REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 71 OF 2016

(Before D. Marete)

HENRY K. TANUI.....1ST CLAIMANT

LEONARD RUFUS OCHIENG.....2ND CLAIMANT

VERSUS

KENYA UNION OF POST PRIMARY EDUCATION

TEACHERS – KUPPET..... 1ST RESPONDENT

REGISTRAR OF TRADE UNIONS.....2ND RESPONDENT

SECRETARY GENERAL OF KUPPET.....3RD RESPONDENT

COMMISSIONER OF LABOUR, MINISTRY OF LABOUR

SOCIAL SECURITY AND SERVICES.....4TH RESPONDENT

RULING

This is an application dated 24th May, 2016 seeking review of an earlier application by the 2nd claimant seeking that Mr. Wicks Mwethi Njenga appears in court and be examined by the claimants. This application was made on 14th April 2016 and the contested order made on 17th May, 2016. The current application seeks the following orders;

1. *That this application certified urgent and heard on priority basis.*

2. That the honourable court be pleased to vacate the orders issued by learned Justice D.K. Njagi Marete on 17th May, 2016.

3. That in alternative the honourable court be pleased to review the orders issued by Justice D.K.Njagi Marete on 17th May, 2016.

4. That costs of the application be provided for.

This is grounded as follows;

a) On 29th April, 2016 during the hearing of the 1st respondent's application dated 17 th March, 2016 the 2nd claimant made an oral application in court praying that Wicks Mwethi Njenga the deponent of the affidavit in support of the 1st respondents application be subjected to cross examination on averments made in the supporting affidavit.

b) The 2nd claimant in the oral application sought that the deponent be committed to civil jail for 6 months if found to have made false averments in the affidavit.

c) That the Honourable Court directed that it would give directions on the 2nd claimant's oral application on the 17th May, 2016.

d) That on the 17th May, 2016 when the matter came up for directions, the Honourable judge directed that having heard the submissions by parties he had allowed the oral application by the 2 nd claimant to allow the deponent to crossexamined.

e) The Honourable judge also made an order that the respondents individually pay Kshs1,000 each being court adjournment fees for the day.

f) The matter was coming up for directions on the 17th May, 2016 and the court gave its directions and as such there was no basis for condemning the respondents to pay court adjournment fees.

g) The 2nd claimant was also not sent in court on the 17th May, but was not ordered to pay court adjournment fees.

h) The order to subject the deponent to cross examination was made without participation of the 1st respondent who was not given an opportunity to heard in reply to the 2nd claimant's oral application.

i) The Honourable court ought to have directed that the 2nd claimants makes a formal application and given the 1st respondent a chance to reply to the application.

j) The Honourable judge has all through the proceedings directed parties to file formal applications and he should not have deviated from that practice especially when the liberty of the deponent may be put at stake.

k) The 1st respondent had a right to be heard before the 2nd claimants application was determined.

l) That the 2nd claimants application was coming up for directions on the 17th May, 2017 and the Honourable Judge could not have occasion to make a determination and issue orders on the application on the day.

m) In the circumstances it is in the interests of justice that the honourable court vacates the orders issued on 17th May, 2016 or in the alternative and without prejudice to the foregoing reviews the orders.

The 1st respondent/applicant's submission is that once a Replying Affidavit is on record, the court is deemed to have awarded the claimant adequate opportunity to litigate his case. He has responded to all the issues brought to his attention and therefore an oral application should not have been entertained on the examination or otherwise in court. This would be reopening a case that is deemed to have been closed.

The respondent/applicant seeks to rely on Article 50 of the Constitution of Kenya, 2010 which defines the procedure for a fair trial. This is as follows;

Fair hearing.

50. *(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal body.*

(2) Every accused person has the right to a fair trial, which includes the right

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

It is her submission that the claimant must disclose the evidence the other party is to be cross examined on. In the present case, the summons are calling upon Mr. Njenga to adduce self incriminating evidence. She also seeks to rely on Articles 3 and 159 (2) (e) of the Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a)

(b)

(c)

(d)

(e) the purpose and principles of this Constitution shall be protected and promoted.

The applicant further submits that the Civil Procedure Act provides that applications of this nature must be made in writing. It is his further submission that matter concerns the conduct of the court in the matter. This is not in the interest of the court and the applicant seeks to protect the interests of the court and should the court allow an examination of Mr. Njenga, counsel would not be party. He would opt out.

The 2nd claimant's submission is that the application for review was heard on 24th May, 2016 and the court made a ruling on it. The respondent was represented and is ceased of it. Further, there exists a valid court order for examination of Mr. Njenga as of today.

