



**Mogeni v Standard Chartered Bank (K) Limited (Civil Case  
42 of 1997) [2024] KEHC 733 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 733 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE 42 OF 1997  
JRA WANANDA, J  
FEBRUARY 2, 2024**

**BETWEEN**

**ZACHARY MOGENI ..... PLAINTIFF**

**AND**

**STANDARD CHARTERED BANK (K) LIMITED ..... DEFENDANT**

**RULING**

1. The Application before this Court is the Notice of Motion dated 28/11/2021 filed by the Plaintiff through Messrs Tito & Associates Advocates. The same seeks the following orders:
  - i. .... [spent]
  - ii. That this Honourable Court be pleased to set aside, discharge and/or vary the Directions on Computation of Benefits delivered on 20/12/2019 by the Deputy Registrar, Hon. G.N. Sitati-Kimathi at the High Court in Eldoret.
  - iii. That an order do issue directing the re-computation of the Plaintiff/Applicants' retirement benefits due under the Respondent's Voluntary Early Retirement Scheme by the Deputy Registrar of the High Court in the presence of the Plaintiff/Applicant, the Defendant/Respondent and their advocates.
  - iv. That in the alternative, this Honourable Court be pleased to effect the computation of the Plaintiff/Applicants' retirement benefits due under the Respondent's Voluntary Early Retirement Scheme.
  - v. That the costs of this Application be in the cause.
2. The Application is brought brought to Order 45 Rules 1 and 2 of the *Civil Procedure Rules*, Section 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Article 159 of the *Constitution* of Kenya 2010 and "all



other enabling provisions of the law”. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Applicant.

3. In the Affidavit, the Plaintiff deponed that he instituted this suit seeking payment of his entitlements by the Defendant under its Voluntary Early Retirement Scheme, that Judgment was entered in his favour by Justice Nambuye on 29/07/2004 whereby the Deputy Registrar of the High Court was directed to work out the Plaintiff's benefits under the Early Retirement Scheme, that the Defendant filed Appeal Number 200 of 2006 at Court of Appeal which Appeal was determined in his favour on 18/09/2012 wherein it concurred with the Judgment and Decree of the High Court and reiterated that the benefits due to the Plaintiff under the Retirement Scheme be worked out by the Deputy Registrar of the High Court, that the Deputy Registrar delivered Directions on Computation of Benefits due to the Plaintiff by the Defendant on 20/12/2019 which entitlements were alleged to be in the aggregate sum of Ksh 1,924,580, that the Directions on Computation of Benefits were based on an erroneous computation of the retirement benefits that the Plaintiff was entitled to under the said Retirement Scheme, that no Advocate or representative from the firm of Nyaundi Tuiyott & Co. Advocates had informed, consulted and/or otherwise sought the Plaintiff's authority before submitting the Defendant's proposal to the Deputy Registrar and having the same adopted as the Directions on Computation of benefits, that on becoming aware of the Directions, the Plaintiff wrote to the Deputy Registrar on 03/03/2020 notifying her that the Plaintiff was not party to the consent purportedly entered into on his behalf by the Advocates, that he disagreed with the calculation of his entitlements and was therefore dissatisfied with the purported consent.
4. According to the Plaintiff, the computation of benefits submitted to the Court was substantially and materially at variance with the provisions of the Retirement Scheme, the computation of his terminal and retirement benefits as tabulated and arrived at before the Deputy Registrar is erroneous because as the Plaintiff was aged 44 years at the time of his application for Voluntary Early Retirement under, his average annual salary of Ksh 475,620/- should have been adjusted to reflect the cost of living increase for 6 years for the period between 1995 to 2001 when he attained 50 years as provided for under the Retirement Scheme, the pension payable should have been calculated as from when he attained the age of 50, the pension payable upon his attaining the age of 50 years should have included a cash commutation and a monthly pension, and that the benefits should have included an annual medical cover of Ksh 35,000/-. He deponed further that it is clearly discernible that the Directions on Computation of Benefits delivered by the Deputy Registrar on 20/12/2019 are at variance with the Judgment of this Court as affirmed by the Court of Appeal, that he continues to suffer financial distress given that his cause of action arose in 1997 and to date, he has not received any payment at all from the Respondent.

