



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 607 OF 2014**

CHARLES KAINDO KURIA.....1<sup>ST</sup> PETITIONER  
KENNEDY WANJALA NAMUTILU.....2<sup>ND</sup> PETITIONER  
CHARLES LANGAT.....3<sup>RD</sup> PETITIONER  
EDMOND KIHARA VANBRINGGS.....4<sup>TH</sup> PETITIONER  
EMMANUEL KIBET KORIR.....5<sup>TH</sup> PETITIONER  
STARFORD KIPKOECH.....6<sup>TH</sup> PETITIONER  
ANNE WANGARI MWANGI.....7<sup>TH</sup> PETITIONER  
GEOFFREY KIPCHIRCHIR TOO.....8<sup>TH</sup> PETITIONER  
HIRAM GACHINAH NGIGE.....9<sup>TH</sup> PETITIONER  
PETER MWANGI WANJIRU.....10<sup>TH</sup> PETITIONER  
PIUS AFULA ODANGO.....11<sup>TH</sup> PETITIONER  
CORNELIUS SILYA MATHEKA.....12<sup>TH</sup> PETITIONER  
KEVIN KYALO WAMBUA.....13<sup>TH</sup> PETITIONER  
ERICK ODHIAMBO OGEYA.....14<sup>TH</sup> PETITIONER  
ELIJAH MWENDA MWAURA.....15<sup>TH</sup> PETITIONER  
SAMUEL MAINA WAMBUL.....16<sup>TH</sup> PETITIONER  
HENRY MATARA KIRIAMA.....17<sup>TH</sup> PETITIONER  
GEORGE OMBOGO NYANGERI.....18<sup>TH</sup> PETITIONER  
MOSES MBITHI MUTINDA.....19<sup>TH</sup> PETITIONER  
DAVID MUTUNGA MWANIA.....20<sup>TH</sup> PETITIONER  
BONIFACE OKONG'O OTIENO.....21<sup>ST</sup> PETITIONER

