



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 01 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

HELLEN LINET KWENA WANDERA.....CLAIMANT

Versus

1. THE PRINCIPAL, LUGULU AC SECONDARY SCHOOL

2. THE BOARD OF GOVERNORS LUGULU A.C SECONDARY SCHOOL

3. LUGULU A.C. SECONDARY SCHOOL.....RESPONDENTS

R U L I N G

The application before me for determination is a motion dated 13th June, 2016 filed by the Claimant seeking the following orders:-

- a) **THAT** the consent judgement entered on 30/6/2015 be reviewed and set aside
- b) **THAT** costs be provided for

The application is filed under Order 45 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The application is supported by the Claimant's affidavit sworn on 13th June, 2016 and on the grounds that the consent Judgement was entered without her consent, approval or consultation and that the consent award is grossly low.

The Respondent opposed the application and filed a replying affidavit of Josephat Otsieno, the Principal and Secretary of the Respondents Board of Management.

The Claimant states in her affidavit in support of the application that she filed the suit herein against the Respondent in person on 3rd January 2014 and thereafter instructed the legal firm of Rodi Orege and Company Advocates to conduct the case on her behalf. The case was fixed for hearing on 30th September, 2015 and she attended court for hearing. The case was called out and fixed for hearing at 11.00 am. Her advocate then instructed her to wait in court for the hearing. At midday her advocate proceeded to record a consent settling the case without approaching or talking to her to seek her view, consent or approval.

She depones that she did not understand what had transpired in court and followed her advocate out of court when he left. The advocate informed her to see him in his chambers at the beginning of October 2015 as they had agreed with the advocate of the Respondent to discuss and agree on an out of court settlement.

The Claimant deponed that at the beginning of October 2015 when she visited her advocate's office to find out progress in the negotiations she was informed that a consent had already been recorded in the sum of Shs.84,175 an amount she considered grossly low. She was aggrieved by the consent and filed an application to act in person on 28th December, 2015. The application was allowed on 26th May, 2016 whereupon she filed the present application.

At the hearing of the application on 21st July, 2016 the Claimant reiterated her averments in the affidavit and stated that she had not received the amount alleged to have been paid to her erstwhile advocates as a consequence of the consent.

In the replying affidavit of Josephat Otsieno it is stated that the negotiations of 30th June, 2015 were held in the presence of and with full participation of the Claimant and settled in the sum of Shs.140,710 made up of the Principal amount of Shs.84,175, interest in the sum of Shs.25,535 and costs of Shs.31,000 and the said sum was subsequently paid to the Claimant in September, 2015 vide National Bank cheque No.001929 in the claimant's name forwarded to the Claimant's then advocates by letter of the same date.

It is deponed that no evidence has been submitted to prove that Mr. Rodi had no instructions to settle, nor was there proof of fraud, collusion or agreement contrary to policy. It is further deponed by Mr. Otsieno in the replying affidavit that the Claimant did not raise objection upon payment of the decretal sum, that the application is intended to embarrass the Respondent, is scandalous, frivolous, vexatious and an abuse of court process, that it will prejudice the Respondent, has no merit and the applicant is guilty of inordinate delay.

At the hearing of the application Mr. Fwaya appearing for the Respondent reiterated the contents of the replying affidavit and submitted that the Claimant has not proved that the consent award was low or stated what parameters she considered to qualify the consent award as low, that there was no affidavit from the Claimant's former advocate to prove he lacked instructions to enter into the consent award or had limited instructions. That the applicant has not stated what her instructions to her advocate were or that the advocate went outside those instructions.

Mr. Fwaya submitted that an advocate has unlimited instructions including entering into consent unless such instructions are expressly limited. He submitted that the court record shows the Claimant was in court on 30th June, 2015 when the consent was recorded and adopted by the court and the Claimant was party to the discussions as demonstrated in the replying affidavit.

Mr. Fwaya submitted, that a consent cannot be interfered with or set aside except on grounds of fraud, mistake, misrepresentation or collusions which the claimant had not adduced any evidence to prove. He submitted that the claimant accepted the payment of the decretal sum, banked and withdrew the money and only raised her complaint 7 months after the payments. He submitted that apart from the inordinate delay the application was not made in good faith, that the claimant wants the consent to be set aside but to keep the money paid pursuant to the said consent, that she is estopped from complaining after benefiting from the money, that litigation must be brought to an end, that the consent meets the ends of justice and should not be interfered with.

