



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 391 OF 2013

[Formerly Cause No. 1593 of 2010 at Nairobi]

CALEB KIBAARA MATHENGE AND 3 OTHERS.....CLAIMANTS

-VERSUS-

STAGE MATTRESSES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th February, 2014)

RULING

The claimants filed an application for review on 17.12.2013 through Ndeda & Associates. The claimants invoked section 26 of the Labour Institutions Act 2007, Rule 32 of the Industrial Court (Procedure) Rules, 2010, section 16 of the Industrial Court Act, 2011 and all other enabling provisions of law. The applicants prayed for orders:

1. **That the honourable court be pleased to review and rescind its decision dismissing the matter unheard.**
2. **That the matter is reinstated and exclusively heard by the court as was intended to by the claimants.**
3. **That dismissing the matter unheard is bad law totally unfair to the claimants.**
4. **That cost of the application be in the cause.**

The claimants' grounds in support of the application included the following:

1. **The respondent's counsel did not table in court the alleged settlement documents signed by the parties to the suit and in absence of the settlement documents the matter had not been settled.**
2. **Respondent's counsel misled the court to believe that the suit had been settled between the parties.**
3. **It will be fair for the case to be heard and determined on merits.**
4. **The respondent's documents forming basis of alleged settlement are subject of dispute before the court.**
5. **The claimants were employed as cashiers or as shop assistants but paid by respondent as general labourers.**
6. **That in the circumstances the Ruling of 18.05.2011 be set aside so that the matter can**

proceed to full hearing and determination. It was submitted that the 1st claimant had already given the evidence and it was unfair to terminate the proceedings on account of alleged settlement.

The claimants further relied on the supporting affidavit of Caleb Kibara Mathenge sworn on 28.01.2014. Paragraphs 4, 5 and 6 are to the effect that it was misleading that the suit had been settled because the documents relied on by the respondent were calculations not agreed upon by the parties and the dispute was subject to determination in the suit.

The respondent opposed the application by filing the replying affidavit of Natwarlal A. Bhadla filed on 15.01.2014. The respondent's case was as follows:

1. Pleadings closed in the case and it was set down for hearing. The 1st claimant's evidence was taken on 17.02.2012.
2. On 3.5.2012, the case was fixed for further hearing when the claimants and their Advocates were absent. The respondent's counsel informed the court that the dispute had been settled by the conciliator and the court directed filing of the evidence of the settlement by the mention date on 4.06.2012. At the mention and on the basis of respondent's letter and payments to the District Labour Office marked **NAB 1(a), 1(b) and 1(c)** on the replying affidavit, the court marked the matter settled.
3. The claimants had failed to give reasons for failure to attend court on 4.06.2012 and the inaction by the claimants in the suit showed that the claimants had been paid and were satisfied.
4. The application for review seeks to review the order of 9.10.2012 which does not exist. Thus, the application is incompetent and an abuse of court process. Further, it was not true that the claimant's case was dismissed on 18.05.2011.
5. The case was marked settled on 4.06.2012 by the court's order which has not been reviewed or otherwise varied.

The court has considered the submissions made for the respective parties and further revisited the court record. The court notes the following pertinent court record:

1. The 1st claimant gave his testimony in court on 21.7.2011 and the case was scheduled for further hearing on 17.2.2012. On 17.2.2012, the case was rescheduled for hearing on 3.5.2012 at 2.30 pm with orders that the respondent was to file and serve upon claimants a supplementary reply on or before 2.3.2012. On 3.5.2012, the claimants and their Advocates were absent and the court ordered thus, **"This dispute is scheduled for mention on 4.6.2012 at 2.30 to receive a report from Nakuru District Labour Officer through the Advocate of the respondent that the claimants have been paid their dues."**
2. On 4.6.2012, the claimants and their Advocates were absent in court. Mr. Gatheru for the respondent addressed the court and stated that payments via the Ministry of Labour had been made as per the **"attached Vouchers"** and thus court order had been complied with. The court then made an order, thus **"In view of the payments the matter is marked as settled"**
3. After proceedings of 4.6.2012, no step was undertaken in the suit until 28.10.2013 when suit was transferred from Nairobi to the court at Nakuru and subsequently the application filed.

The court has considered the issues in dispute and finds that in absence of affidavits of service and in view of absence of the claimants and their Advocates in court on 4.6.2012, it cannot be said that the claimants were party to the order that the matter was settled. The court further finds that the respondent did not file a report from Nakuru District Labour Officer to show that the claimants had been paid their dues and as ordered by the court on 3.5.2012. The court finds that the payment vouchers presented to the court did not amount to a report by the District Labour Officer to show payment of the claimants' dues.

Finally, the court finds that the matter that was marked as settled is ambiguous especially that the first claimant's evidence had been taken and nothing was ordered about the anticipated continued hearing of the suit. It is irresistible to find that the case was alive and the parties had a legitimate expectation to undertake a full hearing and a determination made by way of judgment in the usual manner.

In the circumstances, the court finds that it would amount to manifest injustice on the part of the claimants for the court or the respondent to presume that without involvement of the claimants, the suit was validly determined by a vague order that the matter was settled. The court has taken into account the right of the claimants to have the dispute decided by application of law in a fair and public hearing as provided for in Article 50 of the Constitution.

The court has considered the failure of the parties to extract the relevant orders in issue and weighed that failure against the substantive justice in the matter. The court is of the opinion that justice favours the making of orders that will further justice in the case. In the circumstances, the court will allow review with orders that the parties will bear own costs of the application.

Consequential to the review, the court makes orders:

- a. That the order made on 4.6.2012, thus, **“In view of the payments the matter is settled”** is set aside.
- b. The hearing of the claimants’ case shall commence afresh.
- c. The parties shall bear own costs of the application.
- d. Parties to fix a mention date for directions on the hearing and for fixing a hearing date convenient to the parties and the court.

Signed, dated and delivered in court at Nakuru this Friday, 28th February, 2014.

BYRAM ONGAYA

JUDGE