



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.915 OF 2015

MOHAMED BARE & 48 OTHERS....CLAIMANTS/APPLICANTS

VERSUS

KENYA RURAL ROADS AUTHORITY RESPONDENT

RULING

1. The Claimants by application dated 31st May 2016 is seeking for orders against the Respondent that;

1. Spent.

2. Leave and hereby granted to allow the esteemed law firm of M/s Lumumba & Lumumba Advocates to come on record for the /Claimants as Applicants herein in place of Tengo Madara & Co. Advocates.

3. Spent.

4. Pending hearing and determination of the suit, court be pleased to grant orders to set aside, vary the consent order or judgement dated 14th April 2016.

5. This court be pleased to order that the suit proceeds to full trial and be determined on merit.

6. The court be pleased to make such orders and or further order(s) it may deem just and necessary in the circumstances.

2. The application is supported by the affidavit of Mohamed Bare and on the grounds that the Claimants are employees of the Respondent upon employment from 2010 to 2012 and in April 2012 they received letter dated 26th April 2012 upgrading their placement from grade 3 to grade 5 with effect from 1st July 2012. The Claimants who joined the Respondent in July 2012 started at grade 5. Upon the upgrade, salaries never reflected in the pay slips until 2015.

3. The Claimants instructed the firm of M/s Tengo Madara & Co. Advocates to file suit in July 2015 but was compromised through consent. That instructions given to Tengo Madara & Co. Advocates was to file suit and pray for;

a. That the Claimants be paid their outstanding arrears since 1st April 2012 when they were upgraded from Job Group 3 to grade 5

b. That their salaries to be as per Grade 5 as per their appointment letters.

4. The firm of M/s Tengo Madara & Co. Advocates acted contrary to the instructions given and failed to render account and appreciate all the issues and facts as instructed by the Applicants and proceeded to enter consent purporting to have authority from the claimants. Upon signing the consent without authority, the advocates did not inform the Claimants of its existence as they came to learn about it from the Respondent vide letters dated 9th May 2016 requiring them to acknowledge receipt and return copy of the letter to which the consent was attached.

5. Other grounds in support of the application are that the Claimants disputed and protested in writing to the advocates M/s Tengo Madara & Co. Advocates with regard to the consent vide letter 26th May 2016 and also sent to the Respondent board. The Claimants noted that the consent was signed secretly, concealed and only emerged after 2 months of the date of its signing which demonstrated fraud, misrepresentation and collusion on the part of the Advocates – M/s Tengo Madara & Co. Advocates.

6. The consent is deemed by the Claimants as having violated the employment policy in Kenya, the commerce industry and if not set aside, might lead to a protracted litigation in court hence subject the Claimants to huge loss that if the suit were determined on merit. By disregarding instructions, the consent herein was unfair, faulty, irregular and void and should be set aside as there will be prejudice, injustice visited upon the applicants.

7. In the Supporting Affidavit of Mohamed Bare, he avers that he has authority to make his affidavit in support of the application. That he is the Procurement Assistant having been appointed between 2010 and 2011. The Claimants instructed the firm of Tengo Madara & Co. Advocates to file the claim herein on their behalf but he proceeded without authority and compromised the same in a manner that was fraudulent, in misrepresentation and seek the orders set out in the application by allowing the firm of M/s Lumumba & Lumumba Advocates to come on record for the claimant and to have the consent of 14th April 2016 be set aside.

8. Counsel for the Applicants also submitted that instructions were given to M/s Tengo Mandara & Company Advocates to file suit herein but no consent was given to the firm to settle the matter through a consent order. When negotiations commenced the Claimants were not informed. The consent entered settled the matter that the Claimants be paid 5 years outstanding dues and that they be demoted from Job Group 5 to Job Group 3. The claimant's instructions were to seek their dues owing but not a demotion. The consent also was in terms of the advocate be paid Kshs.2, 512,267.00 as costs, notwithstanding the fact that the Claimants had paid the fees to act for them. The consent entered herein is contrary to court policy and where advocate has instructions to represent a litigant, to compromise it without authority is fraud and the consent should be set aside.

9. In reply, the Respondent filed the **Replying Affidavit of Judith Yamo** filed on 14th June 2016. She avers that as manager in charge of human Resource and Administration with the Respondent has authority of the Respondent to reply herein being conversant with the matters herein.

10. Ms Yamo also avers that the application as drawn is irregular and incapable of addressing the issues raised. The application does not directly impede the firm of M/s Tengo Madara & Company Advocates as a party that is central to the issues raised and should therefore be struck out.

11. Ms Yamo also avers that the Respondent did not at any time during negotiations resolve the matter of the claims raised by the applicant by procuring the consent through undue influence and at all time during negotiations leading to the consent, the Respondent in good faith held the advocates for the claimant had the mandate and authority of the Claimants to represent them in the suit and to pursue their best interests including entering the consent dated 14th April 2016 and filed in court on 19th April 2016. The respondent's advocates did not seek through unlawful means to secure the consent and there is no such evidence and the allegation in this regard should be expunged. It is improper of the Claimants to infer impropriety on the part of the Respondent without evidence.

12. The matter of instructions between the Applicants and their advocates M/s Tengo Madara &

Company Advocates are confidential relations, which cannot be within authority or unlawful cause of the Respondent construct, design, direct or distract from the Respondent role in the manner of instructions that the claimant advocates were required to carry out. The consent should not be punished for a consent that was lawfully entered into freely by the claimant's advocate.