### **Preliminary Objection and Replying Affidavit**

5. In opposing the Application, the Defendant, through Messrs Obura Mbeche & Co. Advocates relied on the Preliminary Objection and the Replying Affidavit filed on 19/11/2021.
6. In the Preliminary Objection, it was stated that the Deputy Registrar rendered a decision herein on 20/12/2019 by consent of the parties over the very issue of the package due to the Plaintiff under the Retirement Scheme which issue is subject of the instant Application thereby rendering the instant application *res judicata* and that the Application is an abuse of the Court process and bad in law as the entire suit is *res judicata* having been heard and finally determined yet the Application seeks to retry the determined suit.
7. The Replying Affidavit was sworn by Lorraine Adoli Oyombe, who described herself as am an Advocate and the Employee Relations Manager at the Defendant company. She deponed that after



a protracted litigation process, including an appeal, Civil Appeal No. 230 of 2006, the Court of Appeal delivered its Judgment on 18/09/2012 upholding the Judgment of this Court delivered on 29/07/2004 directing that the Plaintiff's benefits under the Respondent's Voluntary Early Retirement Scheme (VERS) be worked out by the Deputy Registrar of the High Court in the presence of both parties and/or their Counsels, that on 8/05/2019 Hon. Justice S. M. Githinji allowed as prayed the Notice of Motion by the Applicant seeking inter alia that the Deputy Registrar of this Court compute the Plaintiff's benefits under the Scheme, thereafter the parties severally appeared before the Deputy Registrar and on 20/12/2019, the parties consented to computation of benefits due to the Plaintiff as Kshs 3,119,942 which culminated in the directions of 20/12/2019 issued by the Hon. Ms. G. N. Sitati-Kimathi, the directions capture the VERS computations inclusive of pension as ordered by this Court and upheld by the Court of Appeal, and that thereafter, the Defendant called for costs of the Plaintiff's then Advocates to consider whether the same could be mutually agreed upon or taxed which issue was pending finalisation.

8. It was deponed further that the Plaintiff has now filed the instant Application in total abuse of the Court process as the issue of benefits payable to the Applicant have previously been determined and the matter is therefore res judicata, that the Application is a veiled attempt to reopen proceedings over an issue that is fully determined, that the Plaintiff has failed to demonstrate any grounds that would invite this Court to set aside, discharge and/or vary the consent of the parties leading to the directions issued by the Deputy Registrar on 20/12/2019, that the Plaintiff has failed to demonstrate that the consent was occasioned by mistake, fraud or collusion, contrary to the policy of this Court or reached without material facts, that the Applicant contradicts himself when he states at paragraph 6 of his Affidavit that the computations submitted were erroneous and then again at paragraph 7 of the same Affidavit states that he was neither informed or consulted or that he had not given his authority, that the Application is filed after an inordinate delay of over 18 months and appears to be an afterthought, that the Plaintiff's former Advocates had ostensible authority to bind him in any proceedings before the Court and no fraud, collusion, contrary policy or otherwise can be gleaned from that action, that the matter was finally determined and the same is res judicata and that the Defendant is ready and willing to pay the Kshs 3,119,942 as directed on 20/12/2019 together with duly taxed or agreed costs to put this matter to rest.

### **Hearing of the Application**

9. The Application was canvassed by way of written Submissions. Pursuant to directions given, the Plaintiff's Counsel filed his Submissions on 7/12/2021 and the Defendant filed on 10/12/2021.

### **Plaintiff's Submissions**

10. Counsel for the Plaintiff submitted from the outset, the Plaintiff asserted that he is not seeking to retry the suit as alleged by the Defendant, rather, he is only seeking to correct the computation of retirement benefits payable to him under the Retirement Scheme pursuant to the Directions of both the High Court and the Court of Appeal, that the Plaintiff is wholly in agreement with the decisions of Justice Nambuye in the High Court as well as the Court of Appeal and seeks to comply, implement and enforce the correct Judgments, that therefore, the Defendant claim that the Plaintiff is seeking to retry the suit is baseless.
11. On the doctrine of *res judicata*, Counsel cited Section 7 of the *Civil Procedure Act* and submitted that the issue of the correction of the erroneous calculation of the retirement benefits owed to him under the Retirement Scheme is a novel issue that has never been previously raised at any stage during this suit, that the issue of whether the Directions on Computations of Benefits were based on an erroneous computation of the retirement benefits owed to the Plaintiff has, prior to the filing of the instant



Application, neither been directly and substantially in issue nor has the same ever been determined by this or any other Court. He cited the Supreme Court case of *Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others* 2017 eKLR and added that the Defendant's Preliminary Objection does not meet the requisite elements set out in the case.