It is the further submission of the 2nd claimant/respondent that reliance on Article 50 is intended to oust the law and orders of court. Again, Mr. Njenga is ceased of the issues he is to be examined on. He deponed on these and cannot be seen to run away from them. The Constitution should be read on its spirit and the interest of its drafters but not necessarily its letter. The efficacy of an affidavit is illustrated by its originating effect of the tribunal investigating the conduct of Honourable Justice Phillip Tunoi.

Mr. Ochieng further submits and answers that every party has a right to raise issues but if these are adverse to another party, they should be questioned at the earliest opportunity. He prayed that this application be dismissed.

This application was introduced to court and hearing on 24th May, 2016. It is filed on the same date. At the hearing, the 2nd claimant submitted that the application is improper on the following grounds;

i. That the order of 17.05.2016 is clear and requires the appearance of one wicks Mwethi Njenga.

ii. It spells out the hearing date and time of hearing.

iii. It also spells out a court adjournment fees.

It was his further submission that the order is not set aside and that the respondent ought to have contested the order earlier than the date of hearing. It would not be proper for them to continue without complying

with the orders of court. The court thereupon directed compliance and a hearing 1430 hours.

At 1430 hours, counsel for the 1st and 2nd respondent introduced the subject for hearing as examination of Wick Mwethi Njenga, the deponent in an affidavit sworn on 17th March, 2016. It was his submission that Mr. Njenga was unwell but willing to come to court. The 2nd claimant, Mr. Ochieng submitted that the application dated 24th May, 2015 is overtaken by events and had indeed lapsed. It was his further submission that Mr. Njenga was willing to come to court thus complementing his (claimants) earlier position. The court should move on to hear the salient issues of the current application and suit. The matter was then set for hearing on 17th June, 2016. On this date the earlier application and the issue of crossexamination of Mr. Njenga was sidelined in favour of this application.

This application smirks confusion in the logistics of the litigation of this cause. The 1st and 3rd respondents are fraught with inconsistency in their approach to this exercise. From the onset it is notable that the court order now in contest was made on 17th May, 2016 in the absence of the respondents. This date however had been taken in court after an elongated hearing process where all parties were present. The submissions of Mr. Kirimi, counsel for the 1st and 3rd respondent on 24th June, 2016 admit the position of the court order and directions on crossexamination. Why would they then seek to backtrack on this?

The submissions of the applicants in support of this application again are not formidable in their legal authority. I would agree with the submissions by the 2nd claimant that Mr. Njenga is well versed with the issues that he would be crossexamined on having deponed the same in his affidavit sworn on 17th March, 2016. He cannot therefore be heard to run away from this. The applicants references to the constitution and the Civil Procedure Act are inapplicable in that there is no violation of the right to a fair hearing or breach of procedure. The court applied due process in making the order for cross examination after examining the circumstances of the case.

This is a heavily contested litigation. It is emotional to the topmost. I however note with curiosity the tone of the 1st and 2nd respondent in the entirety of this contest so far, and particularly in this application. Where is good faith and an honest quest for justice? I note that the 1st and 2nd respondents have placed before this court the following applications which are still pending litigation;

1. A Preliminary Objection dated 17th March, 2016 and filed on the same date.

2. An application for recusal dated 17th March, 2016 and filed on the same date.

3. This application dated 24th Mary, 2016.

Is an exercise in circumlocution not a pointer to malafides in litigation? I am forced to infer intimidation of the court in the circumstances. What is unclear is who the ultimate beneficiary of this intimidation would be at the close of the day. Look at this;

> *"…. Mr. Njenga cannot come to court to be examined. This matter concerns the conduct of the court in this matter. The manner in which the matter is evolving is not in the interest of the court. I stand to protect the court and the Judiciary. Should the court be minded to allow an examination or reexamination of Mr. Njenga. I shall not be party. shall opt out."*

In an address to the Annual General Meeting of the Law Society of Kenya on 17th August, 2012 the retired Chief Justice of Kenya Dr. Willy Mutunga made the following remarks;

> *"The lie of the land has changed so irrevocably that it is doubtful the advocacy of yore will continue to subsist for much longer. If the stock of your legal practice rests in the ability to intimidate judges and magistrate cashing in political debts and other networks of patronage, you need to change professions. If using legal technicalities, and loads of Latin as a fig leaf to cover professional competence gaps, integrity deficits and intellectual sloth, you will soon be exposed."*
> **(The Nairobi Law Monthly, Volume 7, Issue No.6, July 2016, Page 58.)**

This cannot be further from the truth. It is aloud and very clear.

This application is to me, frivolous, vexatious and abuse of the process of court. It is intended to vex and intimidate this court and place it in perpetual turmoil. It is geared and intended to confront the court with an endless litigation. It is brought out in bad faith. I am therefore inclined to dismiss the application with costs to the claimants.

Delivered, dated and signed this 19TH day of JULY 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Okwe Achiado instructed by Okwe Achiado & Company Advocates for the 1st and 3rd respondents/appants.

2. Claimants in person.