REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 38/2010

(formerly Nairobi No. 112/2012)

(Before Hon. Justice Hellen Wasilwa on 26th June, 2013)

SURJIT SINGH & MALKIT SINGH .....CLAIMANT

VERSUS

KENYA UNION OF SUGAR PLANTATION &

ALLIED WORKERS .....RESPONDENTS

R U L I N G

The application before court is the one dated 8.4.2010. The application is brought by the applicants herein through the firm of Otieno Ragot & Co. Advocates through a notice of motion dated the same day and the applicants seek orders that:-

1. The application be certified urgent and the same be heard *ex-parte* in the first instance for the reason set forth in the certificate of urgency.
2. Pending the hearing and determination of this application, there be a stay of execution of the orders made on 6.4.2010.
3. An interim order of stay of execution in terms of prayer (2) aforegoing *ex parte* in the first instance.
4. This court be pleased to review the orders made on 6.4.2010 by varying Clause 2 thereof so that the employees referred to therein are those employees who had elected to reapply for their jobs and their applications allowed.
5. In the alternative to prayer No. 3 aforegoing, the order given on 6.4.2010 be reviewed by being set

aside.

They also sought costs of this application. The application is supported by the facts set forth in the affidavit of Surjit Singh and on the grounds that;

a) The terms of the consent recorded in court on 6.4.2010 are unclear and do not reflect the intention of the parties.

b) The consent has effectively determined a substantial part of this dispute without parties being heard on it.

c) The consent order as drawn would be unenforceable and would not help achieve the objectives of resolving this dispute.

d) The claimants erstwhile advocate on record had no authority to enter into the consent order as drawn.

e) It is in the broader interests of justice that this application be allowed.

The respondents on the other hand filed a replying affidavit through the firm of Ombito & Co. Advocates on 22..7.2010. The affidavit was sworn by one Francis Wangara, the Secretary general of the Kenya Union of Sugar Plantation and Allied Workers the respondent herein. They opposed this application stating that the application is made in bad faith, is mischievous and an abuse of the court process. He stated that the applicants first came to court in under certificate of urgency seeking orders to restrain the Union from lawfully performing their duties. That this was after the said applicants had unilaterally terminated services of employees and were purporting to hire fresh ones. The court delivered its ruling on 14.5.2010 stating *inter alia* that:-

"the 60 dismissed employees on the list filed in court on 7th May 2010 less the 3 employees at numbers, 2, 3 and 43 be unconditionally reinstated to their employment or their substantive posts from the date of their dismissal without any loss of their full salaries and all other benefits, allowances, privileges and continuity of service with effect from the date of their dismissal with immediate effect"

They aver that the application for review is baseless because the court had found the **"dismissals"** of the entire 82 to have been reached **"in violation of basic principles of natural justice".** That the court also found the reinstatements were conditional upon renunciation of union membership and hence contrary to law. The gist of the review hence is to rescind the court's ruling on these issues in line with Section 5(2) (1) of the Employment Act. It is further the respondents contention that the application is an abuse of the court process as the applicants who scripted the list of 60 clear employees and rejected 22 from the original list of 82 now would appear want to rebastardise the 60 clean ones, a manouver the court should reject. That the 22 unclean ones are the subject of the pending suit. According to the respondents the issue in court is whether this court can review an order arrived at by 2 counsels by consent.

The applicants have submitted before this court that the advocate who represented them had no authority to record as he did. That the authority was limited only to entering a consent in respect of dismissed workers who had re-applied and had been re-employed by the claimants. This was to deal with the order of maintaining a status quo which would see the re-opening of the claimants business and also, intervene in respect of workers who had re-applied and had been accepted. They aver that this consent should be vitiated by mutual/common mistake of the parties. They cited **Kafuma VS Kafuma [1974]** EA 91 where the court held that if an advocate has no authority to enter a consent judgment, the same is a nullity and should be set aside. They also cited **Flora Wasike VS Wamboko (1982 – 88) KAR 625** submitting that this is the case of common mistake of the parties and should be vitiated. The respondents also submitted that this consent has already determined a substantial part of the suit without the parties being heard and this presuppresses that the strike was legal and dismissals illegal and therefore leaves nothing to be litigated upon.

The applicants have further submitted that the consent as drawn is unenforceable and courts cannot give orders in vain. After hearing submissions from both parties, the issues for determination are:-

1. Whether the consent recorded by the parties can be reviewed?
2. To what extend should parties to a consent go?

It is apparent that the parties recorded a consent and before court on 6.4.2010. By this consent, it was recorded that the 60 dismissed workers be reinstated unconditionally. What remained to be decided was the fate of 22 employees which matter is still pending in court. The applicants contention is that the advocate who recorded the consent on their behalf had limited authority to enter consent in respect of only employees who had re-applied for work. The applicants therefore contend that the consent was not recorded as expected by the applicants. To what extend then should this court interfere with this consent?

In the case of **Rep VS District Land Registrar – Nandi & Another – Misc. Appl No. 240/2002,** the court set down parameters under which a court may review a consent order and **J. Musinga** (as he then was) stated as follows;-

"(1) *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 as those claiming under them. Such an order cannot be varied or discharged unless it 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 in general for a reason which would enable the court to set aside an agreement.

(2) Although an advocate has ostensible authority to compromise his client's case, employment of such authority cannot be upheld where counsel consents to order which are diametrically opposed to the express instructions which he has been given by a client in a matter ---"

These sentiments and findings were also echoed by **Harris J** in **KCB VS Specialized Engineering Company Ltd (1980) CC No. 1728/1979** where it was held that;

" 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 was obtained by fraud or collusion ---"

The burden of proof as to this fraud or collusion would then lie on the applicants to establish they never instructed counsel in the way the consent was recorded. This is a matter of evidence which must be proved and cannot merely be stated or alleged. The applicants have not demonstrated to this court any such fraud or collusion or ignorance on the part of their counsel who recorded the consent on their behalf and therefore it would be irresponsible for this court to purport to review orders given by consent of both parties.

The applicants have also submitted that the consent order seems to determine the entire suit and therefore it should be reviewed. This takes me to the 2nd issue for determination. How far should a consent go? I must say consents have been entered by parties to withdraw a pending suit or even to call for a spruce and peace between the parties and therefore determining the entire suit. The fact that the consent order herein therefore seems to determine the entire suit therefore implies that that is what the parties intended and the court cannot be cited to review that said order on that account. If the implication then is to determine the entire suit then the parties can decide not to pursue what seems to remain and that still is in their domain to do.

The assertion that the consent order is unenforceable is also not true. The court is very clear on reinstating some employees and the applicants have not demonstrated the difficulties in enforcing it. I find that it is actually in the broader interest of justice that this application should not be allowed. I find no merit in it and I dismiss it accordingly with costs to the respondents.

HELLEN WASILWA

JUDGE

26/06/2013

Appearances:-

N/A for parties

CC. Sammy Wamache.