



Kenya Union of Commercial Food & Allied Workers v Kobole Supermarket & another (Employment and Labour Relations Cause 3 of 2023) [2024] KEELRC 1343 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1343 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 3 OF 2023
JW KELL, J
JUNE 6, 2024
FORMERLY BUNGOMA NO. E015 OF 2023

BETWEEN

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS CLAIMANT

AND

KOBOLE SUPERMARKET 1ST RESPONDENT

KOBOLE KENYA LIMITED 2ND RESPONDENT

RULING

(On the Notice of Motion Application dated 20th December 2023 by the 2nd Respondent)

1. The ruling is on application by way of a Notice of Motion application by the 2nd Respondent dated 20th December 2023 brought under the provisions of Sections 3A and 63(e) of the [Civil Procedure Act](#), Section 16 of the [Employment and Labour Relations Court Act](#), No. 18 of 2014, Rule 33, Employment and Labour Relations Court (Procedure) Rules, 2016, Order 45 Rule 1, and Order 51 Rule 1 of the Civil Procedure Rules, and seeking the orders: -
 - a. Spent.
 - b. the firm of Makonjio, Nyaberi & Company Advocates be granted leave to come on record for the 2nd Respondent post Judgement.
 - c. Spent.
 - d. The court be pleased to set aside the judgement/Decree made herein on 4th October 2023 and the matter be re-opened to enable the 2nd Respondent defend the suit herein.



2. The Notice of Motion was premised on the grounds on the face of the application and the grounds in the supporting affidavit of Margaret Nyokabi Kihanya sworn on 20th December 2023 as follows: -
- i. That she is a co-director of the 2nd Respondent (MN1 & 2) and is in charge of running the company affairs since its incorporation.
 - ii. That on 6th December 2023, she was called by a stranger, who met her at her business premises and served her with a decree dated 5th December 2023(MN-3).
 - iii. That she presented the documents to her advocate, Abel Nyaberi, who perused the file and informed her that indeed a suit had been filed against the company and there was a need to file an application to set aside the same as there were anomalies on the face of the said filed documents.
 - iv. That the purported representative of the 2nd respondent had only filed a mention notice (MN-4) as his authority to act for the 2nd Respondent which does not suffice in law as such authority, that he never had the authority to act, depone or to represent the respondents.
 - v. That the court adopted a purported consent and entered judgment based on concealed facts, as the said consent was adopted ex parte without the knowledge of the Applicant.
 - vi. That the suit was defended by a stranger who had no locus to represent the 2nd respondent as he was neither a director of the company.
 - vii. The purported allegations that the said stranger was a managing director of the 2nd respondent was only a ploy that demonstrates he was in cohorts with the claimants to defraud the 2nd Respondent.
 - viii. That some of the purported employees are mere fabrications and include names of persons engaged by the 2nd Respondent.
 - ix. That execution is bound to happen and the 2nd Respondent will be condemned unheard. That the 2nd Respondent was not properly served with the suit and resultant proceedings and hence their absence in court.
 - x. That in the interest of justice the said orders should be set aside and the Applicant allowed to defend the suit.
 - xi. That the court should have scrutinized the consent on record to affirm that it was done by the proper parties.
 - xii. That the Applicant ought to have been heard in their defence and ought to have been served with the notice of the case to enable them to respond to the case and defend the same accordingly.
 - xiii. That the court has the discretion to set aside the ex parte orders made on 4th October 2023 and the applicant be allowed to file a defence to the allegations.
3. The Application was opposed by the Claimant through the Replying Affidavit of Bonface M. Kavuvi sworn on 19th February 2024 on the grounds that: -
- i. The application is an abuse of the court process and ought to be dismissed as the Respondents were duly served with the pleadings and entered appearance vide the notice dated 24th January



2022 and that the judgement/order of 4th October 2023, was signed by the Respondents willingly.

