



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1351 OF 2012

- 1. DUNCAN ODERA OGUTU
- 2. OGAJA OGAJA
- 3. BENSON O. AMBUNI
- 4. JENIFFER MOGIRE
- 5. ANDREW MACHUKI MOMANYI
- 6. AMOS T. KINYOZI CLAIMANTS

VERSUS

- NOAH ROTICH 1ST RESPONDENT
- TOM M. ODEGE2ND RESPONDENT
- JUSTUS K MUGO3RD RESPONDENT
- KUBO TAVO4TH RESPONDENT
- REGISTRAR OF TRADE UNIONS5TH RESPONDENT

RULING

1. The ruling herein relate to two (2) applications, one by **Benson O. Ambuni and dated 14th November 2014** and the second filed **Ogaja Ogaja and filed on 6th October 2014**. Enonda, Makoloo & Makori Advocates represent the Claimants save for Ogaja Ogaja who is acting in person. The firm of Rachier & Amolo Advocates represents the Respondents save for the 5th Respondent who has never entered appearance.
2. Both applications challenge a consent filed herein and dated 11th April 2013.
3. In the application dated 14th November 2014 the application is seeking;
 1. *Spent*
 2. *Spent.*
 3. *The Court be pleased to reject in totality the purported consent dated 11th day of April 2013 and*

filed on the same day and allow the matter to proceed to the full hearing and conclusion.

4. *The Court be pleased to reinstate orders dated 28th day of September 2012 and their resultant consequences and to reinforce their execution immediately to extend to the most current month.*
5. *The Court be pleased to immediately restrain the amendment of the Union of Kenya Civil Servants Constitution being undertaken till the hearing and determination of this case and subject to the adherence to the provisions of Article 30(1) of the union of Kenya Civil Servants constitution.*

4. This application is supported by the annexed affidavit of Benson Ambuni and on the grounds and averments in his affidavit that the purported consent directing the amendment of the constitution is irrelevant to the dispute before Court and in gross violation of Article 30(1) and (2) of the union constitution which is a suspicious shortcut to amend the same which takes away the constitutional rights of the National Delegates conference as per the constitution. The spirit of mutual consenting was abused and grossly violated by the then Claimant No. 1 [Duncan Odera Ogutu], their advocates and advocates for the Respondent and deliberately causing the truth to be concealed from the Court by hiding another consent proposal from the court.

5. Other grounds in support of the application are that Claimant No. 2 was not present during the process of consenting but his signature was hurriedly and suddenly fixed on the purported consent and has since reported the matter to Central Police Station for investigations. There was an alternative consent that was drawn by the Claimants following advice by their advocate with details on conditions for settlement of the dispute but due to the insincerity of the then Claimant No. 1 and the advocate the drawn consent was not presented in court. The letter inviting the Claimants to a meeting for the amendment of the constitution did not mention the consent. The 3 Claimants identified to undertake the process of the constitution, 2 withdrew after learning the truth from the Respondents in their first meeting and were thus not party to the consent order.

6. Other grounds are that the 4 Respondent who are chief officers of the union never attended a single meeting where the settlement proposals were being discussed and cannot claim knowledge of what transpired during discussions except what they were told. The current constitutional amendments has abused its terms, it was amended in December 2010, mutilated by the 2nd Respondent before presentation to the 5th Respondent and the consent herein does not insulate the 2nd Respondent from observing the union constitution. The consent herein did not resolve the issues in the dispute herein as was intended and the Respondents have habitually lied to the Court and continued to violate the union constitution. The question of an audit directed by the Court was so crucial and cannot be ignored or diverted by the consent. There are other pertinent issues that the Court should consider and address especially the illegal branch officials suspension; the sale and purchase of union vehicles without adherence to the constitution; the involvement in national politics of the 2nd Respondent which is contrary to the union constitution must be discouraged as he is using union resources; and the Respondent failed to settlement the matter amicably as directed by the court.

