



Kenya Union of Commercial Food & Allied Workers v Nestle Kenya Limited; Owinyo & 7 others (Applicant) (Cause E811 of 2023) [2024] KEELRC 1117 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1117 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E811 OF 2023
NZIOKI WA MAKAU, J
MAY 14, 2024**

BETWEEN
KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS CLAIMANT
AND
NESTLE KENYA LIMITED RESPONDENT
AND
JULIUS OWINYO & 7 OTHERS APPLICANT

RULING

1. Eight (8) Applicants filed a Notice of Motion Application dated 11th December 2023 seeking for Orders:
 - a. Spent.
 - b. That the firm of Muthoni Njagi Advocates be and is hereby allowed to enter appearance on behalf of the Applicants.
 - c. That this Honourable Court be and is hereby pleased to declare the filed consent dated 16th November 2023 by the Respondents null and void before adoption by the parties.
 - d. That this Honourable court be pleased to grant leave to the Applicants to amend the Statement of Claim dated 5th October 2023.
 - e. That costs of the application be in the Cause.
2. The Application was supported by the Affidavit of Mr. Simon Kamau, sworn with authority from the other Applicants. Mr. Kamau averred that the eight (8) Applicants are among the 14 members of the Claimant Union, and on behalf of whom the said Union filed this instant suit. He asserted that according to the Statement of Claim in Court, the Respondent has since retained the 9th to



14th Members of the Claimant Union after the review of the Collective Bargaining Agreement (CBA) while the positions of the 1st to 8th Members/Applicants herein have been declared redundant. He contended that they were surprised to learn that the Claimant Union entered a Consent with the Respondent to mark the matter as settled without the participation and or consent of the Applicants. Furthermore, that the Respondent proceeded to hold invalid meetings, in the absence of the Applicants, to implement the unilaterally reached decision in an attempt to subvert the will and claim of the Applicants. Mr. Kamau fronted that the eight Applicants form the majority out of the members whose interests were presented in the Statement of Claim and that therefore the Claimant Union making a decision based on the minority and or based on its own volition is a gross injustice to the Applicants. He noted that they had subsequently written a letter dated 6th December to the Claimant Union protesting against the said Consent but it has never responded.

3. Mr. Kamau further averred that there is need for them to withdraw from the Claimant Union and act on their own through their duly appointed advocates, M/s Muthoni Njagi Advocates, to prevent them facing any further detriment. He asserted that the actions of the Claimant Union are and will be of substantial irreparable harm/injury that cannot be compensated by way of damages if the impugned Consent is adopted by Court and that they risk being condemned unheard in the absence of a meritorious determination. He urged this Court to grant the Orders sought herein in the interest of justice, equity and fairness.
4. In response, the Claimant filed a Replying Affidavit sworn by its Assistant General Secretary Mr. Peter Ngugi on 16th January 2024. Mr. Ngugi averred that the Respondent herein opted to declare redundancies after it failed to achieve its set target of the number of employees to exit through the initially proposed Voluntary Early Retirement (VER) option. In this regard, the Respondent herein notified the Claimant Union on 2nd August 2023 of its intention to declare redundant a total of 19 employees being 14 factory and 5 office positions. That out of the 19 positions, only eight (8) unionisable employees were affected while the remaining 11 were Management Staff outside of Trade Union representation. Mr. Ngugi further averred that the Claimant Union was displeased after learning that the payment proposed to employees in the Redundancy Notice would be only in accordance with the law and the CBA, which was less favourable compared to what had been offered to staff who opted to take advantage of the VER. That however after several meetings between parties herein, the Respondent enhanced the Redundancy Package and also met the lawful requirements for declaring redundancy. That the same then gave rise to a Consent dated 16th November 2023 and at the end, the affected employees were paid:
 - a. 2.5 months' basic salary for every year of permanent employment with the Respondent.
 - b. Two (2) months' Notice pay.
 - c. Pay in lieu of leave earned but not taken.
 - d. Baggage allowance in accordance with clause 43 of the parties' CBA.
 - e. Any payment that may have been accrued at the last date of work.
 - f. Pro-rated 13 months' pay for the current year.
 - g. Pension benefits calculable as per the rules of the Pension Fund.
5. It was the Claimant's stance that the Applicants herein have already enjoyed the above listed benefits and therefore any attempt to oppose the Consent is in bad faith. He noted that from the benefits paid, the Respondent enhanced severance pay and notice pay and that other benefits such as service earned but not taken, gratuity, ex-gratia pay, long service awards and retirement gift of Kshs. 20,000/-



were strictly applicable to employees who opted to exit by VER and would not be available under the redundancy clause.