Mr. Fwaya relied on the case of **Flora N. Wasike v Destimo Wambuko (1982-1988) I KAR** and the case of **Kenya Commercial Bank Limited v Specialised Engineering Company Limited [1982]KLR 485**. In both cases the court held that a consent order cannot be set aside except on grounds that it was obtained by fraud or collusion or agreement contrary to instructions, that an advocate has implied general authority to compromise and settle an action on behalf of his client unless there is limitation of authority brought to the notice of the other side, or that the advocate was acting contrary to express general authority. In the case of **Kenya Commercial Bank Limited v Specialised Engineering Company Limited** the court further stated that the making of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or other of the recognised grounds.

Determination

I have considered the application together with the grounds and affidavit in support thereof as well as the replying affidavit. I have also considered the submissions of the Claimant and counsel for the Respondent.

The parties hereto do not have any disagreement over the main facts of this case being that consent was recorded and adopted on 30th June, 2015. The only issue for consideration is whether the claimant has made out a case for setting aside of the consent order.

The circumstances of setting aside such orders is well set as demonstrated by the two cases cited by the Respondent. My duty therefore is to determine whether the Claimant has proved any of the grounds upon which the consent judgement may be set aside.

The Claimant stated that on 30th June, 2015 she attended court ready for hearing of her case and after the case was called out and allocated time for hearing at 11.00 am her counsel instructed her to sit in court and wait for the time of hearing. She further stated that at 12.00 when the case was called out she did not understand what transpired and when she asked the advocate outside the court to explain to her he informed her that they had agreed to discuss and agree on an out of court settlement but when she went to his office at the beginning of October 2015 to find out the progress of the case she was informed that a settlement had been made at Shs.84,175 without her involvement or consultation. She immediately filed an application to act in person and after being granted leave, filed the present application. Her ground is that the consent award is extremely low.

The Claimant denied having received the settlement amount as averred by the Respondent. The Respondent on the other hand submits that the Claimant was present during the discussions, and the claimant has not proved that her advocate had no instructions.

From the conflicting facts as stated by the parties, it is not possible to determine whether the claimant is the one telling the truth or it is the Respondent as both counsel for the Claimant and the Respondent who carried out the actual negotiations did not swear any affidavit to state what happened. I likewise cannot determine the case on the basis of participation or otherwise of the claimant. On the same grounds I also cannot determine the case on the basis of negative instructions, fraud, misrepresentation or collusion.

I therefore must fall back on the provisions of Article 159 of the Constitution and Section 20 of the Employment and Labour Relations Court Act which behave this court to determine cases on the basis of substantive justice without undue reliance on technicalities. On this account the court asked Mr. Fwaya on 13th July, 2016 and again on 21st July 2016 to explain the basis upon which an amount of Shs.84,175 was agreed upon as settlement of the claim which he was unable to do even though he personally participated in the impugned negotiations leading to the recording of the consent Judgement.

The court took the liberty to consider the pleadings and the annexures thereto to determine if indeed the amount in the consent judgement was indeed too low as alleged by the claimant.

The letter of termination of the Claimant states that she would be paid 1 months salary in lieu of notice and half salary for each year worked, an amount that the claimant rejected and filed suit seeking instead the salary she would have earned to the date of retirement at the age of 60 years. At a salary of Shs.10,225 per month for 17 years that she worked the payment offered in her letter of termination would amount to shs.97,137.50. This means that the settlement recorded by her counsel is lower than what the claimant would have been paid according to her letter of termination, which she registered and came to court.

On this ground, I agree with the claimants contention that the settlement was inordinately low. It would therefore amount to a miscarriage of justice from this court to ignore the claimant's contention that she did not concede to such a low amount as a basis of settlement. This leads to a conclusion that she was either not consulted or the true facts were misrepresented to her by her advocates.

On account of the foregoing, I find merit in the Claimant's application to set aside the consent judgement which I hereby do. The consent judgement recorded on 30th June, 2015 is hereby set aside and parties are directed to fix a hearing date for the case. Each party shall bear its costs of the application.

Dated, Signed and Delivered this 29th day of September, 2016

MAUREEN ONYANGO

JUDGE