



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 151 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

AMANYA RAPHAEL ANABASWACLAIMANT

-Versus-

MUMIAS SUGAR COMPANY LIMITED.....RESPONDENT

R U L I N G

The application before me is a motion dated 26th February, 2016 filed by the Applicant (who is the Respondent in the substantive suit) seeking the following orders:-

1. This application be certified as urgent and service thereof be dispensed with in the first instance;
2. This Honourable Court be pleased to set aside the Consent Orders recorded before this Honourable Court on 15th October 2014; and
3. The costs of this application be provided for.

The application is supported by the grounds on the face thereof and the supporting affidavit of RONALD LUBYA, the Respondent's Legal Services Manager. The application is filed under Order 42, Rule 7, Order 51 Rule 4 of the 3A of the Civil Procedure Act and are enabling provisions of the law.

In the grounds and supporting affidavit the applicant stated that the claimant attained retirement age of 55 years in 2014 and was set to retire on 18th July, 2014. On 5th June, 2014 the Claimant was examined by the Director of Medical Services and recommended for registration as a person with disability under the Persons With Disability Act. The Claimant subsequently filed this suit seeking orders restraining the Respondent from retiring him until he attains 60 years as provided in the Act.

Believing that the Claimant was a person with disability (PWD), the Respondent entered into a consent Judgement which was adopted by the court on 15th October, 2014 in the following terms:-

1. **THAT** the Claimant shall not be retired by the Respondent until he attains the age of 60 years and further, he shall be given all exemptions and privileges under the persons with disability act 2003.
2. **THAT** costs shall be either agreed by the parties or taxed.

Early in 2015 the Respondents requested the Director of Medical Services to constitute a Medical Board to review all disability cases following a rise in the number of employees applying to be certified as PWDs. The reassessments were carried out on 5th to 8th October, 2015 and the report forwarded to the Respondent by a letter from the Director of Medical Services dated 20th November, 2015. The findings in the report was that out of the 50 employees assessed, 36 were found to suffer from disability, 8 were found to have improved from previous disability and were no longer qualified for registration as PWDs while 6 were found to have no functional disability necessitating registration.

With respect to the Claimant the report states:

No disability.

No recommended for registration as Persons With Disability.

Needs psychiatric review, counselling.

Following receipt of the reassessment report the Respondent filed the present application seeking the setting aside of the consent order recorded on 15th October 2014.

The Claimant opposes the application and filed a replying affidavit sworn on 13th March, 2016 in which he states that this case was settled by consent order of 15th October, 2015 following which he was reinstated. He states that he was again served with a letter dated 6th January, 2016 requiring him to retire on 31st January, 2016 prompting him to file an application under certificate of urgency on 20th January, 2016 seeking an order restraining the Respondent from retiring him. The Respondent however reinstated him rendering the application redundant/spent. That the Respondent thereafter filed its present application which in his opinion is actuated by malice and intended to have him retired prematurely before attaining the age of 60 years.

It is the Claimant's case that the application is frivolous, scandalous, and vexatious, that the court is *functus officio* and the case is *res judicata*. The Claimant states that his certificate of disability issued on 6th June, 2014 is still valid and the report of assessment dated 5th - 8th October, 2015 is a fabrication and that the team which prepared the disability report are total strangers and the report should be disregarded.

He prayed that the application be dismissed.

Applicant/Respondent's Submissions

It is submitted for the Applicant/Respondent that a decree passed by consent of parties may, in appropriate circumstances be challenged on grounds of fraud, mistake or misrepresentation or other reason which could persuade a court to vary or set aside the consent decree - per Nyarangi J. in **Flora Wasike v Destino Wamboko (1988) 1 KLR 429**. The Applicant/Respondent further submits that a consent order has a contractual effect and can be set aside on grounds upon which a contract may be set aside.

The Applicant/Respondent further relied on the case of **Jacob Juma v Rosaline Wanjiru [2009]eKLR** where the court quoted with approval the following passage from **Halsbury's Laws of England, 4th Edition**;

"Mistake nullifies consent when the parties reach an agreement but that agreement has no legal effect because it is based on a fundamental mistaken assumption. A mistake will not negative a consent under it [unless] it is material to the formation of the agreement in the sense that if the party mistaken had realised his mistake, he would not have entered the agreement."