6. Mr. Ngugi further averred that the Claimant opposes the Motion Application because the Applicants are only Grievants in the suit and did not file any claim in this Court on their own. He argued that the Applicants cannot therefore choose to change representation at will or amend the pleadings which can only be amended by a party who lodged it. That the Applicants can only seek to be enjoined in these proceedings as interested parties but cannot purport to emasculate the Claimant and take over the conduct of the suit. That the Applicants having not sought to enjoin themselves to the suit as interested parties and having not sought for the Claimant Union to cease acting on their behalf, their Application is unmerited. Mr. Ngugi asserted that the Applicants have not indicated any lawful provision(s), which parties to the Consent did not address and what they now want the Court to address by their intention to amend the Statement of Claim, which proposed amendments are notably not attached to their Application. Furthermore, that the Applicants have not demonstrated what clauses in the CBA the Claimant did not address and how they would force the Respondent to grant benefits that are outside the law and not covered in the CBA. He asserted that the Applicants were involved at every stage including before recording of the Consent and that their present Motion Application is thus in bad faith and intended to discredit the Claimant. He further fronted that from the suit, the Claimant has managed to improve clause 28 of the CBA, which benefits the Applicants and will benefit exiting employees in future. His stance was that the Claimant acted in the best interest of the affected employees and there is no evidence placed before Court to prove that the Union did not consider the Applicant's best interests. The Claimant seeks that the Consent dated 16th November 2023 be adopted as an order of the Court to mark the entire suit as settled and that the Application dated 11th December 2023 be dismissed with costs to the Claimant.
7. The Respondent, Nestle Kenya, filed a Replying Affidavit sworn on 17th January 2024 by Mr. Stephen Mokaya, who averred that the Claimant Union and the Respondent agreed to settle the pending court case and withdraw the matters before both, the Court and the Ministry of Labour. Subsequent to this, the parties submitted to Court a Consent letter dated 16th November 2023. Mr. Mokaya similarly argued that the Applicants have no *locus standi* since they have not sought leave to be enjoined as parties in the suit and are as such strangers in the suit. That at all material times, the Claimant Union was the appropriate party to negotiate the terms of the Settlement Agreement and the Consent Letters as the duly recognised Union representing the interests of the unionised employees who included the Applicants. That therefore as long as the Claimant is the recognised Union, the Respondent has no legal mandate to deal with the individual unionisable employees while the Applicants cannot file a claim of their own or set aside the Consent Letter. That in any event, the Applicants are bound by the terms of the Consent Letter that became binding upon execution by parties. Mr. Mokaya further averred that the Applicants' claim on the invalidity of the Consent is unsubstantiated through evidence and that their Application should be dismissed with costs.
8. The Applicants then filed a Supplementary Affidavit sworn on 2nd February 2024 by Mr. Simon Kamau, who stated that the averments of the Respondent are speculative and far-fetched, as their Motion Application had duly sought for leave that they be legally represented in the suit. He argued that section 5 of the *Labour Relations Act* protects employees against discrimination from exercising any rights conferred in the *Act* and that an employee cannot be threatened and/or prevented from exercising the said rights or from participating in any proceedings specified in the *Act*. He further argued that as much as the *Act* allows union representatives to represent their unionisable members, the same is not a leeway to make individual decisions without consulting union members. While noting that the Claimant did not consider their best interest at the time of negotiating and signing the Consent, he maintained that the Applicants have a right to be adequately represented and a right to a fair hearing.



It was the averment of Mr. Kamau that the purpose of amending pleadings is to assist the Court in arriving at a fair and just decision and that issues of procedural technicalities should not hinder the attainment of justice.

Applicants' Submissions

9. The Applicants submitted that the issues for determination by this Court are:
 - a. Whether the Claimant breached Applicants' rights by entering into Consent without involving the participation of the Applicants;
 - b. Whether the Applicants have a right of legal representation and fair hearing;
 - c. Whether procedural technicalities can hinder administration of justice; and
 - d. Who is liable for the cost of the suit?
10. It was the Applicants' submission that Article 41 of the Constitution of Kenya provides that every worker has the right to fair labour practice and the right to form, join or participate in the activities and programmes of a trade union. That Article 27 of the Constitution provides for equality and freedom from discrimination yet they were excluded in the negotiation of the settlement agreement, which act was discriminatory. They relied on the case of Francis Cheng'oli & 2 others v Kenya Universities Staff Union [2022] eKLR in which the Court declared that the respondent had contravened and violated the petitioners' fundamental rights and freedoms under Articles 27 and 41 of the Constitution and that the petitioners and union members have a right to participate in the affairs of the union. The Applicants affirmed that the Claimant/Union owed them a fiduciary duty to act diligently and in good faith but breached that duty by failing to allow them to participate in the negotiations of the settlement agreement. That the Claimant is further liable for damages for failure to perform its core mandate to fairly represent its members, as stated in the case of Food and Allied Workers' Union v. Ngcobo [353/ 12] 2013 [ZASCA] 45 [28th March 2013], cited by the Court in the case of Seth Panyako v Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers [2013] eKLR.
11. The Applicants further submitted that as guaranteed under Article 50 of the Constitution of Kenya, they have a right to proceed to full trial and obtain a meritorious determination as opposed to being condemned unheard by the adoption of unilateral consent against their will. That there is sufficient evidence that the Claimant breached its mandate by unfairly representing the Applicants through conniving with the Respondent to secretly retain and or absorb few aggrieved members then hurriedly entering into a consent in complete disregard of the interests of the majority aggrieved members. That they therefore have a right to represent themselves independently in this suit as the Claimant has betrayed them. The Applicants argued that it is well decided that when a trade union, through its representatives, fails to fairly, diligently and honestly represent its members, the aggrieved members can actively and independently represent themselves and hold the trade union accountable for its rogue actions. They relied on the case of Seth Panyako v Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (*supra*) in which the Court stated as follows:

“...The position that Trade Unions are associations of employees, and it would not be possible for employees to sue themselves as an association, no longer holds sway in modern trade union law. Members have contract or mandate with their Trade Unions, and Trade Unions can be held liable if they breach it. ...When the Constitution of Kenya, the Labour Relations Act and the Internal Constitution of KUDHEIHA grant the mandate to recruit Members, there is a reciprocal obligation to act honestly and fairly, in representing recruited Members. When a Trade Union recruits Members and is granted organizational rights by the law, there



is created a fiduciary duty to protect Members’ rights, act diligently and in good faith. Trade Union Dues and agency fees are not paid to merely increase the material wealth of Trade Union Nabobs; they are paid to ensure Members are effectively represented at the various Industrial Relations Platforms.”

12. It was the Applicants’ submission that Article 159(2) of the Constitution of Kenya states that justice shall be administered without undue regard to procedural technicalities. Further, section 3A of the Civil Procedure Act provides that nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. That this is also buttressed in sections 1A and 1B of the Civil Procedure Act providing for the overriding objectives of the Act, which is to facilitate the just and expeditious resolution of disputes. The Applicants asserted that the overriding objectives overshadow all technicalities, precedents, rules and actions that are in conflict with it and that whatever is in conflict with it must give way. They cited the case of David Bundi v Timothy Mwenda Muthee [2022] eKLR in which the Court, considering an application opposed on technicalities by the respondent, affirmed that courts will determine disputes on the merits and lean on the principle of natural justice which guide all courts, that is, a party in a dispute must be given an opportunity to be heard. According to the Applicants, the issue raised by the Respondent on their failure to seek leave to be enjoined to the suit is a mere issue of technicality which cannot be sustained. They urged the Court to invoke its unfettered and inherent power and consider the merits of their Application against any procedural technicality and grant the orders sought as may be necessary for the ends of justice.
13. On the issue of joinder, the Applicants cited Order 1, rule 1 and 10(1) of the Civil Procedure Rules and relied on the observation of the Court in the case of Sammy Kanyi Kareithi v Barclays Bank of Kenya & 2 others; Ross Xavier Whitney (Applicant) [2021] eKLR, that the court is empowered to join a party to a suit at any stage of the proceedings with or without an application by any party and that the mere delay in filing an application for joinder is not fatal. They submitted that they are necessary and proper parties and their presence is necessary to enable the Court effectively and completely adjudicate upon the questions involved, which are the guiding principles for joinder to a suit as held in Kingori v Chege & 3 others [2002] 2 KLR 243. It was the Applicants’ submission that the issue of costs is a discretionary award to a successful party and that section 27(1) of the Civil Procedure Act of 2010 is instructive that costs shall follow the event unless the court orders otherwise for good reason. The Applicants pray that this Honourable Court, upon finding that the Applicants’ case has merit, to award them costs as against the Respondents.

Claimant’s Submissions

14. The Claimant submitted that for the redundancy present in the instant suit, the Respondent observed clause 28 of the parties’ CBA and met the requirements under section 40 of the Employment Act of 2007. That there was thereafter no issue left to pursue in the Claim dated 5th October 2023 and that it was unfortunate that the axe fell on the Grievant/Applicants herein. It submitted that the foregoing forms the reasoning behind the recording of the Consent dated 16th November 2023. It was the submission of the Claimant that the Applicants have not filed any evidence to show that the Shop Stewards they elected to represent them did not participate in the discussions leading to the subject Consent. That it is on the basis of the Union’s representatives participating in the consultations meetings with the Respondent that the Applicants accepted the redundancy package, which they have since enjoyed in full and final settlement of their claims against the Respondent herein. That the allegation that the Claimant Union breached the Applicants’ rights by executing a Consent without their involvement is thus baseless. As regards the Applicants’ right to legal representation, the Claimant submitted that they filed the instant suit on behalf of the Grievant named in the Claim and



thereafter proceeded to act in their best interest when it engaged with the Respondent and agreed on an enhanced package. That at all times the dispute was being considered, the Applicants did not attend conciliation meetings, which meetings were attended on their behalf by their representatives without any complains. The Applicants argued that an advocate can only come in to represent the grievant where their status change to interested parties and that the Grievant cannot be represented by two parties, albeit with different interests and different viewpoints as this will create a chaotic situation. That notably, the Applicants had not sought to dislodge the Claimant Union from handling the matter.

15. According to the Claimant, the Applicants' failure to seek to be enjoined in the suit is a procedural technicality that should not be ignored. It cited the case of [*Francis Kariuki Muruatetu and another v Republic*](#) (Petition Nos. 15 and 16 of 2015) [2017] eKLR in which the Supreme Court outlined the requisite elements to consider for joinder as an interested party to a suit including filing a formal application to lay out sufficient grounds for the Court's consideration. That it was asserted in the Francis Muruatetu case (*supra*), an interested party cannot amend any pleading before court and cannot frame its own issues, or introduce new issues for determination by the court. The Claimant argued that given there is no application clearly setting out reasons for joinder, this Court should not exercise its discretion and that in any event, such a prayer has not been placed before the Court for consideration. It was the Claimant's submission that it therefore deserves an award of costs as the Application under consideration was unnecessary.

Respondent's Submissions

16. The Respondent submitted that the Applicants cannot be joined as parties to the suit because the Claimant Union is their legal representative in the matter and they have no legal standing to institute proceedings on their own behalf or take over the proceedings filed by the Claimant. It argued that if the Applicants are dissatisfied with the Consent Letter, their remedy lies in filing proceedings for damages as against their trade union. That when a trade union has been recognised under the [*Labour Relations Act*](#), the union becomes the main representative of the interests of workers in negotiating and articulating issues that affect them with the management. That by dint of the Applicants' being unionisable workers of the Respondent, they have ceded their right to representation in the Claim to the Claimant. The Respondent further argued that guided by the decision in [*Seth Panyako v KUDHEIHA*](#) [2013] eKLR, any form of liability for the activities of the Claimant should have been raised as against the Claimant and not the Respondent. It contended that the case of [*Francis Cheng'oli & 2 others v Kenya Universities Staff Union*](#) (*supra*), cited by the Applicants, is not relevant the matter at hand as the facts of the said Case do not relate to joinder of a unionisable worker where the union has filed the case against the employer and the worker seeks to set aside a consent letter.
17. The Respondent further submitted that the Claimant, being the legal representative of the Applicants, had implied general authority to compromise and settle the present case. That the same is similar to the position between an advocate and the client and the Court in [*Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd*](#) [1982] KLR 485, as cited in [*Cheruiyot v Korir*](#) (Civil Appeal 131 of 2017) [2021] KECA 222 (KLR), held that 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. The Respondent also noted that there is no legal provision under the [*Labour Relations Act*](#) entitling unionisable members to take over proceedings filed by their union. It affirmed that the Claimant, acting as the duly instructed advocate of the Applicants, has an implied general authority to compromise and settle the action and the Applicants cannot claim that the authority was limited unless such limitation was communicated to the Respondent.



18. The Respondent further submitted that the Applicants have also not sought leave to be joined as a party to the suit and that in any event, they have not satisfied the requirements for joinder as parties. It argued that owing to the fact that there exists a Consent between the Claimant and Respondent to the effect that the suit is withdrawn, the Applicants should have filed an application for joinder to demonstrate that they are a proper and necessary party in these proceedings. In the opinion of the Respondent, the Applicants' inclusion in this matter is neither necessary nor relevant to the determination of the dispute. Furthermore, the Applicants have not illustrated that they should be joined to the matter as parties and the Honourable Court should thus dismiss their prayer for joinder. The Respondent submitted that dissatisfaction with terms of a consent and all the other reasons proffered by the Applicants are not cogent grounds for setting aside the Consent Letter herein. That once a consent letter has been executed, it becomes a contract which binds all the parties as was as held in the *Cheruiyot v Korir* case (*supra*). It cited the case of *Kuwinda Rurinja Co. Limited v Kuwinda Holdings Limited & 13 others* [2019] eKLR in which the Court of Appeal held that for a consent to be set aside, the applicant has to demonstrate to the satisfaction of the Court that the consent was procured by fraud non-disclosure of material facts or mistake. It was the Respondent's submission that the Consent Letter between itself and the Claimant is legally valid and enforceable and there is no *prima facie* evidence that the same was based on undue influence and duress upon the Claimant. It further argued that considering a claim for violation of human rights should be resolved in a separate petition against the Claimant outside these proceedings, this Court should uphold the Consent Letter.
19. The Respondent further submitted that as affirmed in the cases of *Cleophas Omondi v Dismas Wamaya* [2018] eKLR and *Mumwanjesy Development Ltd v Ali* (Environment & Land Case 60 of 2016) [2022] KEELC 13816 (KLR), the Applicants' Supporting Affidavit and Supplementary Affidavit do not sufficiently disclose the nature of the amendment to enable this Court exercise its discretion in their favour, without first having seen a draft of the amended Statement of Claim. That even if this Court would find that the Applicants be joined as interested parties, they cannot be allowed to amend the Statement of Claim as asserted by the Supreme Court in the *Francis Muruatetu case* (*supra*). It thus prays that the application for leave to amend the Claim be dismissed.
20. The Applicants seeks to have the consent herein set aside. They assert their interests were not catered for in the consent entered into between the Claimant Union and the Respondent. The Court notes that the Applicants were represented by the Union in the matter before the Court and that subsequent to negotiations between the Union and the employer, there was a consent recorded herein. The terms of the consent were implemented and it is this consent that the Applicants now seek to overturn.
21. When a party seeks to set aside a consent, dissatisfaction in the terms in the consent is not one of the provisions under which the consent can be set aside. In the case of *Kuwinda Rurinja Co. Limited v Kuwinda Holdings Limited & 13 others* (*supra*), the Court of Appeal held that for a consent to be set aside, the applicant has to demonstrate to the satisfaction of the Court that the consent was procured by fraud, non-disclosure of material facts or mistake. Nothing has been placed before me to demonstrate *prima facie* that the consent was obtained by either undue influence or duress upon the Claimant. In my considered opinion, there is no reason to vitiate the consent. The Applicants have sought to impugn the actions of the Claimant but have not demonstrated how the Union is liable. The Applicants application is dismissed with costs to the Claimant and Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY 2024

NZIOKI WA MAKAU

JUDGE