12. Counsel further cited the Supreme Court case of *Aviation & Allied Workers Union Kenya V Kenya Airways Limited & 3 Others* (2015) eKLR, and submitted that the Plaintiff contests the Preliminary Objection on factual matters in so far as it claims that the instant Application seeks to retry the entire suit; and that the issue of the veracity of the Directions on Computation of Benefits has already been raised, heard and determined by the Deputy Registrar. He added that the Defendant's assertions alluded to require additional evidence to substantiate the Preliminary Objection as they refer to matters of fact which are disputed and not pure questions of law.
13. On the merits of the Application, Counsel contended that the computation of the Plaintiff's terminal and retirement benefits as tabulated and arrived at by the Deputy Registrar was erroneous on the grounds already set out in the Supporting Affidavit, that the Directions are materially and substantially at variance with the clear Judgment of this Honourable Court as affirmed by the Court of Appeal, that it would be grossly prejudicial to Plaintiff if the correct computation is not arrived at by the Court because, as computed, the Plaintiff's retirement benefits fall short of the provisions of the Retirement Scheme thus denying the Plaintiff his life-long earned retirement benefits which denial subjects the Plaintiff to deprivation and violates his constitutional right to human dignity. He cited the case of *Elijah Njagi & Another V Yvonne Ndunge* (2021) eKLR and urged the Court to take cognizance of the fact that the retirement benefits that are the subject of the instant Application were payable to the Plaintiff in 1995 and revert to the hallowed maxim that postulates that justice delayed is justice denied.

#### **Defendant's Submissions**

14. On his part, Counsel for the Defendant submitted that the instant Application is bad in law and an abuse of the Court process as the subject matter thereof is res judicata because the Application not only seeks to set aside, discharge and/or vary the directions of Hon. G. N. Sitati-Kimathi of 20/12/2019 but also seeks an order directing the re-computation of the Plaintiff's retirement benefits due under the Early Retirement Scheme by the Deputy Registrar in the presence of the Plaintiff, the Defendant and their Advocates. He submitted that computation of the benefits was duly undertaken by the parties before the Deputy Registrar following a protracted litigation process which began with the filing of this suit in 1997 and culminated in the Court of Appeal Judgment delivered on 18/09/2012 retransmitting the matter to the Deputy Registrar for computation, that the parties set their respective computations before the Registrar by way of Affidavit evidence and thereafter consented before her resulting in the directions given, that the matter having been duly considered and a binding and conclusive decision reached by the consent of the parties, then the issue is res judicata. He cited the Court of Appeal case of *Accredo AG & 3 Others v Stefano Uccelli & Another* [2019] eKLR as authority for his submission that the issue of res judicata has been properly raised as a Preliminary Objection. Counsel further submitted that this suit has been pending for over 21 years and it would be gravely unjust to reopen an already determined issue and urged the Court to uphold the Preliminary Objection.
15. On the merits of the Application, Counsel submitted that the instances when a consent order may be set aside, discharged and/or varied have severally been litigated upon, that whilst the Plaintiff cites the allegation that his now former Advocates did not inform, consult and/or otherwise seek his authority prior to accepting the proposal of the Defendant, the same has not been proved to the required standard before this Court and that moreover, the Plaintiff's former Advocates had ostensible authority to bind him. He cited the case of *SMN vs ZMS & 3 Others* 2017 eKLR and added that the Plaintiff has failed



to discharge the burden of proof upon him as he has failed to table correspondence with his former Advocates prior to recording of the consent to enlighten the Court on the discussions with his Counsel following delivery of the Court of Appeal Judgment, that the Plaintiff has also not tabled proof of delivery of the letter appearing as 'SCB3' to his Supporting Affidavit to his former Advocates and there is also no stamp on the face of that letter or even a forwarding email to demonstrate that his former Advocates received the said letter, that his former Advocates having acted on his behalf for well over 21 years were well versed with his claim, properly instructed and had ostensible authority to bind him by way of the consent captured in the directions of the Deputy Registrar, that the Plaintiff's former Advocates were properly on record and therefore retained apparent and ostensible authority to bind the Plaintiff.