7. Other grounds are that the Claimants have since lodged a complaint against the Claimant No. 1 and their advocate with regard to their conduct. Events herein go contrary to the values of the national constitution and the union constitution, the Respondents have applied mischief, Respondents are regular offenders and persistent in breaking the union constitution. In a proper consent, costs of the Claimants should have been awarded. The advocates to the consent were compromised and the Claimants were betrayed and the consent herein should be set aside.

8. The second application is seeking for orders that;

9. The two judgement by consent dated 29th October 2012 and 11th April 2013 be sent aside and that;

1. *That I be granted leave to prosecute the application herein on my behalf and on behalf of the other 4 claimants*
2. *That this application be certified urgent and same be placed and admitted to exparte hearing and determination*

3. *That the Court be pleased to deliver judgement and nay other orders it deems fit setting aside the judgement and consent delivered on 11th April 2013*
4. *That the Court do order for immediate reinstatement of the orders of injunction contained in the ruling delivered on 28th September 2012 and the review as applied for made accordingly'*
5. *That the Court be pleased to order for immediate constitution of a caretaker committee to run the union, formalise and regularise the process of making the union constitution and establishment.*
6. *That the Court declare the current constitution all those that were done under the same a nullity*
7. *That the regret of trade union be ordered to deregister the constitution in force forthwith and together with any other registration made under the constitution for fresh election*
8. *That Respondents 2, 3, and 5 be declared guilty of*
 - i. *Gross abuse of their offices*
 - ii. *Constitutional immorality*
 - iii. *Engagement in financial malfeasance occasioning massive loss of colossal sums of money belonging to civil servants through scandal involving fraudulent registration and establishment of illegal organisation and illegally formulated constitution of the union*
9. *The Respondents be declared guilty of fraudulent securing judgment by misleading the Court with consent that never was*
10. *That the Respondent and any other person found guilty of conspiracy or connected in any manner I this scandal be barred from holding public office and contesting any elective position in this union pursuant to provisions of the constitution of Kenya 2010*
11. *Costs of the whole suit.*

10. The application is supported by the supporting affidavit of Ogaja Ogaja and on the grounds that since the suit was filed the Respondents have not given a defence against matters raised in the claim but chosen to engage in mischievous activities so as to evade full hearing/proceedings herein. There was no conciliation meeting between the parties but the Respondent caused 4 Claimants through Duncan Ogutu Odera to sign in approval a consent on promise of bribery and threat. The Respondents bribed the Claimants first lawyer with Kshs.600,000.00 to compromise the claimants; the 2011 general elections were conducted using the old union constitution; the constitution has been amended by the 1st and 2nd Respondents in conspiracy with the 5th respondent; and the constitution cannot be enforced due to its illegality.

11. Mr Ogaja also avers that he left Nairobi on 6th April 2013 for his home and only came back to Nairobi in May 2013 for a meeting at Bounty Hotel and from 7th to 10th April 2013 the Respondents applied for massive withdrawal of funds approximately Kshs.12, 000,000.00 and out of which kshs.3, 500,000.00 was meant to bribe the claimants. To date there is no legitimate organ of the union and in a meeting held in Eldoret, the 2nd Respondent misled the delegates by stating that the Court only wanted the issue of budgets addressed.

12. That the orders herein should be granted as prayed.

13. In reply, the Respondent filed **Replying Affidavit sworn by Tom Odege on 22nd November 2014** and avers that the application by the Claimants is incompetent as Benson Ambuni cannot represent the Claimants as he is not a union official or their advocate and no leave to file such application was obtained. The application does not set the basis as to why the consent order should be set aside and the consent of 28th September 2012 has since been overtaken by events. That is has taken the Claimants 8 months to challenge the consent that they signed and not signed by their advocate before the same was presented in Court by the advocates. The Claimants signed the consent in the presence of their own advocate and cannot cite the same to be by fraud unless they were complicit to the same. The high burden of fraud as alleged has not been achieved on the part of the Respondents or the claimant's advocate. The application is vexatious and an abuse of the Court process.

14. In response to the second application, the Respondent filed **Replying Affidavit sworn by Tom Odege**

on 15th October 2014 and avers that the application by the application is contemptuous of due process as they continue to change advocates or acting in person at will so as to confuse issues and the application is thus an abuse of Court process. The Claimant is seeking to introduce a second claim herein and noting he had filed Cause No. 8 of 2013 at Kisumu that was dismissed, similar the application herein seeking to introduce the same should be dismissed. The allegations of bribery alleged in the application taint the Claimants and should not be used to imply bad motive on the officers of the court. The application is made in bad faith and should be dismissed.

Submissions

15. The Claimants through their advocate submitted that suit herein commenced on 8th August 2012 and before the suit could be heard, various applications were made and in particular on 28th September 2012 the Court barred the Respondents from operating the union accounts without an approved budget, an audit be taken and the union assets be preserved. This order was followed by efforts to settle the matter out of Court and a consent drawn on 11th April 2013. The consent purports to terminate the case and all pending applications. It also seeks to set up a committee to amend the union constitution and to have the union accounts unfrozen and bar the Claimants from raising the issues in the case in any court. This consent is tainted with fraud, collusion and mistake and Claimants seek to set it aside.

16. There was a collusion to defeat the ends of justice as the consent was not signed by all the parties. Some parties also colluded to defeat the course of justice. The consent did not address the issues that triggered the suit herein. There were two drafts of the consent and an agreement had not been reached as to which draft was to be presented in court. There were conditions precedent that were to be fulfilled being that of setting up a committee to amend the constitution and reporting to the Court on the progress. The non-fulfilment of this condition renders the consent invalid.

17. A review of a consent is a tool used by an aggrieved party inviting the Court to take a second look at a consent and set it aside. The grounds as set out by the Court of Appeal in **Kenya Commercial Bank limited versus Benjoh Amalgamated Limited & Another [1998] eKLR** where the Court held that where a consent is 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 misapprehension or in ignorance of material facts this would enable the Court to set it aside. A consent is a contract and can be set aside on the same grounds as a contract would. The Court herein should apply the same grounds and allow the application by the Claimants and set aside the consent judgment herein.

18. Mr Ogaja Ogaja has filed his separate submissions and states that the decision to enter in conciliation talks with Respondents was arrived at after the claimant's advocate suggested and counselled the Claimants into settlement out of Court which proposal was accepted. The Claimants were assured of security against manipulation during the conciliation talks but the Respondents proceeded and started using third parties to employ bribery with the hope of killing the case. The Claimants were duped into signing unauthenticated papers and the filed documents did not reflect the claimant's agreement. On 4th April 2013, Duncan Odera brought the consent paper drawn by the Respondents and asked the Claimants to sign. He promised that once the consent was signed, each Claimant would receive Kshs.300, 000.00 but the amount was rejected for being too little and an alternative consent was drawn.

19. Mr Ogaja also submitted that the union constitution now registered has illegal amendments. At the delegates meeting held, the amendments that were eventually registered by the 5th Respondent are in conflict and the issue on how to deal with union funds is not set out. The amendments were therefore fraudulent. The registered office of the union is Nature House, Tom Mboya Street but the union has been operating from Ufundi Plaza, Moi Avenue against the constitution. The union is operating without branch offices in the 47 counties and thus not serving the wide membership. The non-existence of a physical office and bank accounts renders the operations of the Respondents illegal.

20. That the Court should allow the application and set aside the consent judgement herein. Grant costs to the claimant.

21. In reply, the Respondents submitted that the consent herein was procured through mutual agreement of the parties, the Claimants were represented by counsel and it has since taken 8 months to challenge the same. There is no proof of fraud as held by the Court of Appeal in **Peter Githinji & Another versus Julius Kiruma & 2 Others [2015] eKLR**. the consent order has contractual effect and can only be set aside on grounds which could justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons as held in **Mwakio versus Kenya Commercial bank Limited, Civil Appeal No. 28 of 1982**.

