



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 77 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DOROTHY VIVIAN ATIENO OGUTUCLAIMANT

-Versus-

MUMIAS SUGAR COMPANY LIMITEDRESPONDENT

RULING

The application before me for determination is a motion dated 27th May, 2016 filed by L.G. Menezes Advocates for the Respondent/Applicant under certificate of urgency seeking the following orders:-

1. **THAT** this application be certified urgent and service be dispensed with in the 1st instance.
2. **THAT** there be a stay of proceedings in this claim pending the hearing and determination of this application.
3. **THAT** the Honourable Court be pleased to order the re-opening of the Respondent's case.
4. **THAT** the Honourable Court be pleased to set aside the consent recorded between both parties selecting this suit as a test suit and the Respondent be allowed to call a further defence witness.
5. **THAT** a date for inter-parties hearing of this application be given.
6. **THAT** costs of this application be provided for.

The application is supported by the grounds on the face thereof and the supporting affidavit of Ronald Luby, the Legal Officer of the Respondent sworn on 27th May, 2016.

The Claimant opposed the application vide her replying affidavit sworn on 3rd June, 2016.

On 13th June, 2016 parties recorded a consent on prayer No.3 that the Respondent's case be re-opened on condition that the Respondent pays the claimant Shs.20,000 as thrown away costs. The only prayer for determination is therefore prayer 4. Parties filed and exchanged written submissions in respect of the same.

It is the Respondent/Applicant's case that this suit came up for hearing of the Respondent's case on 24/02/2016 when one witness testified and the Respondent's case was closed. That the closing of the Respondent's case by its then advocate was contrary to the Respondent's instructions in that the Respondent had another witness to call prior to closing its case. That the Respondent is also aggrieved by

the consent recorded between its advocates and the Claimant's advocate selecting this suit as a test suit contrary to the Respondent's instructions to its advocate then on record. It is the Respondent/Applicant's application that the consent selecting this suit as a test suit be set aside as no instructions were ever given by the Respondent in such terms to its advocates. That in the circumstances it is just, fair and in the interest of justice that the Respondent's case be re-opened and the Respondent be allowed a fair opportunity to call its remaining witness and present evidence so that the court can determine the dispute in this case on merits.

In the supporting affidavit of Ronald Luby, he states that the Respondent had another witness to call for purposes of expounding on the M/S Price Waterhouse Coopers (PWC) Report and the closure of the Respondent's case was premature. He further states that the consent to use this case as a test suit was entered into by the previous counsel of the Respondent without authority and the consent order should be set aside in the interest of fairness and justice.

In the Respondents written submissions, counsel for the Respondent submitted that it is trite law that consent Judgements may be set aside on any grounds that would invalidate an agreement or contract between parties to the contract. It is submitted that the Respondent's previous counsel Mr. Ouma did not have written or verbal instructions to enter into consent that would be prejudicial to the Respondent and that the Respondent had all intentions to see the conclusion of this case and all the other numerous suits as there are triable issues which can not be determined by way of consent. Counsel for the Respondent submitted that the effect of the consent is to bind the Respondent to a conclusive order that would not be subject to appeal except by consent of the parties as provided in section 67(2) of the Civil Procedure Act.

The Respondent relied on the case of **Brooke Bond Liebig (T) Limited v Mallya (1975) EA 267** wherein the court quoted a passage from Seton on Judgements and Orders 7th Edition Vol.1 page 124, with approval as follows;

"Prima facie, any order made in the presence and with the consent of the counsel is binding on all parties in the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

It was submitted for the Respondent that the facts of **Cause No.77 of 2015** are not similar to the facts which led to termination of services of the Claimants in 52 other suits and as such the selection of **Cause 77 of 2015** as a test suit for the purpose of determining liability was made in ignorance of material facts in controversy, and that it was the Respondent's intention to call a witness from PWC to testify and shed light on the findings contained in a forensic investigation report titled "PROJECT HONEY LIMITED SCOPE REVIEW INTO POSSIBLE IRREGULARITIES IN THE TERMINATION OF CANE PLOTS AND ETHANOL STOCKS" annexed as "Appendix A" to the Respondent's Memorandum of Response filed on 22nd September, 2015.

The Claimant opposed the application and in the replying affidavit she deposes that the orders for this suit to be selected as a test suit was mooted by the bench after consideration and consultation with the parties, that the set of facts, cause of action and witnesses to be called especially by the Respondent in all the cases are the same on the issue of liability. She deposes that senior officers of the Respondent namely Mr. Fidelis Odeke, John Shiundu, Mathew Gae, Jonathan Mutonyi and Bonface Makhandia who are all known to her were always in court including on the date the impugned orders were made. She states that the Respondent has not alleged any fraud, mistake or collusion to warrant the setting aside of the order to use this suit as a test suit. She states that the Respondent has not explained what prejudice it would suffer if this suit is used as a test suit. That on the contrary it is the claimants whose cases were stayed pending the outcome of this suit who stand to suffer prejudice if the application is allowed, having kept their cases in abeyance awaiting the conclusion of this suit. It is her position that the present application has been filed in bad faith with the intention of bringing in fresh evidence to controvert the claimant's case after closing the Respondent's case and receiving the claimants written submissions. The Claimant further

depones that the application is an abuse of court process, was filed after undue delay of 124 days after the Respondent closed its case without explanation just when the case was due for determination.

