



REPUBLIC OF KENYA

Industrial Court at Nairobi

Cause 24 of 2012

DOUGLAS KARIUKI KAGAI.....CLAIMANT

-VERSUS-

THE ATTORNEY GENERAL.....1ST RESPONDENT

PYRETHRUM BOARD OF KENYA.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 7th June, 2013)

RULING

The court delivered the judgment in this case on Friday, 22nd March 2013. The judgment was entered for the claimant against the respondent for orders that:

- a) **the respondent to pay the claimant a sum of Ksh.938,882/= plus interest at court rates till full payment;**
- b) **the respondent to pay the claimant the money in (a) forthwith; and**
- c) **the respondent to pay the costs of this cause.**

At page 2 of the court's copy of the judgment, the court stated as follows:

“The respondents through the Attorney General filed the memorandum of defence on 27.06.2011 and the amended memorandum of response on 26.07.2011. The respondents prayed that the claim be dismissed with costs.

On 19.02.2013, and upon agreement of the parties, the case was fixed for hearing on 11.03.2013. At the hearing counsel for the respondent was absent for reasons that were not known to the court and the court directed the hearing to proceed ex-parte. The claimant gave evidence to support his case.”

Further, the court record shows that the case came up for oral submissions on 14.03.2013 when Mr. Njuguna, counsel for the respondents was in court. The record shows that he apologised for the absence and decided that he was going to respond to the claimant's submissions. He did not apply for the claimant to be recalled for cross-examination or for the respondents to be given opportunity to call their witnesses to support their case. In any case, all the relevant documents were on record and not disputed.

The record shows that counsel for the respondent made detailed oral submissions on behalf of the respondents and the court made the judgment taking into account the submissions and the respondents'

pleadings and documents as filed. The court has revisited and perused the judgment on record and is satisfied that the respondents' pleadings, documents and submissions were, throughout the judgment, taken into consideration in arriving at the final orders made in the case.

On 21.05.2013, the 2nd respondent through Gladwell V. Mumia Advocate of the Federation of Kenya Employers filed a notice of motion under a certificate of urgency. The substantive prayers in the motion are that the court be pleased to set aside the judgement entered in the case against the 2nd respondent, the respondent be granted leave to defend the claim, the respondent be granted leave to cross-examine the claimant and the costs of the application be in the course. The key grounds in support of the application are that:

- a) the 2nd respondent was misguided by the 1st respondent into thinking that the 1st respondent would represent it fully;
- b) the 1st respondent did not communicate the hearing date to the 2nd respondent and the 2nd respondent did not consequently attend the hearing as scheduled;
- c) the 2nd respondent is a state corporation undergoing financial difficulties and if the execution proceeds flowing from the judgment the respondent will suffer irreparable loss and damage; and
- d) the defence already on record and before the court at the hearing raises serious triable issues.

The claimant opposed the application by filing the grounds of opposition dated 30.05.2013. The key grounds of opposition include that:

- a) the application is frivolous, vexatious and an abuse of court process;
- b) the application was improperly before the court as the Advocate and the Federation of Kenya Employers did not seek leave before acting and filing the application for the 2nd respondent;
- c) the judgment is a final decision of the court and the court has no residual jurisdiction to set aside its own final decision and reopen the dispute;
- d) the only open avenue was for 2nd respondent to seek an appeal but has failed to do so;
- e) the applicant has not satisfied the conditions for review of the judgement; and
- f) the 1st respondent was properly on record representing the 2nd respondent being a public body and the representation being in discharge of the 1st respondent's constitutional function.

The claimant also relied upon the written submissions filed on 04.06.2013 to oppose the application. The application was heard on 4.06.2013. On that date, Mr. Njuguna, the learned counsel for the respondents attended the preliminary proceedings at which the parties agreed to proceed with the hearing of the application. He informed the court that he was served the application on 22.05.2013 in this matter which had reached the stage whereby a judgment had been issued. He stated that he was properly on record in this matter where the 2nd respondent had appointed an Advocate but the court directed he acts for both respondents. He also informed the court that according to the Attorney-General the matter had been concluded as determined. However, he could not stop the 2nd respondent from appointing an advocate for purposes of review, appeal or an application before this court. He then concluded thus, **“With the new development I see no role by the Attorney-General.”**

The court in considering the application has taken considerable time to reflect upon the learned counsel's conclusive submission, thus **“With the new development I see no role by the Attorney-General.”** In particular, what was the new development in this matter that the role of the Honourable Attorney-General

would be rendered invisible, that is, not be seen. The court finds that the Attorney-General has been properly on record for the respondents throughout the hearing and determination of the case. The new development referred to by counsel, in the opinion of the court, is that without reference to the Honourable Attorney-General and particularly the counsel on record, the 2nd respondent appears to have moved behind the formal court processes and purported to make an application to challenge the judgment on record. In the opinion of the court, counsel correctly pondered thus, can anyone see the role of the Attorney-General and which role, in the considered view of the court, is stated in Article 156 (4) of the constitution which declares that the Attorney-General –

- a) is the principal legal adviser to the Government;
- b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
- c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

Government is not defined in the constitution but in the opinion of the court it is known that government entails all agreed institutions and arrangements for exercise of public authority including the judiciary, the parliament, the executive and any semi-autonomous body vested with any power or functions of any of the three arms in the interest of checks and balances or efficiency and effectiveness.

The respondent is a public body established under the Pyrethrum Act, Cap 340 of the Laws of Kenya. It is part of government in the wider sense set out above and indeed the executive as government in the narrower sense was directly involved in the transactions and particularly the redundancy proceedings leading to the dispute in this case. I say narrower sense to mean government means the executive as commonly used as opposed to the wider sense of government as already elaborated above.

In our constitutional order, the ligament between the executive and statutory bodies like the respondent as part of the government in the wider sense is founded in the provisions of Article 132 (3) of the Constitution which provides that the President shall by a decision published in the Gazette, assign responsibility for implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament. Embracing that constitutional ligament, there is no doubt that the respondent is part of government and is amenable to constitutional representation by the Attorney-General. Thus, without the Attorney-General's express or clearly implied consent, the respondent could not act, like it was done in this case by filing the application, thereby attempting to erase the clear constitutional role of the Attorney-General. If that were to be allowed to happen then as the learned counsel pondered, then the role of the Attorney-General would have become invisible; not seen at all.

It is obvious that the consent of the Attorney-General was not sought and obtained before filing the application now before the court. There was no leave of the court obtained before the filing of the application with an apparently changed representation. The issue of representation goes to the root of the cited constitutional provisions and consideration and the court finds that the application was filed in breach of the due process of the court and in sightlessness of the constitutional role of the Attorney-General in the case before the court and as already determined by the court.

The court observes that it was misconceived for the application to have included a prayer for leave to defend the suit in circumstances whereby there was a memorandum of response on record and the respondents' counsel had been heard at least at the submissions stage and without having applied for the respondent's oral evidence to be taken. In any event, as already pointed out all the relevant documents in the matter were on record and they were taken into account in making the judgment.

In view of the findings of the court, the application dated 21.05.2013 and the notice of appointment filed on 22.05.2013 are expunged from the record with orders that the 2nd respondent shall pay the costs of all the proceedings leading to this ruling.

Signed, dated and delivered in court at Nakuru this Friday, 7th June, 2013.

BYRAM ONGAYA
JUDGE