- ii. That parties willingly signed the consent dated 16th November 2022, which was on 18th November 2022 reviewed, with the Respondent confirming that so far Kshs. 50,000/- had been paid to each of the Four grievants.
 - iii. That the payment of the 2nd instalment was through cheques issued by the Respondent's Director Margaret Nyokabi Kihanya, which later bounced embarrassing the claimant and its clients.
 - iv. That the issuing of cheques towards the settlement of the matter was an admission and no doubt that they were part of the proceedings in court and confirmed that they gave authority to the said representative to represent them in the proceedings.
 - v. That there was no concealment of facts as the Respondent had started executing the consent by paying the grievants and also paying the agreed cost of Kshs. 100,000 to the Claimant.
 - vi. That the consent was not ex-parte, as the respondent was fully aware of the proceedings and adopted and willingly signed the consent.
 - vii. That the respondent is introducing new evidence which was not produced or filed in court before the judgment yet they participated in the proceedings until the issuance of the consent. That the new evidence should be struck out since it was not part of the proceedings.
 - viii. That the respondent had enough time to file their documents and to defend the case and they failed to do so, and equity dictates that he who comes to equity must come with clean hands.
 - ix. That the Respondent should be ordered by the court to deposit with the court, the remainder of the decretal sum of Kshs. 1,400,000/- as parties await the determination of the suit.
4. The 2nd Respondent filed a Supplementary affidavit sworn by Margaret Nyokabi Kihanya dated 20th February 2024, asserting that the said representative could not address the court as the proper documents were never filed to grant audience before court, he had no resolution by the company to represent the respondents, no authority to act, or depone; and he had no locus to even address court and any resultant activities thereof lack substance to be heard and thus the proceedings and decree ought to be set aside.
 5. She argues that no memorandum of appearance is on record nor a response to the claim, and the case directly affects the 2nd Respondent which is a limited company.
 6. She argued that the court proceeded to hear the case on the basis that the 1st respondent is a legal entity which is not the case as no registration thereof was provided.
 7. Regarding the cheques drawn (MN 1 (a-f)), the deponent alleged that she was coerced by the claimant's representative one Vackson Khalumi who informed her that he needed cheques or else she could face the wrath of the law, as he routinely had been coming to demand cheques from her so that she could be safe.
 8. She states that she wrote the cheques but later recalled them when she was confident enough beyond the threats.
 9. She stated that she was harassed by the claimant's representative who asked to meet her via text (MN 2 (a-d)) on multiple occasions and thus she was forced to seek legal intervention from her advocate.



10. That the aspect of defrauding the 2nd Respondent was raised in Bungoma ELRC No. 88 of 2021 at Para 13 of the Judgement (MN3).
11. She states that the Claimant's admission that they have brought new evidence is not true as the present application is different from the trial and any new evidence is necessary and warranted to support the application.
12. That they have never had time in court and thus they come to court with clean hands.
13. That they have an arguable defence (MN-4) and the court should hear the parties to come to a reasonable justification.
14. That the amounts paid related to the disagreements between the parties and the issues raised in the defence are key and need the court's determination.

WRITTEN SUBMISSIONS

15. The court directed that the application be canvassed by way of written submissions. The parties complied. The 2nd Respondent/Applicant's written submissions dated 23rd February 2024 were filed by Makonjio, Nyaberi & Co. Advocates on 29th February 2024. The Claimant's written submissions dated 20th March 2024 were filed by Bonface M. Kavuvi, the General Secretary of the Claimant on an even date.

DETERMINATION

Issues for determination.

16. The Applicant/2nd Respondent addressed the following issues in its written submissions: -
 - i. Whether the court has discretion to set aside the judgement
 - ii. Whether the 2nd Respondent has raised triable and arguable issues.
 - iii. Whether there is any prejudice that will be suffered from the setting aside and explanation for delay in bringing the application.
17. The Claimant did not set out the issues for determination and submitted globally on the need to end litigation and in support of its objection to the application, which may lead to reopening the suit without having new evidence which the Respondent could not have adduced when exercising due diligence.
18. The court having perused the pleadings by the parties and their submissions was of the considered opinion that the issue placed before the court by the parties for determination of the application is Whether on the face of the record, there is any sufficient reason to justify the setting aside of the judgment herein and re-open the suit.

