REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 717(N) OF 2009

BETTY SUNGURA NYABUTO…….CLAIMANT

VERSUS

LAW SOCIETY OF KENYA……...…….....RESPONDENT

RULING

The application before me for determination is dated 5th July, 2010. It is filed by the Respondent who seeks the follows orders:

1. **THAT** this matter be certified urgent to be heard ex-parte in the first place.
2. **THAT** the firm of M/s e. K. Mutua & Co. Advocates be granted leave to come on record in place of M/s Enonda Makoloo, Makori & Co. Advocates.
3. **THAT** the status quo be maintained pending the hearing and determination of this application.
4. **THAT** there be a stay of execution of the consent judgment and or award issued and dated 2nd June 2010 and all consequential execution orders thereof.
5. **THAT** the consent judgment and or award dated 2nd June 2010 be reviewed and or be set aside.
6. **THAT** this matter do proceed to full hearing.
7. **THAT** cost of this application be provided for.

Prayers 1, 2, 3, and 4 are spent having either been granted or overtaken by events. The only prayers pending for determination are 4, 5, 6 and 7 that is that the consent judgment/award dated 2nd June 2010 be reviewed and/or be set aside, that the case proceeds to full hearing and that costs of the application be provided for.

The application is supported by the affidavit of Apollo Mboya, the chief Executive Officer/Secretary of the Respondent/applicant and on the grounds that the Respondent's Advocates did not have instructions to record consent judgment in terms of the award sought to be reviewed or set aside. The Respondent further states that the advocates then on record M/s Enonda Makoloo, Makori & company Advocates refused instructions from the Respondents to apply to set aside the consent judgment and the Respondent has referred the conduct of the Advocate Mr. Enonda to the Disciplinary Committee of the Law Society of Kenya.

The Claimant filed a replying affidavit in opposition to the application. In her replying affidavit she states that the application by the Respondent is incompetent, bad in law and should be struck out with costs. She further stated in the affidavit that the application was intended to delay and frustrate her from enjoying the fruits of her judgment, that there is no error apparent on the face of the record and that the Respondent had not demonstrated that the application meets the threshold for setting aside of consent judgments.

When the application came up for hearing on 28th October 2013 following the failure of the parties efforts to reach out of court settlement over several years, the parties were at their request granted leave to proceed with the application by way of written submissions. The parties subsequently filed submissions and came to highlight the submissions on 16th June 2014 when Mr. Mung'ao appeared for the Respondent/Applicant while Mr. Muite jointly with Ms. Nyaguthie appeared for the Claimant.

The Respondent's case is that by letter dated 4th December 2009 the Respondent instructed its then Advocates to propose settlement terms to the claimant's Advocates being payment of notice, salary for days worked up to 19th June 2009 and 30 days leave. That by letter dated 30th March, 2010 the Respondent's Advocates wrote to the Claimant's Advocates with different terms of settlement being 3 months salary in lieu of notice, salary for days worked in June 2009, payment of 64 claimed leave days (subject to proof) and 12 months salary as gratuitous pay. That on 4th June 2010 the then Respondents Advocates wrote to the Respondents Chairman informing him that they attended court on 29th June 2010 for hearing when the Claimants Advocates conceded to the settlement terms and further that consent was entered in terms of **"previous discussions and agreement".** A copy of the consent was enclosed. That it is through this letter that the Respondent realized that the Advocates had acted without authority. That on 15th June 2010 the Respondent instructed their Advocate to immediately take action to set aside the consent and await further instructions.

Mr. Mung'ao submitted that the Advocates had acted without authority. He submitted that the consent order does not fulfill the legal and legitimate threshold of an order as it lacks express authority from the person on whose behalf it was made, that the award was not an intention of the Claimant and the Respondent. He submitted that by entering into the consent judgment the Respondent was denied the right to be heard which is a constitutional right. He further submitted that the order did not fulfill the legitimate threshold of court orders as it was tainted by misrepresentation. He urged that the court order be set aside and the case be heard to conclusion.

The Respondent relied on the case of Flora N. Wasike v Destimo Wamboko Kisumu Civil appeal No. 81 of 2984 where the court of Appeal held that **"it is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract. For example fraud, mistake or misrepresentation entered into with knowledge of the material matters by legally competent persons……"**

The Respondent also relied on the following authorities: **Kenya Commercial Bank Limited V. Benjo Amalgamated Limited & Another Civil Appeal No. 276 of 1997** where the court stated inter alia.

> **"It is contrary to the Policy of the court and public policy for an advocate to act contrary to express instructions given by his client".**

The Respondent further relied on the case of **R.V District Land Registration Nandi & Another, Misc. Appl. No.240 of 2002** in which the court stated:

"Although an Advocate has ostensible authority to compromise his client's case, employment of such authority cannot be held where the counsel consents to orders which are diametrically opposed to the express instructions which he has been given by a client in the matters……"

The Respondent also relied on the case of **County Council of Bureti v. Kennedy Nyamokeri T/A Nyamokeri & Company Advocates** in which the court held that:

"… The Respondent did not annex any letter of instruction by the Applicant authorizing him to make the demands in question. The Applicant being a public authority established under the local Government Act (Cap 265) of the Laws of Kenya cannot make decisions where public money will be expended for services without the resolution of the Council or where the sum involved is more than ten thousand shillings without tender. The Applicant is not an individual who can make a decision to

engage the services of an Advocate at eh spur of a moment or without ceremony. The law mandates the applicant to give instructions which may result in it incurring expenditure in writing….. It is therefore imperative that the Respondent, knowing that he was dealing with a public authority to demand that the instructions be given to him in writing…….”