RULING

1. Through the application dated 17<sup>th</sup> March 2017 the applicants/petitioners herein seek the setting aside of orders issued on 22<sup>nd</sup> January 2016 which orders had the effect of marking the petition as settled.
2. The application is premised on the grounds that the petition dated 10<sup>th</sup> December 2014 is still pending and has not been determined and further that when the matter came up for mention on 22<sup>nd</sup> January 2016, the petition was erroneously marked as settled in its entirety when only the application dated 10<sup>th</sup> December 2014 had been finalized.
3. The application is supported by the affidavit of **Rodah Kirui**, advocate for the petitioner, who avers that a consent order was on 15<sup>th</sup> December 2014, recorded in respect to the application dated 10<sup>th</sup> December 2014 and that when the matter came up for mention on 22<sup>nd</sup> January 2016 to confirm compliance with the said consent order, the petitioners' advocate did not attend court due to a mix up in the entries in their diary where the matter was mis-diarised as coming up on 22<sup>nd</sup> February 2016 and that the respondent took advantage of the petitioners' absence to mislead the court into believing that the petition had been settled in its entirety.
4. The applicant's case is that their advocate was thereafter unable to get the court file in the registry in good time so as to enable them fix the matter for the next cause of action and that on or about late January 2017, the court file was eventually retrieved after which the instant application was filed.
5. The applicant's case is that it was dishonest for the respondent to misinform the court that the entire petition had been settled when only the application dated 16<sup>th</sup> December 2014 had been agreed upon and that the mention of 22<sup>nd</sup> January 2016 was to confirm compliance with the consent recorded on the said application on 15<sup>th</sup> December 2014.
6. In a nutshell, the petitioners challenged the order marking the petition as in their absence and before the hearing of the petition.
7. In her submissions during the hearing of the application, **Miss Kirui** Learned counsel for the applicants stated that some of prayers sought in the petition were still pending and that it was therefore unprofessional for the respondent's counsel to take advantage of their absence from court to make a misrepresentation to the court to the effect that the whole petition had been settled.
8. **Miss Kirui** attributed the delay in filing the instant application to their inability to obtain the court file from the registry in time thereby prompting them to write to the Deputy Registrar of this division as shown in the letter attached to the affidavit in support of the application as annexure "**RK3**".
9. The respondents opposed the application through the replying affidavit of its advocate **Okinyo Byron Barrack** dated 30<sup>th</sup> May 2018 wherein he deposes that the mention date of 22<sup>nd</sup> January 2016 was taken by consent of both parties' respective court clerks and that at no time did the respondent's counsel mislead the court into marking the matter as settled. It is the respondent's case that the Judge on his own motion and wisdom marked the matter as settled upon establishing that the respondents had complied with the consent orders of 15<sup>th</sup> December 2014.
10. The respondent's case is that the petitioners' counsel was not interested in knowing the outcome of the mention of 22<sup>nd</sup> January 2016 and that this explains why it took her over 6 months before writing a letter to court ("**RK3**") to request for another mention date.
11. The respondent accused the petitioners' counsel of professional misconduct for relying on a letter whose court receiving stamp bore the logo of a different division, the Environment and Land Court, instead of this division, Constitutional and Human Rights Division.
12. The respondents counsel further averred that the substratum of the prayers sought in the petition, which was to bar the petitioner from conducting the graduation scheduled for 1<sup>st</sup> December 2014 was already spent through the consent recorded on 15<sup>th</sup> December 2014 whose compliance was confirmed on 22<sup>nd</sup> January 2014 when the petition was marked as settled. The respondent faulted the petitioners for the unexplained and inordinate delay in filing the instant application and urged the court not to allow them to ride on their indolence.
13. I have considered the application filed herein dated 17<sup>th</sup> March 2017, the respondents replying affidavit and the submissions made by the parties' respective advocates. I note that the main issue for determinations is whether the orders issued on 22<sup>nd</sup> January 2016 marking the case as settled, should be set aside. In determining this issue, there is need to trace the genesis of the case and the circumstances that led to the orders of 22<sup>nd</sup> January 2016.
14. The background of the case is that the petitioners herein, then students of the respondent university, sued the respondent in a petition filed on 10<sup>th</sup> December 2014 in which they sought the following orders:
  - a) **That, an order of mandamus be issued to compel the respondents to include the names of the petitioners in the list of grandaunts for the graduation ceremony slated for 18<sup>th</sup> December 2014 and graduate them.**

- b) That, in the alternative and order do issue stopping the respondent from proceeding with the graduation on 18th December 2014.
- c) That an order of mandamus be issued to compel the respondents to issue the relevant diploma certificates to the petitioners within a specific period of time.
- d) That declaratory orders do issue that the rights and freedoms of the petitioners under Articles 27, 28, 47 and 50 of the Constitution have been violated.
- e) That an order for compensation do issue and that an inquiry as to the quantum thereof be gone into.
- f) That the Honourable court grants such further or other orders it deems just, expedient and fair.
- g) That costs be provided to the petitioners.

15. Concurrently with the petition, the applicants also filed an application dated 10<sup>th</sup> December 2014 under certificate of urgency, seeking the following orders:

1. That this application be certified as extremely urgent and that it proceeds ex-parte in the first instance.
2. That pending inter-parties hearing, a conservatory order do issue restraining the respondents from proceeding with the graduation slated for 18<sup>th</sup> December 2014.
3. That at the inter-parties hearing and pending and determination of the petition:-
  - a) An order of mandamus be issued to compel the respondents to include the names of the petitioners in the list graduands for the graduation ceremony slated for 18th December 2014 and graduate them.
  - b) In the alternative and order be issued stopping the respondent from proceeding with the graduation on 18<sup>th</sup> December 2014.
4. That such further or other orders and directions be issued to facilitate just, expeditious and fair determination of this application and petition.
5. That costs of this application be borne by the respondent.

16. The said application dated 10<sup>th</sup> December 2014 was then listed for hearing on 15<sup>th</sup> December 2014 when parties recorded the following consent order:

“By consent

1. Examinations in respect of the petitioners including for the mathematics unit to be conducted by the respondent between 5<sup>th</sup> January 2015 and 16<sup>th</sup> January 2015.
2. The results for the said examinations generally and the mathematic unit specifically to be released on or before 20<sup>th</sup> February 2015.
3. Subject to the petitioners passing the said examinations, examination transcripts to be availed to the petitioners, an application, from 10<sup>th</sup> March 2015.
4. Subject to the petitioners passing the examinations and pending the convocation ceremony, qualified students to be issued with appropriate letters of recommendation.
5. Parties shall discuss the issue of awards of diploma certificate for directions on 29<sup>th</sup> January 2015.

17. The matter was thereafter listed for mention on at least 5 occasions to confirm compliance with the above mentioned consent order culminating in the impugned mention of 22<sup>nd</sup> January 2016 when the case was marked as settled with no orders as to costs.

18. The applicant’s case was that the case was erroneously marked as settled in their absence and at the instance of the respondent who misled the court into believing that the claim had been settled. A perusal of the court record of the proceedings of 22<sup>nd</sup> January 2016 does not however show if the respondent’s counsel made any submissions in court so as to justify the applicants’ claim that the court was misled into holding that the matter had been settled. I note that the mention of 22<sup>nd</sup> January 2016 was specifically to confirm compliance with the consent order made on 15<sup>th</sup> December 2014. The applicants have not stated that the said consent order was not complied with and this explains the respondent’s position that the court on its own motion, marked the matter as settled upon establishing that the said consent order had been complied with.

19. The applicants' case was that the consent was only in respect to the application dated 10<sup>th</sup> December 2014 and that certain prayers in the petition, namely, prayer d, e, f, and g were still pending the hearing and determination by the court and that it was therefore not proper to mark the case as settled.

20. I have however considered the prayers sought in the said application dated 10<sup>th</sup> December 2014 and the consent orders of 15<sup>th</sup> December 2014 and I note that the consent order is all encompassing and had the ultimate effect of determining not only the application but also the petition as it addressed the reason why the applicants were not listed for the graduation slated for December 2014. The applicants have not stated that they have not graduated following the consent of 15<sup>th</sup> December 2014 so as to justify their claim that prayer d, e, f and g of the petition are still pending.

21. My humble view is that the consent of 15<sup>th</sup> December 2014 went beyond the issues raised in the application dated 10<sup>th</sup> December 2014 and can be said to have determined the pertinent issues raised in the petition. I believe that this is the reason why the learned Lenaola J. (as he then was) concluded that once the terms of the consent had been complied with, then the petition was spent thereby necessitating the marking of the matter as settled. My take is that the learned Judge's decision may have also have been informed by the lapse of time between 15<sup>th</sup> December 2014 when the consent was recorded and 22<sup>nd</sup> January 2016 when the matter was marked as settled considering that the subject matter of the petition which was mainly to stop a graduation slated for December 2014. Clearly, as at 2016 when the matter was marked as settled, one could safely say that the substratum of the petition was already spent.

22. The ideal situation however is that cases ought to be marked as settled in the presence and concurrence of both parties to the dispute. In the instant case, it is not clear if the judge marked the case as settled on his own motion or at the instance of the respondent's counsel who was then present in court. My humble view is that in so far as marking the matter as settled is concerned, the only parties who could confirm if their claim is settled are the petitioners themselves and in this case, they claim that they still have unsettled prayers in the petition which they wish to pursue on their merit.

23. That being the case and the delay in filing the instant application notwithstanding, this court will in the interest of justice allow the application dated 17<sup>th</sup> March 2017, but with a rider that the order marking the case as settled is substituted with an order that the consent order dated 15<sup>th</sup> December 2014 has been complied with no orders as to costs.

24. I further direct that the parties file and exchange written submission to the remaining prayers in the main petition to wit prayers d, e, f, and g within 30 days from today's date.

Orders accordingly.

**Dated, signed and delivered in open court at Nairobi this 8<sup>th</sup> day of October 2018.**

**W. A. OKWANY**

**JUDGE**

**In the presence of**

Miss Adhiambo for the petitioners

Court Assistant – Kombo