 3rd respondent denounces the consent stating that he was not involved in its crafting nor was he aware of it. The dispute before court is whether or not the court has jurisdiction to entertain an application to set aside a consent order. The obvious answer is that the court does have jurisdiction to review its own orders be they entered into by consent or otherwise.

34. The only legitimate question is whether the court has already determined this matter in its ruling of 17th April 2015 and therefore the matter is *resjudicata*.

35. The court has carefully perused its ruling and in particular noted its finding on page 4 thus;

“upon a careful perusal of papers filed on record, the court is satisfied that the application / on review lacks merit at all. The court upholds the aforesaid submission by the respondents and dismisses the application with costs.”

36. This clearly a finding on the merits of the application for review filed on 30th April 2013. The 6th to 17th interested parties who were joined to the suit after this ruling seek the court to revisit its decision on the same case, between the same parties and proceed to set aside the consent order recorded on 30th April 2013 and upheld by the court in its ruling of 17th April 2015.

37. The court notes contrary to the submissions by the applicants that it had in its short ruling considered the merits of the application for review. ‘*Resjudicata*’ has been defined in the Black’s Law Dictionary ninth Edition to mean;

“an issue that has been definitively settled by judicial decision.”

It includes;

“an affirmative defence barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.”

38. The three essential elements of the defence of *resjudicata* are;

“(1) an earlier decision on the issue;

(2) a final judgment on the merits, and

(3) the involvement of the same parties, or parties in privity with the original parties.”

39. The court having made a definitive ruling that the application by the 6th to 17th applicants on the question of legitimacy or otherwise of the consent entered into on 30th April 2013, in its ruling of 17th April 2015, lacks jurisdiction to revisit the issue as the case is *resjudicata*.

40. The court in particular notes that it had indicated in its ruling that the application for review then was brought one year later after the consent was entered into and upheld the submission by the respondents then, that the application was frivolous, vexatious and an abuse of the court process therefore.

41. The court's hands are tied and will say no more.

42. Consequently the application is dismissed on this point alone with costs to be borne by the 6th to 17th applicants.

Dated and delivered at Nairobi this 10th day of June, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE