



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1518 OF 2013

EDWARD ACHOLLA CLAIMANT

VERSUS

SOGEA SATOM KENYA BRANCH1ST RESPONDENT

SOGEA SATOM (FRANCE)2ND RESPONDENT

VINCI CONSTRUCTION (FRANCE)3RD RESPONDENT

RULING

1. On 30th September 2014, the Claimant Edward Acholla filed his application through Notice of Motion seeking for orders that the proposed consent judgement be set aside pending determination of this case after full hearing. This application is supported by the annexed affidavit sworn by the Claimant and on the grounds that the proposed consent was signed under extreme duress. The respondent, on 14th October 2014 filed the Replying Affidavit sworn by James Wairoto.

2. The Claimant also submitted that the basis of his application is that he signed the consent under extreme duress and that he does not want judgement to be entered by consent. That unless the matter proceeds to full hearing there will be a miscarriage of justice. The Claimant attached to his affidavit various documents and records most of which relate to a medical history of his son Chris Miguda Obuya suffering from a rare cancer that has forced him to seek for treatment abroad and in Kenya putting him under extreme financial pressure, facts within the respondent's knowledge as he had a shared medical cover from the Respondents during his employment with them. That due to his financial status that require constant chemotherapy payments for his ailing son, the Claimant was made to sign the proposed consent in settlement of the claim under duress. The amounts agreed upon through various emails have been changed and or not correct figures and thus he does not want the court to adopt the proposed consent as the judgement of the court. That the consent signed was not signed voluntarily.

3. In reply, the Respondents stated that the Claimant freely and willingly signed a consent dated 29th August 2014 after extensive direct negotiations party through face to face negotiations, telephone conversations and email communication with the respondent. The consent was voluntarily signed by the Claimant in the presence of an advocate.

4. The Respondents also stated that the claim herein was filed on 23/9/13 to which the Respondents filed a defence and counter-claim dated 4/12/13 where the Claimant was represented by an advocate. On 7/11/13 the Claimant filed a Notice of Motion seeking a warrant of arrest against the directors of the Respondents to show because why they should not furnish security for the sum of kshs.65 Million. Following a hearing the court directed the Respondents to deposit Kshs. 5 million in a joint account of the

advocates for both parties. The Claimant later made a change of his advocates to act in person. The Claimant also commenced negotiations with the Respondents for an out of court settlement which culminated into the consent drawn on 29th August 2014. The consent was not signed under any duress as it was agreed upon and signed voluntarily by both parties.

5. The Respondents also submitted that the legal principles of setting aside consents require proof that the party contesting the same demonstrate the extreme duress suffered which has not been fulfilled in this case. That the claimant's application is frivolous, vexatious and an abuse of the court process and should be dismissed.

6. It is trite that a consent drawn by parties to settle a dispute already filed in court cannot be effected without an order of the court. The order was sought by the Respondents but the same could not be confirmed as the final order of the court as the Claimant was absent. The consent thus drawn by the parties herein and dated 29th August 2014 is not an order of this court. The dispute is still alive. During the pendency of a matter in court consent of the parties on any issue or issues therein is allowed. In such a case, a consent order is binding on all parties to the action if made in the presence and with consent of the parties. One cannot therefore challenge such an order unless it is shown to have been entered into through fraud or collusion or by misrepresentation. Consent is however a creature of the agreement on which it is founded and it may be set aside on the grounds which would invalidate an agreement between parties. Such examples would be discovery of new and important matter sufficient to warrant the setting aside of such an agreement as held in **Wangechi Kimita et al versus Mutahi Wakibiru [1985] KLR 317**.

7. In this case, when the parties drew their consent on 29th August 2014, the same was filed on 1st September 2014 and the respondents took a mention date at the registry on 25th September 2014 to have the parties attend court on 30th September 2014 for the adoption of the same as the final order of the court. But the claimant was absent from court. On the same date [30th September 2014] the Claimant was busy at the registry filing his application to contest the consent, that the same had been signed under extreme duress and thus requested for orders that the matter be set for full hearing. The consent therefore fell one set shop, that of adoption by the court as the final order on the agreed issues by the parties.

8. Are therefore valid reasons on the record for saying that there exists grounds such as would justify the setting aside the consent of the parties? Consent becomes a judgement or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgement or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. The consent herein therefore fell one set shop, that of adoption by the court as the final order on the agreed issues by the parties.

9. The amounts subject of litigation is contested by the claimant. The Claimant is the supposed beneficiary of the consent herein. As the claimant, it is paramount that the settlement of the suit through consent is well understood and agreed by him as the party who filed the claim in the first instance. Where there are doubts raised before the consent is adopted as the judgment or order of the court by the very party that is supposed to benefit from the same, the court must stop and listen to that party. Even where the Respondents raises any issue with regard to a consent that is supposed to extricate them from the suit, the court must stop all else and listen.

10. The Respondents submitted that they will suffer prejudice of the nature that this court is under Article 159 of the Constitution bound to allow alternative disputes resolution mechanisms. However such settlement of disputes must be with the clear consent of the parties concerned and the court cannot impose an alternative mechanism of dispute resolution on any given party so as to expedite a process and save time. Justice is expensive and where time is required by a party to organise their claim and articulate it, then that is of essence and more time where needed will be granted. The constitutional requirement under Article 159(2) (c) is that alternative disputes resolution mechanism should be promoted. This is not tantamount to imposing, forcing or be applied in a manner that is coercive.

11. The court cannot in this case be said to have interfered with a consent order. There is no such order adopted by this court. Where the Respondents suffer prejudice, upon proof costs are payable. Without going into the merits of the case, the application by the Claimant is therefore not frivolous. It has a basis and merit.

In the circumstances, the application of the claimants dated 30th September 2013 is allowed. Parties to fix hearing dates for the main cause.

DATED and DELIVERED at NAIROBI this 1st day of December, 2014.

M. Mbaru

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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