22. The Respondents also submitted that the issues in dispute cannot form the basis of setting aside the consent orders herein as there was no fraud, collusion or agreement that was contrary to Court policy. The consent entered herein is binding on the parties to it as there is no sufficient material facts or any misapplication or ignorance of the parties that agreed on it. The Claimants fails to prove any fraud or collusion. The alleged representatives of the Respondent in alleged bribery claims have not been linked to the Respondents or shown to have been representative4s of the respondents.

23. The application dated 14th November 2014 is filed for and on behalf of other claimants. The applicant fails to demonstrate his representative capacity so as to have the requisite capacity to so file. The orders sought should thus be dismissed and the nature of application rendered incompetent.

24. With regard to the application by Mr Ogaja Ogaja, the Respondents submit that the Claimant lacks the *locus stadi* to being the application as he has failed to demonstrate sufficient interest in filing the same. The matters raised are *res judicata* having formed the basis of Cause No.8 of 2013 Kisumu and cannot form basis to file the application as herein. The application herein has not complied with Rule 23 of the Civil Procedure Code where notice of change of advocates should be brought to the attention of the other party and advocates.

25. The Respondent also submits that there are no sufficient grounds set out to warrant the setting aside of the consent order herein as the Claimants signed the same expressly giving their approval. The principles that guide Court in the setting aside of consent are set out in **Al Jalal Enterprises Ltd versus NIC bank & Another [2010] eKLR** where the Court held that a consent judgment has a contractual effect and can only be set aside on grounds which could justify setting aside a contract. Where such conditions are not fulfilled, the Court should affirm the consent. In this case there is no material to enable the Court interfere with the consent orders made.

26. The Respondent thus submitted that in the interests of justice, the two applications by the Claimant should be dismissed with costs.

Determination

Question of representation herein;

Whether the consent dated 11th April 2013 should be set aside;

Whether the Court should reinstate orders made on 28th September 2012;

Whether the Court should stop the amendment to the union constitution; and

The constitution of a caretaker committee to run the affairs of the union

27. The two applications raise a myriad of issues and the main issues I note as outlined above. Which is not raised and I find crucial to address is the question of representation of the Claimants as this has a huge bearing on the nature of the applications and the orders sought herein.

28. The Claim filed on 8th August 2012 was filed for the 6 Claimants by the firm of Abuodha & Omino Advocates. On **19th November 2012** Rakoro & Company Advocates filed Notice of Change of

Advocates. On 7th December 2012, appearance was made for Rakoro Advocates for the Claimants. I have perused the entire file and the Firm of Rakoro & Co. Advocates and Mr Rakoro did make appearances in Court for and on behalf of all the claimants until **30th October 2013** when there was withdrawal by the claimants. Within such representations, a consent was drawn, filed and confirmed by the Court on 11th April 2013. The consent is signed by all the Claimants as above listed and the Respondents save for the 5th Respondent who never entered appearance.

29. On **30th October 2013**, the Claimant filed *Transfer of Instructions* changing their advocates from Rakoro & Co. Advocates to act in person, in exclusion of Duncan Ogutu Odera who had been the claimant's representative and was replaced by Ogaja Ogaja in such representation. This *Transfer of Instructions* is signed by all the Claimants save for Duncan Ogutu Odera. On 11th April 2013 a consent order filed by the Respondents and signed by all the Claimants was served upon the firm of Rakoro & Company Advocates for the claimants. Therefore at the material time subject of the negotiations, signing, filing and confirmation of the consent of 11th April 2013, all the claimants were represented by counsel.

30. Upon this background, on 6th October 2014, Ogaja Ogaja filed *Change of Instructions* from the firm of Enonda, Makoloo, and Makori Advocates to himself. The other Claimants have continued to be represented by the same firm of advocates. Further on 17th November 2014, Ogaja Ogaja filed *Change of Instructions for Representation in Cause No. 1351 of 2012* noting that he would act in person.

31. On 26th March 2013 Mr Rakoro for the Claimants addressed Court and made presentations that both parties were keen to negotiate on the issues in dispute with a view to settle the whole claim and a mention date was agreed with respondent's advocate for 10th March 2013 to confirm the consent. On 10th March 2013, Mr Rakoro submitted that a draft consent had been agreed upon and requested that the matter be mentioned on 11th April 2013 for its confirmation.