In the written submissions filed by Mr. Odeny, counsel for the Claimant, it is submitted that this court has no jurisdiction under section 12 and 16 of the Employment and Labour Relations Court Act to set aside its orders. He relied on the case of **The owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Limited** wherein the court stated that without jurisdiction the court has no power to make even one step and that the application must fail on this ground alone.

It was further submitted for the Claimant that section 1A, 1B and 3A of the Civil Procedure Act under which the application has been filed do not apply to this court, that the proper legal provision under which the jurisdiction of this court should have been invoked is section 16 of the Employment and Labour Relations Court Act which provides for review as a review encompasses setting aside or revoking of earlier orders. It was submitted that the reliance on irrelevant provisions of the law in an attempt to invoke the powers of court was addressed in **Kisumu HCCC No.236 of 2000 Rajinder Singh Wallia v Nooleza A Shamji & Another** where the court held that;

"...It is well established law that section 3A of the Civil Procedure Act the inherent jurisdiction of this court can only be invoked in circumstances where the procedure by which a party can move the court is not specifically provided in the Civil Procedure Rules, I find that section 3A would not apply here."

It is further the Claimant's argument that the application is bad in law as the Respondent's application does not disclose the date when the order selecting this suit as a test suit was made and that the court cannot address itself on a problem that the applicant is unable to identify. It is submitted that under section 16 the court can only review its judgements, awards, orders or

decrees as envisaged in the Rules. He relied on the decision of **Tanui J in Kisumu HCCC No.34 of 2000 Nathan Ondego Mdeizi v National Housing Corporation** where the court stated;

"It is patently clear from the above rule that a person who applies for a review has to have been aggrieved by a formal order or decree and not a ruling (or) judgement. An application for review of a ruling is not provided for under the Civil Procedure Rules."

The Claimant further relied on **HCCC No.1227 of 1996 Edward Kings Onyantha & Another v China Jiangsu International Economic Technical Co-operation** in which Visram J. held as follows;

"That aside, the plaintiff's application must also fail since he did not annex to his application the order which was sought to be reviewed. Without the order the plaintiff claims to be aggrieved with, how can this court exercise the discretion given to it in favour of the plaintiff? What will be the matter of reference?"

On the question of want of authority by the Respondent's previous counsel, it is submitted for the Claimant that the Respondent has not proved that Mr. Ouma, its previous counsel did not have instructions as alleged. It is submitted that the counsel had ostensible authority as was held by **Ombija J in Kitale HCC No.97 of 2008 Marcellus Lazima Chege v Joel Bob Sirengo** when he stated -

"It is now settled law that an advocate on record has ostensible authority to compromise a suit or consent to Judgement, so far as the opponent is concerned..."

The Claimant further relied on the decision in the case of **Kenya Commercial Bank Limited v Specialised Engineering Company Limited [1982]KLR 485** as quoted in **John Warunge Kamau v Phoenix Aviation Limited [2015] eKLR**, that -

"The making by the court of a consent 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 either of the recognized grounds."

It is submitted for the Claimant that the present application is an afterthought intended to delay the conclusion of this case as the court record show that the parties were given time to consult over the possibility of consolidating the case or selecting one case as a test suit and parties returned to court choosing to select this suit as a test suit. That the Respondent attended court through its senior officers named in the replying affidavit and participated in the hearing until the case was closed after hearing evidence from witnesses called by both the Claimant and the Respondent. That the Respondent waited until the last minute to file the application without explaining the grounds for the delay.

The Claimant relied on the Court of Appeal decision in **Kisumu CA No. 352 of 2005 Gerphas Alphonse Odhiambo v Felix Adiego** where the court observed that:-

"The period of delay, however short, must go in tandem with the explanation for it. Without any explanation there would be no basis for exercise of discretion."

It is further submitted for the Claimant that a consent is a binding agreement and can only be set aside by the court on serious grounds like mistake, fraud or misrepresentation, none of which had been alleged by the Respondent. On this ground the Claimant relied on several authorities being **Gerishom Likechi Kitungulu v Patel Prabhakar Issuer bhai (2005)eKLR, Brook Bond Liebig (T) Limited v Mallya, John Warunge Kamau v Phoenix Aviation Ltd and Flora Wasike v Destino Wamboko**.