The Respondent further relied on Order 45 Rule 1 of the Civil Procedure Rules, and Article 47(1) of the Constitution all of which are reproduced below:

Section 45 Rule 1 Civil Procedure Rules:

1. *(1) Any person considering himself aggrieved-*

a. *by a decree or order from which no appeal is allowed, but from which no appeal has been preferred; or*
b. *by a decree or order from which no appeal is hereby allowed,*

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

Article 45 of Constitution: *“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”*

Mr. Muite for the Claimant submitted that the law on setting aside of consent orders is analogous to setting aside of an order entered in default and that one of the rationales to be considered is whether there is a prima facie credible defence. This rationale is intended to serve the precious judicial time. He further submitted that the law is even more rigid in the case of a consent judgment. The court will in such cases look at the response to the claim and address the issue whether the Respondent has a credible defence. He submitted that from the letter of termination, the claimant’s contract was terminated without reasons, that the contract terms stipulated that it was renewable by operation of the law and the only way it would be terminated is by the Respondent writing to the Claimant before 1st March 2009 to inform her that it will not renew the contract. He submitted that there can be no defence whatsoever, even if the consent judgment were to be set aside. He further submitted that although the claimant was asking for payment for the remainder of her contract term, which she had served for only 2 months, the settlement was for twelve months salary only instead of 2 years and 5 months.

Mr. Muite further submitted that the letter dated 30th June, 2010 refers to the Respondent having made further concessions. He submitted that the letter was copied to the Secretary of the Respondent, that although they had notice of the letter they did nothing until they were advised of the recording of consent. He further submitted that the letter dated 4th June 2010 demonstrated that it was the Respondent who was pushing for settlement. He further submitted that he letter refers to ***“previous discussions and agreement”*** *and* that no minutes were produced by the Respondent in which the terms of settlement are disputed.

On the principles for setting aside consent judgments, it was submitted for the claimant that a consent order will not be set aside unless it is obtained by fraud, or the agreement is contrary to policy of the court. That the misapprehension referred to is between one party and the other and not between advocate and client. That a duly instructed advocate has implied authority to compromise the client’s case. He submitted that the Respondent had authorized its advocate to settle the Claimant’s case out of court and the Respondent’s complaint is the principles of settlement. Mr. Mutie observed that Cause No. 38 of 2010 relied upon by the Respondent was dismissed.

The Claimant relied on the following cases: -

i. Kenya Commercial Bank Limited – vs – Specialised Engineering Company Ltd (1982) K.L.R P. 485.

ii. Civil Appeal No. 276 of 1997 Kenya Commercial Bank Ltd – vs- Benjoh Amalgamated Ltd & Muiru Coffee Estates Ltd.

iii. High Court of Kenya at Nairobi Civil Case No. 542 of 2009 Joseph Mwangi Githia & 3 others – vs- Mbo-i-Kamiti Farmers Co. Ltd.

iv. High Court of Kenya at Mombasa Civil Case No. 27 of 2013 Surajpur Construction Co- Ltd – vs- Salome Otunga and Solomon Amian & other.

I have considered the pleadings by the parties, the affidavits and documents attached thereto, the written and oral submissions of the parties. I have also considered the authorities cited and the relevant law.

The Respondent applicant has in its submissions set out the issues for determination as follows:

a. **WHETHER** the Council of the Law Society of Kenya is a legal and public body established by law and hence governed by the procurement and disposal laws.

b. **WHETHER** there was any consent order entered between the Claimant and the Respondent. **If yes, did** the Advocate for the Respondent have any express or implied instructions to enter or arrive at such consent for or on behalf of his client?

c. **WHETHER** the said Consent Order had fulfilled all the legal and legitimate threshold of such an order.

d. **WHETHER** there was breach of Public Policy by the then Advocates on record for the Respondent/Applicant as provided for under the Constitution of Kenya and Section 45 of the Advocates Act, Cap. 16.

e. **WAS** there breach and threatened breach of fair trial, natural justice and freedom entitled to the Respondent/Applicant under Constitution of Kenya 2010 through the dismissal of the application to have the matter adjourned?.

f. **WHO** will bear the cost of the Application?.

In my opinion the issues for consideration are only (b) (c) and (f). The reason why I do not think the other issues as framed by the Respondent are relevant for determination of their application is that the Law Society of Kenya though set up by Act of Parliament is not a public body but a Professional body. The Procurement and Disposal laws therefore do not apply to the Society as its funds are not public funds, but members funds. Its membership is only open to members of the Legal Profession who have paid subscriptions. I also do not think that breach of Public Policy is relevant as the relationship between the Respondent and its Advocate was private. I further do not think the issue of breach of fair trial, natural justice and freedom of the Respondent is an issue as the issue before the court is private relationship between an employer and its employee and the application before the court relates to a consent order of the court in which fair trial and natural justice is irrelevant.