The applicant further relied on the case of **Hassanali Holdings v Citizen Cinema Corporation Limited [2005]eKLR** wherein it was held that;

For mistake to bring a contract to a halt, it must be mutual. And a mistake like fraud or misrepresentation can warrant setting aside a consent judgement/order - as it would in an ordinary contract because the pact following a consent order/judgement assumes all characters of a contract. That mistake should however be common to both parties to a pact. It is the element of mutuality that says that the parties were not acting with the meeting of the minds i.e. ad idem.

It is the Applicant's submission that the consent order of 15th October, 2015 was entered into by a mutual mistake made by both the Claimant and the Respondent on the basis of a medical examination report dated 6th June, 2014 from the Director of Medical Services that caused both parties to believe that the claimant was suffering from disability.

Claimant's submissions

It is submitted for the Claimant that the court is *functus officio* and the issue before the court is *res judicata*. It is submitted that the applicant has not proved the existence of fraud or misrepresentation to justify the setting aside of the consent judgement recorded and adopted by the court on 15th October, 2014. That the consent order is binding on the Respondent and the Claimant is entitled to be in employment until he attains the age of 60 years.

Determination

Section 15(6) of the Persons With Disabilities Act provides that the minimum age of retirement for a person with disability is 60 years. The mandatory age of retirement for the Claimant like all other employees of the Applicant/Respondent is 55 year. The parties hereto recorded the consent order of 15th October, 2014 on the mutual belief that the Claimant was a PWD and was therefore entitled to retire at the age of 60 years.

The issue for determination is whether the consent order recorded on 15th October, 2014 was based on a mutual mistake or other ground justifying the setting aside of the order.

I have considered the pleadings, the documents on record and the submissions of the parties and I am convinced that both parties have been and are still operating under a mistaken belief or ignorance of what constitutes registration under the Persons With Disabilities Act. What I have seen on record are Medical Assessment Forms for the claimant filled on 6th June, 2014. The Medical Assessment Form **recommended** that the Claimant **is qualified to be registered** as a person with disability. **It is not a registration or proof of registration as a PWD.**

According to the website for the Council of Persons with Disability which is the body charged with registration of PWDs the requirements for registration are the following:-

Individual Registration

Individuals who qualify as per the definition of a PWD is registered at the County level through the Disability Services Officers (DSOs).

The registration process is a continuous exercise where children and adults are all registered.

Requirements

- 1. One passport sized photo**
- 2. Duly filled individual registration form**
- 3. A copy of a signed medical assessment report from a government gazetted hospital.**

After registration a PWD is issued with an disability identity card as proof of registration. It is the

disability card that is used to access benefits under the Act such as extension of retirement age to 60 years, tax exemption certificate from Kenya Revenue Authority for exemption from payment of income tax, import duties, value added tax, among other reliefs and incentives for Persons With Disabilities.

In the present case the claimant only presented the Medical Assessment Form. He has not presented an Application for Registration Form or disability identity card as proof of registration as a PWD. **He has therefore not proved that he is registered with the National Council for Persons with Disability as a PWD.**

The foregoing means that the consent judgement was made under the mistaken belief that the Claimant is entitled to benefit from the provisions of section 15(6) of the Persons With Disability Act when in fact he was and still is not.

This in my opinion is the kind of situation that was contemplated in the case of **Hassanali Holdings v Citizen Cinema Corporation Limited** when the court stated that:-

For mistake to bring a contract to a halt, it must be mutual. And a mistake like fraud or misrepresentation can warrant setting aside a consent judgement/order - as it would in an ordinary contract because the pact following a consent order/judgement assumes all characters of a contract. That mistake should however be common to both parties to a pact. It is the element of mutuality that says that the parties were not acting with the meeting of the minds i.e. ad idem.

I find that both parties were mistaken as to the right of the Claimant to retire at the age of 60 years and that this falls under the nature of mistake discussed at paragraph 290 of **Hulsbury's Laws of England 4th Edition** where it stated -

'Mistake nullifies consent when the parties reach an agreement but that agreement has no legal effect because it is based on a fundamental mistaken assumption. A mistake will not negative consent unless it is material to the formation of the agreement in the sense that if the party mistaken had realized his mistake, he would not have entered the agreement.'

I find that had the Applicant been aware of the fact that the Claimant was not registered as a PWD it would not have consented to the orders. I find that the assessment report dated 5th - 8th October, 2015 does not change the position as the Claimant is not registered as a PWD.

For the foregoing reasons the application succeeds. I hereby set aside the consent judgement recorded by the parties in court on 15th October, 2014. Each party shall bear its costs of the application.

Ruling Dated, signed and delivered this 8th day of September, 2016

MAUREEN ONYANGO

JUDGE