The Claimant submitted that the Respondent has failed to discharge its evidentiary burden in support of its application, that the circumstances leading to the termination of employment contracts for all the suits in which this case has been selected as test case are the same, that the evidence and witnesses of the Respondent in all the cases are the same and a test suit is the best option to dispense with the cases as fixing the individual cases for hearing and calling the same witnesses to repeat what the court has already heard would be prejudicial, unfair and a waste of court's and parties' time.

Determination

I have perused the file herein and found that the orders selecting this case, that is **Cause 77 of 2015**, were not made in this file. This underscores what the Claimant has raised in its submissions, that the orders sought to be set aside have not been extracted and attached to the application herein.

As was stated by **Visram J** (as he then was) in the case of **Edward Kings Onyancha & another v China Jiangsu International Economic Technical**

Corporation, and also by **Tanui J.** in the case of **Nathan Ondego Mdeizi v National Housing Corporation**, a person who applies for review or setting aside of an order can only do so against a formal order and must attach a copy of the order sought to be reviewed or set aside. Otherwise the court will not have any reference upon which to exercise its discretion.

The foregoing notwithstanding, and even assuming that the application was made in the correct file and the order sought to be set aside was extracted and attached to the application, the applicant has not proved that the erstwhile counsel had no instructions to enter into the consent to select this suit as a test suit.

As ably submitted by both counsels for the Claimant and Respondent, the circumstances when a consent order or judgement may be set aside are well established by both legislative and judicial authorities. A consent judgement or order made with the consent of counsel once adopted by the court becomes a binding judgement and order of the court and may only be set aside on grounds of fraud or collusion, or if the agreement is contrary to the policy of the court. The consent order may also be discharged if consent was given without sufficient material facts, or in misapprehension or ignorance of material facts, or in general, for a reason which would enable a court to set aside an agreement. An order or judgement may also be set aside if there is proof that counsel acted contrary to express negative directions.

In the present case the Respondent's only ground for seeking the setting aside of the consent order is that Mr. Ouma, its erstwhile counsel, had no authority to enter into such consent. The Respondent has however not denied that 5 of its Senior Officers were in attendance throughout the proceedings, or that the deponent of the affidavit in support of the application was not in court and cannot depone to the circumstances leading to the recording of the consent order selecting this cause as a test suit as has been stated in the claimant's replying affidavit. The Respondent has also not submitted to court any instructions given to their former counsel as proof that the counsel acted contrary to negative directions.

I find that the Respondent has failed to meet the threshold for setting aside consent orders. The Respondent also failed to explain the delay in making the application, having done so only after it had called evidence, closed its case and received final written submissions of the claimant.

The Claimant raised the issue of this court's jurisdiction to grant setting aside orders as prayed for and further submitted that the Respondent invoked the court's jurisdiction under the wrong provisions of the law and argued that both grounds would warrant the failure of the application.

On the issue of Jurisdiction, section 12(3)(viii) gives this court very wide powers including the power to grant "any other appropriate relief as the court may deem fit to grant." Rule 27(1) of the Rules of this court also allow the court to make "any other order to meet the ends of justice," while section 16 of the Act and Rule 32 also allow the court to review its decisions. I do not find merit in the argument of the Claimant on want of jurisdiction.

With respect to the Claimant's argument on the invocation of this court's jurisdiction under the wrong provisions of the law, both Article 159 of the Constitution and section 20(1) of the Act provide that this court shall act without undue regard to technicalities.

In the case of **Mawji v Arusha General Store** quoted and adopted in **Brooke Bond Liebig (T) Limited v Mallya**, the court stated;

"We have repeatedly said that rules of procedure are designed to give effect to the rights of the parties and that once the parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in vitiation of the proceedings. I should like to make it quite clear that this does not mean that the rules of procedure should not be complied with - indeed they should be. But non-compliance with the rules of procedure of the court, which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no injustice has been done to the parties."

In that case an application to set aside consent judgement was made under (the then) Order 23 Rule 3 of the Civil Procedure Rules which provided for the recording of compromises instead of Order 43 which provided for applications for review of judgements and orders.

I fully agree with the decision in the of the court in the two decisions and I too would adopt the said ruling. The Claimant has not stated how the bringing of this application under sections 1A, 1B and 3A of the Civil Procedure Act caused her any injustice or prejudice.

Conclusion

Having found that the application herein was brought in the wrong file and the orders sought to be set aside have not been extracted and attached to the application for setting aside, having further found that the delay in bringing the application has not been explained and further that the Respondent has failed to meet the thresh hold for setting aside of consent orders entered into by its previous counsel, I find the application without merit. The upshot is that the application is dismissed with costs to the Claimant.

Ruling Dated, Signed and Delivered this 8th September, 2016.

MAUREEN ONYANGO

JUDGE