13. The question of representation of the claimant should be resolved first before the Claimants can be allowed to make the application as herein. Unless representation is addressed first by the Claimants themselves, to issue orders sought of setting aside the consent will result in injustice to the respondent. the Claimants have since received monies in their accounts being sums between Kshs.800,000.00 to Kshs.950,000.00 and none has written to the Respondent to enquire what the amount was for and neither has any of them returned the money received from the Respondent based on the consent now under challenge. The application should be dismissed.

14. In submissions, respondent's counsel submitted that there is no allegation that the consent was entered into through unlawful means and it is improper for the Applicants to infer improper motive on the part of the respondent. Where the Claimants and their advocate has issues unresolved, that should be separately addressed as the consent entered herein was lawful. The setting aside of a consent is guided by principles set out by the Court of Appeal in **Kenya Commercial bank limited versus Benjoh Amalgamated limited 7 Another, Civil Appeal No.276 of 1997** and held that, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them. Such consent cannot be set aside or discharged unless obtained by fraud, collusion or agreement contrary to court policy or without sufficient material facts or misrepresentation and or in ignorance of material facts.

15. That once consent was made herein, the settlement amount was to be immediately paid to claimant accounts. The Claimants received these amounts without objection and thus they are not sincere. Such payments have not been returned to the respondent. The Claimants are beneficiaries of the consent they seek to set aside.

Determination

The key issues that arise from the Applicants application can be set out as;

Whether leave should be granted to allow M/s Lumumba & Lumumba Advocates to come on record for the Applicants herein in place of Tengo Madara & Company Advocates;

Whether the court should set aside or vary the consent order or judgement dated 14th April 2014; and

Whether the suit should proceed to full trial.

16. Where there is a consent order or judgement, the same becomes binding on all the parties to the action if made in the presence and with consent of counsel on record. One cannot challenge such an order or judgement unless it is shown to have been entered into through fraud, collusion or by misrepresentation as held in **Kuwinda Rurinja Co. Ltd versus Kuwinda Holdings Ltd & 13 Others [2013] eKLR.**

17. The universal practice is to record that a judgement or order is by consent by the court. in employment and labour relations matters/claims, such practice is regulated by the Employment and Labour Relations Court (Procedure) Rules, 2016 where all claims filed with the court must have an order or judgement of the court issued by the Judge of the court. Unlike in the High Court practice rules where certain powers are granted to the Registrar and or their deputies, before this court, an order is valid upon issuance by the Judge of the court. See Rule 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016. This was clearly set out by the court in **Kassmir Wesonga Ongoma et al versus Ismael Otoicho Wanga, Civil Appeal No.25 of 1986 [1987] KLR** thus;

The purpose of a consent judgement is for the parties to inform the court that they have

compromised all their differences in a manner suitable to themselves without asking the court to make any further decision. ... A consent becomes the order of the court compromising the differences to the satisfaction of parties.

18. It is therefore a fundamental practice that even where parties have negotiated, agreed and filed a consent agreement with the court, such agreement by consent must be legally accepted by the court. The duly executed written consent of parties only becomes a court order the moment it is domesticated and approved by the court. Also when one of the parties orally addresses the court on the content of the proposed consent and thereafter the Respondent or adversary is called upon to confirm the contents, then the court must confirm and adopt the terms of such a consent as its order and allow parties to append their signatures or thumbprints. In both instances the court retains the discretion to enquire from the parties consenting to give further details if necessary and before the adoption and confirmation of the consent as a final order. See **Simon Ayiemba versus Kenya Industrial Estate Ltd Busia, HCCC Civil Appeal No.5 of 2001**

19. I find the consent letter filed by the parties herein on 19th April 2016 has not been adopted by the court to amount to an order and or final judgement of the matter in settlement or compromise of the suit herein. Since the filing of the suit, there is no record that the claimant and respondent's counsels attended court to have the consent agreement confirmed and adopted by the court as its order or judgement. This is well articulated by the high Court in **Nahashon Firtwanga versus Environment Disaster Research Foundation, HCCC No.20 of 1999 (Mombasa)** and the finding that;

... the consents filed by the plaintiff on 18.11.2002 were not recorded in the file and therefore were not adopted into the court proceedings ... until the consents are made part of the record by being reduced into the court file record by the judge or the Deputy Registrar, they do not become orders of court and cannot be available for extraction as court's final orders.

19. In this case, even though the consent agreement was received as filed on 19th April 2016, the same is not reduced as an order of the court to be binding upon the Claimants in compromise of their claims. A record of the court should follow such filing of the consent agreement, for the judge to adopt and confirm the same in its terms and conditions.

20. Therefore, the orders sought for setting aside, varying the consent order or judgement dated 14th April 2016 does not arise as no such order or judgement exists in law or in fact. The matter is still pending unresolved until the court enters judgement and or makes final orders. The application made by the applicant to have the firm of M/s Lumumba & Lumumba Advocate to come on record instead of the Claimants Advocates, I surmise is made under the impression and belief that there exists a valid order and judgement of the court. No such order or judgement is on record.

21. While the suit/claim is pending, The Claimants are at liberty to change their advocates as the matter/suit/claim is still pending without final orders or judgement. Noting the averments in the Replying Affidavit of Ms Yamo filed on 14th June 2016 that the Claimants have since received part of the dues set out in the claim, such should be put into account when the matter/suit/claim comes for hearing.

In the interests of justice, noting application before court, the Claimants are at liberty to change their advocates and set the main claim for hearing and final determination by the court.

Delivered in open court this 2nd day of September 2016

M. MBARU

JUDGE

In the presence of:

Court assistant: Lilian Njenga