32. On 11th April 2013, Rakoro advocate was present for the Claimants and Mr Liguya was present for the respondents. A consent was agreed upon and filed settling the suit and further, parties agreed to;

- i. *Adopt the filed consent in its entirety;*
- ii. *Have a mention date in 6 months' time to confirm review and amendments to union constitution*
- iii. *Mention date on 31st October 2013.*

33. On 31st October 2013, Mr Ligunya for the Respondents was present together with Benson Ambuni acting in person for the claimants. Counsel for the Respondent submitted that the mention date was for purposes of confirming progress on the review of the union constitution but there had been challenges. The Claimants had also made efforts to file a new suit before the Court in Kisumu. Mr Ambuni also submitted that he wished to contest the consent filed before court.

34. What is important for Court to now determine is whether, at the time of confirming the consent on 11th April 2013 there was fraud, mistake or misrepresentation as to invalidate it. Reading from various courts I find wide jurisprudence with regard to the principles of setting aside consent is found in the **case Flora N. Wasike versus Destimo Wamboko** [1982 – 88] I KAR, which held that:

It is settled law that a consent judgement can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation.

35. Ogaja Ogaja submitted that there was a report filed at Central police Station, Nairobi with regard to case of fraud committed against him and the other claimants. He however does not state the resultant outcome of such a complaint, whether there were arrest, prosecution or conviction of any of the respondents. What is clear from his Affidavit attached to his application dated 6th October 2014 is that there were third parties set to him and the other claimants to bribe or promise to bribe him and the other claimants but when the consent was signed, the bribes were not forthcoming. Such third parties are not

linked to the respondents and even if they were, the bribe or promise to bribe cannot justify the setting aside of the consent that the claimants agreed to sign to as persons who had filed the suit herein on good grounds. To allow to be compromised in itself is not justification for causing the settlement of their own suit.

36. This is not a matter that can be said to be technical that the court should ignore and address the substantive issues in the consent. The consent, forming a critical document in this suit, terminated a great part of the dispute herein and had there been no such consent, the matter should have proceeded to full trial for the determination of the same. The process then leading to the consent dated 14th April 2013, its contents and resultant import on the claimants as the parties who filed the dispute is key.

37. Where the enforcement of the terms of the consent is a challenge that does not defeat its authenticity. The validity of the consent is not to be equated with non-enforcement of it. Where there were activities to be followed up from the consent that can be addressed without interfering with the terms of it. To go back on a document that one has signed simply because after second thought one is not happy with it is not what court orders are meant to be. Once the consent order was adopted by the court, the same became a valid order of the court capable of enforcement and can only be set aside in very exceptional circumstances which I find have not been established in this case.

I therefore agree with approval the finding in **Hirani v. Kassam [1952], 19 E.A.C.A 131** and cited in **Greenfield Investments Ltd. v. Baber Alibhai Mwawji CA (Nrb) 160/1997,**

Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and or those doing 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 the consent was given without sufficient material facts, or in misapprehension or ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement

40. The consent must be binding on all parties to the proceedings or action and those doing under them. Such consent must not be obtained by fraud or collusion or by agreement contrary to the policy of the court.

42. In making such a finding I note that it has been several months since 11th April 2013, there are obvious changes that have occurred with regard to the main suit herein; the import of the consent herein must have caused fundamental changes at the union and where new claims occur as a result, parties can legally address such claims. This is also in recognition that the suit herein is against union officials, their use of resources and assets of a trade union, there are annual returns that should be filed with the 5th respondent who has since failed to enter appearance. Such returns are as required under the Labour Relations Act. The returns filed within the pendency of the suit are therefore relevant to refer and where a new cause of action arise, that can be addressed outside the current suit.

I therefore dismissed the applications dated 6th October 2014 and 14th November 2014. Costs shall be in the cause.

Delivered, dated and signed in open Court at Nairobi this 16th day of July 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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