Whether on the face of the record, there is any sufficient reason to justify the setting aside of the judgment herein and re-open the suit.



Analysis

The applicant's case

19. The supporting affidavit of Margeret Nyokabi Kihanya, a co-director of the 2nd respondent. The applicant stated that the representative who appeared in court relied on a mention notice as an authority(MN4) That the representative was a stranger and there was no resolution of the company to appoint him. They were not related to companies mentioned in MN4. They were not properly served with the suit and the resultant proceedings hence their absence in court.
20. That she was informed by the advocate on record that the court ought to have scrutinized the consent on record and adopt it if only the same was done by consent of correct parties. The deponent sought for setting aside the judgment to defend case.
21. In the supplementary affidavit of Margaret Nyokabi Kihanya dated 20th February 2024, she contended that directors of the 2nd representative had not allowed anyone to represent them in court and subsequent proceedings lacked substance. That no memorandum of appearance could be traced on record or responses thereof. That the main case affected the 2nd Respondent who was a registered company with limited liability.
22. That the court further proceeded on basis that the 1st Respondnet was a an entity which was not.
23. Kihanya contended that she signed the cheques to be safe as she was coerced by the representative of the Claimant Vackson Khalumi who informed her he needed the cheques or else she would face the wrath of the law. He had routinely demanded for cheques from her. (MN1 a-f were copies of the cheques issued)
24. That she wrote the cheques and later recalled them after she got confident and beyond the threats. That the said Khalumi had been constantly harassing her by asking to meet multiple times and when the threats became unbearable and hence sought lawyers intervention (MN2 a- d were a copy of their text conversations).
25. That the allegation of the intent to defraud the 2nd Respondent was raised way in Bungoma ELRC Cause No. 88 of 2021 between the parties herein particularly in paragraph 13 of the judgment (MN3 was a copy of the judgment)
26. On the allegation of new evidence the deponent said this was an independent application and had never had time in court hence had come to court with clean hands.
27. The deponent contended they had good defense (MN4 was a draft response)
28. The deponent stated that the amount paid related to the disagreements between them and that they failed to agree on a way forward.

Response

29. The Claimant opposed the application through the affidavit of Bonface M. Kakuvi dated 19th February 2024. The deponent contended that the application lacked merit, that the Respondents were served with the pleadings and entered an appearance vide notice dated 24th January 2022, that the consent was signed willingly by the parties on 16th November 2022 settling the dispute and the court reviewed the same on the 18th November 2022 where the respondent confirmed compliance and having so far paid Kshs. 50,000/- to each of the grievant. That on the 2nd installment the Respondent's Director Margaret Nyokabi Kihanya issued cheques that bounced embarrassing the claimants before its members. That



the cheques which bounced were issued towards the settlement of the dispute and hence an admission beyond doubt that the respondent was part and parcel of the proceedings before court. This was a confirmation that the representative before court had authority to represent the respondent.

30. Kakuvi further deponed that there was no concealment of material facts by either party since the respondent in further execution of the consent by paying the grievants and also paying the Claimant's agreed costs of Kshs. 100,000/- .
31. That the consent was not adopted *ex parte* as purported by the Respondents since they were fully aware of the proceedings of the court and adopted and signed the consent willingly. The respondent introduced new evidence not before the court before the judgment was issued.
32. That the respondent had adequate time to defend their case and hence had not approached the court with clean hands.

DECISION

33. The application to review the Decree of the court dated 4th October 2023 vide adoption of the consent of parties is brought under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 to wit:-

“33.

- (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.”