16. On whether the Court should order a re-computation of the benefits due to the Plaintiff on the basis that the computation recorded before the Deputy Registrar was erroneous, Counsel submitted that the Court of Appeal was clear in its Judgment on what the Plaintiff was entitled to and listed them as: (i) payment in lieu of notice (ii) a lump sum payment (iii) payment of immediate pension for qualifying staff over 50 years old or a deferred pension for qualifying staff under 50 in accordance with the rules, (iv) discount on all existing staff loans repaid on departure, (v) payment of full compensation benefits right up to date of departures. He contended that the Plaintiff is now inviting this Court to reopen the issue to consider afresh documents that had already been litigated upon and in essence to sit on review of the Court of Appeal Judgment, that the documents at annexure 'SCB-4' were litigated upon by the parties prior to the Judgment in the High Court and the Court of Appeal and were therefore duly considered in both Courts and cannot now be used as a ground to justify the orders sought, that the Directions by the Deputy Registrar catered for all limbs of the Judgment and are also clear on the fact that 25% staff discount was not awarded as the sports, loan, personal coach and furniture loans proposed by the Plaintiff were not provided for under the VER Scheme. In conclusion, Counsel submitted that there must be an end to litigation more so after the more than 21 years that this suit has been pending.

### **Analysis & Determination**

17. Both in its Notice of Preliminary Objection and also in its Replying Affidavit, the Defendant has argued that the present Application is Res Judicata. On his part, the Plaintiff has raised the challenge that the Preliminary Objection is not properly taken as it is not a pure point of law. The challenge is therefore along the lines set out in the oft-cited case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696.
18. On the issue of Preliminary Objection, the same matters raised therein have also been raised in the Replying Affidavit. This therefore renders any challenge against the Preliminary Objection purely academic and overtaken by events.
19. On the issue of *res judicata*, it is clear that the no Application seeking Review of the orders made by the Deputy Registrar on 20/12/2019 has been previously made in this matter. Under these circumstances, I do not agree that Res Judicata can apply.
20. In the circumstances and upon examination of the Pleadings, Affidavits, Submissions and the entire Record, I find the one broad issue that remains for determination in this matter to be "whether the Court should review, set aside, discharge and/or vary the Directions on Computation of Benefits delivered on 20/12/2019 by the Deputy Registrar and order for re-computation of the Plaintiff's Retirement Benefits".



21. It is trite law that any party seeking review of Court orders is bound by the provisions of Order 45 of the Civil Procedure Rules. In respect thereto, Order 45 provides as follows:

1. (1)

Any person considering himself aggrieved — (a) by a decree or order from which an 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.

22. In Paul Mwaniki vs. National Hospital Insurance Fund Board of Management [2020] eKLR, it was stated that:

“... a review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

23. It is therefore clear that Order 45 provides for three circumstances under which an order for review can be made. The first one is where there has been discovery of new and important matter or evidence. The second is where there has been a mistake or error apparent on the face of the record. The third ground is “for any other sufficient reason”.

24. I have looked at the said Directions and note that the Deputy Registrar stated as follows:

“3. I have taken note of the proposal by Zacharia Mogeni and I have equally taken note of the proposal by Standard Chartered. Miss Koech for Zachary stated that was not opposed to the proposal by the bank and I agree that it addresses the judgment of the Court”

25. Insofar as the Plaintiff’s Advocate is therefore reported to have accepted the Defendant’s proposal, the Directions would amount to a consent order. In the circumstances, it is imperative to note the circumstances within which a consent order can be reviewed, varied or set aside. On this point, the Court of Appeal, in the case of Brooke Bond Liebig v Mallya 1975 E.A 266 held as follows:

“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the Court to set aside an agreement.”



26. Again, the Court of Appeal in the case of *Kenya Commercial Bank Ltd. v. Specialized Engineering Co. Ltd* (1982) KLR P.485 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 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 set aside an agreement.”

27. Finally, Hancox JA (as he then was), in the case of *Flora Wasike v. Destimo Wamboko* (1982 -1988)1 KAR 625 stated as follows:

“It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out .....”

