



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 265 OF 2013**

**KENYA NATIONAL PRIVATE**

**SECURITY UNION.....CLAIMANT/RESPONDENT**

**VERSUS**

**SECURITY GUARD SERVICE LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent's Notice of Motion application dated 16<sup>th</sup> June 2015 and filed on 23<sup>rd</sup> June 2015 is up for determination. In the motion, the Respondent/Applicant seeks a stay of execution against the garnishee order (nisi) which is in favour of the Claimant/Respondent. The Respondent/Applicant seeks a review and setting aside of the order of 15<sup>th</sup> April 2015 endorsing the consent between the parties entered into on 26<sup>th</sup> November 2014. The Respondent/Applicant seeks that the costs of the motion filed on 26<sup>th</sup> February 2015 be reversed and that the suit be dismissed with costs to the Respondent/Applicant. The application was grounded on grounds on the face of it as well as the affidavit of Earnesto Kigundu. Briefly, the grounds and the affidavit are to the effect that the consent entered into was obtained by fraud and that several of the employees of the Respondent/Applicant denied ever signing the consent to join the union.
2. The Claimant/Respondent filed a notice of objection on 8<sup>th</sup> July 2015. In the notice the Claimant/Respondent stated that there was nothing urgent in the matter and that the certificate of urgency had no merit. The Claimant/Respondent asserted that the allegations of forgery lacked material facts that the court could rely on. The Claimant/Respondent stated that it could not forge the list as the members payroll number was a secret and further that none of the members had indicated to the union that they had resigned from union membership.
3. The parties canvassed the application on 8<sup>th</sup> July 2015. The counsel for the Respondent/Applicant Mr. Sagini submitted that the Court was being asked to reverse and set aside the orders granted to the Claimant on 15<sup>th</sup> April 2015 inclusive of the order adopting a consent entered into by parties on 26<sup>th</sup> November 2014 and garnishee order consequent to the consent. Counsel submitted that the Claimant had committed fraud which was the basis of the consent and that the Claimant sought to rely on a check off list filed which has numerous name repetitions and multiple forgeries. He referred the Court to paragraphs 6 and 7 of the affidavit in support. He submitted that the fraud committed makes the consent null and that fraud is a ground for setting aside the consent for breach. He urged that the Court should set aside the consent as the Court does not come to the aid

of a person who comes to it with unclean hands as the check off list is tainted with fraud and cannot be used to assess the threshold for recognition. He thus urged that the application be allowed and the consent set aside as well as the application of February 2015.

4. The Claimant/Respondent through its representative Mr. Matete opposed the application and submitted that there is no sufficient ground brought to allow the Court to set aside. He submitted that there was an annexure that was attached addressed to the Respondent but not copied to the Claimant. He submitted that the suit was filed in February 2013 and a consent entered into in November 2014. On entering the consent they could not come to Court and set aside. The consent was confirmed and the Court thus did not have jurisdiction over the matter. He urged the Court to allow the garnishee order to remain in force and allow the remittance of the union dues. He submitted that no one had written to the union to say that the signature was not in order or inaccurate.
5. Mr. Sagini in brief reprise submitted that it was immaterial about the timing of the application and the fact was that fraud was committed and that is sufficient to set aside the consent.
6. Generally, any order made in the presence and with the consent of counsel or parties is binding on all parties to the proceedings or action and those claiming under them. Consents can however be set aside on meeting certain threshold. The grounds for setting aside a consent are:-
  - i. If consent is obtained by fraud
  - ii. If consent is obtained by collusion
  - iii. If consent is obtained by an agreement contrary to the policy of the court
  - iv. or if consent was given without sufficient material facts,
  - v. or in misapprehension or in ignorance of material facts,
  - vi. or in general for a reason which would enable the court to set aside an agreement.
7. In the case of **Brooke Bond Liebig (T) Limited v Mallya [1975] E.A. 266**, Law JA, stated the law at p. 269 in these terms:-

The circumstances in which a consent judgment may be interfered with were considered by this court in **Hirani vs Kassam (1952), 19 EACA 131**, where the following passage from **Seton on Judgments and Orders, 7th edition, Vol.1 p.124** was approved:

*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 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.

8. The consent herein is stated to have been obtained by fraud. The Respondent supports this by highlighting the repetitions and forgeries of signatures on the form. After a close scrutiny of the check off forms, it is amply clear there are material defects in the forms. The signatures appearing alongside some names bearing the same particulars are different. The only inference is that the signatures were forged. The form is the instrument which the Claimant used to prove that it had the requisite numbers in terms of Section 54 of the Labour Relations Act 2007. The fact that the form has errors means that though the Union has *prima facie* sufficient numbers, the forms cannot be used as a basis for a consent or deduction of union dues.
9. In the premises, the only order that can commend itself for me to make is one setting aside the consent entered into. The application succeeds in part and thus the Claimant will pay costs of the application to the Respondent. A fresh list with proper signatures would of necessity have to be presented in order for any order on deductions to be made.

Orders accordingly.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of July 2015**

**Nzioki wa Makau**

**JUDGE**