34. In submissions, the Applicant addressed several issues. It is true under Rule 33 the Court is empowered to review its own decisions and may set aside a judgment;-

- a) if there is discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
- (b) on account of some mistake or error apparent on the face of the record;
- (c) if the judgment or ruling requires clarification; or
- (d) for any other sufficient reason.

35. In the supplementary affidavit of Margaret Nyokabi Kihanya dated 20th February 2024, she contended that the directors of the 2nd respondent had not allowed anyone to represent them in court and subsequent proceedings lacked substance. That no memorandum of appearance could be traced on record or responses thereof. The main case affected the 2nd Respondent who was a registered company with limited liability.



36. The 2nd Respondent submits that no affidavit of service was filed to demonstrate the directors were served and at registered office.
37. The court perused the record and established as follows:-
1. The instant suit by way of a memorandum of claim dated 1st December 2021 was filed in court on the 21st December 2021 and a Notice of summons was issued by the court on the even date.
 2. On the 27th of January 2022, the Respondents entered appearance through Director Maxwel George Murungaro Mbugua on behalf of all other directors of the 1st Respondent and simultaneously filed notice of preliminary objection and grounds of opposition dated 24th January 2022.
 3. On the 11 February 2022, the Claimant filed response dated 10th February 2022 to Respondents' preliminary objection.
 4. On the 23rd June 2022, the claimant filed amended claim dated 10th May 2022 together with a supplementary witness statement.
 5. On the 28th of June 2022, the respondent filed a statement of defence dated 25th May 2022 drawn by the aforesaid director, Maxwel.
 6. On the 19th August 2022, the Respondent through the aforesaid director filed its list of issues in dispute dated 18th August 2022.
 7. On the 12th September 2022, the claimant filed response to the defence and further witness statements of even date.
 8. On the 24th October 2022, the court heard the claimant's case where 3 witnesses of the claimant testified on oath and were cross-examined by the aforesaid Director of the Respondent. The matter was marked as part-heard and the claimant was to call one more witness. The defence was also granted file statements of more witnesses and file statements. The court issued a further hearing date of 9th November 2022.
 9. On the 9th November 2022 when the matter was listed for hearing, the parties informed the court that they were not proceeding with the hearing as they had engaged in out of court settlement. The parties requested for 14 days to attempt out of court settlement. The court allowed the application and gave mention date of 30th November 2022.
 10. On the 18th November 2022, a consent dated 16th November 2022 was filed in court. Consent was signed by the aforesaid director and the General Secretary of the Claimant union. The terms of consent settled the claim of the 4 grievants for the total sum of Kshs. 1,500,000/- plus Kshs. 100,000/- as costs.
 11. On the 30th November 2022, an advocate called Khayumbi appeared in court and stated he had come on record for the claimant and had instructions to oppose the filed consent. Filed in court on even date was a notice of appointment dated 28th November 2022 of advocates M/ S.J.I. Khayumbi & Co. Advocates.
 12. On the 22nd February 2023 the aforesaid director informed the court they were settling out of court. There were further mentions without relevant outcomes. On the 3rd of May 2023 the court dismissed the case for non- attendance. The claimant filed an application dated 18th September 2023 to reinstate the suit.