28. The background of this Application is that after the Plaintiff was dismissed by the Defendant from employment in the year 1994, he filed this suit in 1997 seeking damages for wrongful termination and payment of his entitlements under the Defendant’s Voluntary Early Retirement Scheme (Scheme). Judgment was entered in the Plaintiff’s favour by Hon. Justice Nambuye on 29/07/2004 for payment of his entitlements under the Scheme. Justice Nambuye then directed that the Deputy Registrar of the High Court work out the Plaintiff’s benefits under the Scheme. Dissatisfied with the Judgment, the Defendant bank filed an appeal, namely Court of Appeal Civil Appeal No. 200 of 2006. This Appeal was however dismissed on 18/09/2012 and the Judgment of Justice Nambuye upheld. The way was then opened for the Deputy Registrar to proceed with the computation of the benefits and which she did on 20/12/2019. From the record, Advocates for both parties were given the opportunity to make submissions on the computation and the Plaintiff’s Advocate accepted the proposed computation presented by the Defendant. In the circumstances, the Deputy Registrar accepted the breakdown presented and which aggregated to the sum of Ksh 1,924,580. The figure was therefore basically adopted as a consent order.

29. The Plaintiff now alleges that the figures recorded were based on an erroneous computation of the retirement benefits and that no Advocate or representative from the firm of Nyaundi Tuiyott & Co. Advocates had informed, consulted and/or otherwise sought his authority before submitting the Defendant’s proposal to the Deputy Registrar and consenting to the same being adopted. He therefore contends that he was not party to the consent purportedly entered into on his behalf by the Advocates, that he disagrees with the calculation of his entitlements and is dissatisfied with the purported consent.

30. As already stated, a Court will only set aside a consent order where the same was procured by fraud or collusion. To convince this Court to set aside the orders herein and therefore depart from the age-old principle that an Advocate has ostensible authority to compromise his client’s case, the Plaintiff needed to demonstrate that the consent was diametrically opposed to the express instructions which he had given to the Advocates. He needed to demonstrate that the consent orders completely negated his interests.

31. In this matter, I note that the law firm of Nyaundi Tuiyott & Co. has been on record for the Plaintiff for the last 27 years, it is the same law firm that commenced this suit by filing it in the year 1997. The same law firm was there for the Plaintiff even when the matter went before the Court of Appeal. With this long history of the law firm being on record, there was no obligation upon the Defendant and by extension, the Court, to inquire from the Advocates whether indeed they had authority to compromise



the matter in the manner they did. I am not persuaded that Messrs Nyaundi Tuiyott & Co. had no authority to negotiate and compromise the matter on behalf of the Plaintiff. In the absence of any fraud or collusion being demonstrated on the part of the Advocates, I am unable to agree with the Plaintiff.

32. As Harris J stated in *Kenya Commercial Bank Ltd -vs- Specialised Engineering Company Ltd* (1982) KLR 485: -

“A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

33. In *Kenya Commercial Bank Limited vs Benjob Amalgamated Limited & Another* [1998] eKLR the Court cited the passage in the *Supreme Court Practice 1976* (Vol. 2) to the following effect:

“Authority of Solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power.... No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice.”

34. Further, in the case of *Board of Trustees of NSSF Vs. Michael Mwalo* (2015) eKLR, the Court of Appeal held as follows:

- “1. A consent order entered into by consent 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 collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material, fact or misapprehension or ignorance of such facts in general for a reason which would enable a court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

35. Again, in the case of *Republic v District Land Registrar Nandi & another Ex-parte Kiprono Tegerei & another* [2005] eKLR, Musinga J (as he then was), stated as follows:

“Although an advocate has ostensible authority to compromise his client’s case, employment of such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions which he has been given by a client in a matter. It is not easy to prove that there was fraud or collusion in recording of any consent orders between advocates in the absence of their instructing clients but where such orders completely negate the interests of an instructing client and it is shown to the satisfaction of the court that the client was not even aware of the application that gave rise to those consent orders leave alone having consented to the recording of the orders, in the absence of any satisfactory explanation by the counsel who is accused of entering into the consent orders in question, a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the consent orders issued.



36. It is therefore evident that a Solicitor on record has a general authority to compromise an action on behalf of his client provided he acts bona fide, not contrary to express negative direction or reasonably and not in defiance on the client's direct and positive instructions. In this case, none of these intervening factors have been demonstrated. 27 years is such a long time for a suit to remain in litigation. Having been concluded by this Court and also by the Court of Appeal, it is time this litigation is allowed to come to an end. The Application therefore fails.

**Final Orders**

12. The upshot of my findings above is that the Notice of Motion dated 28/09/2021 is hereby dismissed with costs to the Defendant.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 2<sup>ND</sup> DAY OF FEBRUARY 2024**

.....

**WANANDA J.R. ANURO**

**JUDGE**