Having settled the issues for determination, I will consider issue (b) and (c) together.

The law relating to setting aside of consent orders and review of court orders are well stated in both statute and case law.

Order 45 Rule (1) (b) of the Civil Procedure Rules provides for review of decisions of the court where the decision was made by mistake or error apparent on the face of the record or any other sufficient reason. For the Industrial Court, the relevant law is the Industrial Court (Procedure) Rules, 2010 which provide at Rule 32 as follows:

Rule 32 (1) A person who is aggrieved by a decree ort an order of the Court may apply for a review of the award, judgment or ruling –

a. **if there is a discovery of new an important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or**

b. **on account of some mistake or error apparent on the face of the record, or**

c. **on account of the award, judgment or ruling being in breach of *any written law; or***

d. **if the award, the judgment or ruling requires clarification; or**

e. **for any other sufficient reasons.**

In the case of **Flora N. Wasike v.s Destimo Wamboko** (ibid) the court stated that consent awards may only be set aside on the same grounds that would justify setting aside of contracts. These are fraud, mistake or misrepresentation.

As pointed out by Mr. Muite for the Claimant which position I agree with, the fraud, mistake or misrepresentation envisaged here is between parties, not between an advocate and client. An advocate is presumed to have authority of his client and as stated in the case of Kenya Commercial Bank Limited v. Specialized Engineering Company Limited (1982) KLR 485, ***"a consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.***

In the same case the court of appeal further held that:

"An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding".

For the Respondent herein to succeed it must show that either there was fraud, misrepresentation or mistake on the part of the Claimant, or that its advocate then on record Mr. Enonda did not have general authority or was not acting bona fide or that he acted contrary to express negative instructions.

The facts as submitted herein show that the Respondent did instruct Mr. Enonda to make an offer of settlement based on salary for days worked, notice and leave. However, by letter dated 30th March 2010 copied to the Secretary of the Law Society of Kenya the Respondent/Applicant herein, an offer was made to the Claimant Advocates which had a variation of the instructions to Mr. Enonda. The letter offered notice of 3 months instead of one month, leave of 64 days instead of 30 days and an additional item, 12 months salary as gratuitous pay. By letter dated 4th June 2014, Mr. Enonda again wrote to the Respondent conveying the recording of the consent settlement in court. The last paragraph of the letter stated ***"we thus recorded settlement as per our previous discussions and agreement. We enclose a copy of the same for your records and appropriate compliance".*** The letter was addressed to the Claimant's Chairman and copied to the Secretary. The application herein was filed on 5th July 2010. There is no evidence of what transpired between 4th June and 5th July 2010. There is no affidavit from then Chairman of the Respondent denying what Mr. Enonda referred to as ***"previous discussions and agreement"*** to confirm that indeed there was no discussion and agreement with the Chairman in terms of the offer made to the Claimant's Advocates which was the basis of the consent judgement.

In the affidavit in support of the Respondent's application Mr. Mboya admits receiving a copy of the letter dated 30th March 2010 making the offer that was eventually recorded as settlement. Neither Mr.

Mboya or the Council of the Respondent to whom he is Secretary and Chief Executive Officer objected to the offer made to the Claimant's Advocates either to Mr. Enonda or to the claimant's Advocates. Having not objected to the proposal, it remained open for acceptance. Having not raised any objection until after the proposal had been accepted and recorded as a decision of the court more than 3 months later, the Respondent is estopped from denying the authority of Mr. Enonda to proceed with the settlement in terms of the offer.

From the foregoing, I find that there was no fraud, mistake or misrepresentation either on the part of the claimant or Mr. Enonda. I further find that in the absence of objection to the letter dated 30th March 2010 Mr. Enonda had implied authority to proceed with the settlement proposal as he did, by recording the consent order in court.

Before I conclude, I must also consider whether the application by the Respondent may be granted as a review of the consent judgment.

As already stated above Order 32 of the Industrial Court Act only permits review if there is discovery of new important facts that were not within the knowledge of the applicant at the time the decree was passed or order made, or on account of mistake or error apparent on the face of the record, or the award or order being in breach of the law, or that the award requires clarification, or for any other sufficient reason.

The Respondents Advocates did not address the court on any of the above grounds for review. In my opinion the application does not fit under any of the circumstances envisaged in Order 32. There were no new facts that were not within the knowledge of the Respondent at the time the consent judgment was recorded, there is no mistake or error on the face of the record, it has not been alleged that the award was in breach of any written law, or that there is any other sufficient grounds. I therefore find that the application does not meet the threshold of Rule 32 of the Industrial Court (Procedure) Rules to merit review. This however, is a technical issue for which I would not have declined the application if it was merited.

For the foregoing reasons I find the application without merit and dismiss it with costs to the claimant.

Read in open Court this 3rd day of October, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms. Njuguna for Claimant

Gitaka holding brief for Naikuni for Respondent