13. The court gave direction for hearing. On the 4th of October 2023 when the application dated 18th September 2023 was scheduled for interparties hearing the claimant informed the court that their application was unopposed. The respondent was absent. The court allowed the reinstatement, the court having noted partial compliance with the consent dated 16th November 2022 wherein each of the 4 grievants had been paid Kshs. 50000/- the court having been satisfied partially, the same was adopted as a judgment of the court in the final settlement of the dispute.
14. The court issued a Decree of the Court dated 5th December 2023 as per the adopted Consent terms.
38. From the above proceedings, the Court finds that the respondents entered an appearance, filed a defence and the case was part-heard in their presence when the Respondent's representative who described himself as Managing Director informed the court they had settled the claim and were making payments. The court was satisfied that the written consent filed in court was signed by the parties representatives and adopted the same as Decree of the Court. As per the court record, as at the time of the adoption of the consent, the court was informed the 2nd Respondent had made payment of Kshs. 50,000 to each of the grievants and paid costs of Kshs. 100,000/- to the claimant.
39. The Court did not find evidence of the alleged threats by the deponent of the 2nd Respondent which in any event ought to have been reported to the police for investigations and prosecution. The court did not find disclosure of evidence of any threat on a balance of probabilities in the annexed text messages (MN2 a and 2b).
40. On the issue of representatives, the court finds that the 2nd Respondent's deponent position that the representative, Maxwell George Murungaro Mbugua, who appeared in the proceedings before was a stranger to the 2nd Respondent was unbelievable and an afterthought idea meant to defeat justice for the grievants. The document MN1 was a mention notice filed after the judgment of the court hence not relevant to the application. This position of the court is informed because of the successful payment of the Installment of Kshs. 50,000 to each of the grievants and Costs of the suit of Ksh, 100000 to the claimant and the subsequent bounced cheques in honour of the consent judgment. This is further informed by the 2nd Respondent's exhibit MN3 relied on to prove allegation of fraud which decision arose from a claim defended by Maxwell George Murungaro Mbugua, the alleged stranger. The decision 'MN3' arose from a claim by the claimant against the instant respondents. The court cannot allow the Respondents to cherry pick facts as they suit their interests. The conduct amounts to an abuse of court process.
41. The Court in adopting the consent order was satisfied that the consent was by the parties with clear intention to settle the dispute and at time of adoption it had already been partially executed as demonstrated above. The court then became functus officio.
42. The Supreme Court explained the role of the court in adoption of consent order in Supreme Court of Kenya(Coram: Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ)Petition No. 7 of 2019 Between Geoffrey M. Asanyo and 3 Others V The Attorney-General,(see SC website) ' [40] Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court. It is only from that stage, that the Court becomes functus officio.'" The court having adopted the consent on the 4th of October 2023 became functus officio.



43. It is trite that litigation must come to an end. The Judge is obliged to dispense with the business of the court promptly. The only obligation of the court in doing so is to ensure a fair hearing which right was upheld as the Respondents had the opportunity to defend the case but opted to leave the trial which had commenced for out-of-court settlement. The court was satisfied that the written consent filed in court was signed by representatives of the parties and was in settlement of the dispute.
44. The court holds that a consent agreement is a contract between the parties and can only be set aside on the same grounds that vitiate a contract. In the case of Frank Phipps & Pearl Phipps v Harold Morrison SCCA 86 of 2008 cited by justice Nyakundi in SNI v AOF [2020] eKLR, Harris JA stated: "As a general rule, an order obtained by the consent of the parties is binding. It remains valid and subsisting until set aside by fresh proceedings brought for that purpose. Kinch v Walcott and Others {1929} A.C. 482 "The bringing of fresh proceedings would normally be guided on the obtaining of the consent order by fraud, mistake or misrepresentation."
45. The court established that the representation of the Respondents was historical having been represented by the same person, Maxwell George Murungaro Mbugua, in Bungoma ELRC Cause No. 88 of 2021(MN3), that the Representatives entered appearance and filed defence and had partially fulfilled the consent agreement even before the adoption by Court. The court holds that in the circumstances the application does not meet the threshold of setting aside the consent judgment on basis of fraud, coercion, mistake or misrepresentation.
46. In the upshot the Court holds that the application dated 20th December 2023 is an abuse of court process and meant to defeat justice. The application lacks merit and is dismissed with costs to the Claimant assessed at Kshs. 10,000/- payable within 14 days of this judgment.
47. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 6TH JUNE 2024.

J.W. KELI,

JUDGE.

In the Presence Of: -

Court Assistant: Macheso

For Claimant: Tacko- Industrial Relations Officer

2nd Respondent/Applicant: Mbetera Advocate

