



Kenya Union of Commercial Food & Allied Workers & 13 others v Tatu City & another; Kenya Plantation and Agricultural Workers’ Union (Interested Party) (Employment and Labour Relations Cause E6452 of 2020) [2024] KEELRC 2388 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2388 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E6452 OF 2020
NJ ABUODHA, J
SEPTEMBER 27, 2024**

BETWEEN

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS CLAIMANT

AND

- FRANCIS MBURU 1ST APPLICANT
- DOMINIC GITAU 2ND APPLICANT
- JOSEPHAT MWARIRI 3RD APPLICANT
- ELIUD OKUMU 4TH APPLICANT
- JOAB WANJALA 5TH APPLICANT
- ANDREW KWEMBOI 6TH APPLICANT
- LENSON MUNENE 7TH APPLICANT
- KENNETH MTUMA 8TH APPLICANT
- BOBIAS ORIRI 9TH APPLICANT
- JUSTUS NYAWITA 10TH APPLICANT
- FAITH CHESANG 11TH APPLICANT
- ABASS HASSAN 12TH APPLICANT
- EDRWARD MWANGI 13TH APPLICANT

AND

- TATU CITY 1ST RESPONDENT
- KOFINAF CO. LIMITED 2ND RESPONDENT



AND

**KENYA PLANTATION AND AGRICULTURAL WORKERS'
UNION INTERESTED PARTY**

RULING

1. The Applicants filed application dated 23rd February, 2024 Under Section 1A, 3A and 22 of the *Civil Procedure Act* and Order 1 Rule 10 of the *Civil Procedure Rules* 2010 seeking for orders of the court to enjoin the Grievants in the matter as parties to the suit and the court to set aside in its entirety the consent dated 9th October,2023 and adopted in court on 20th November,2023.
2. The application was supported by the grounds set on the application and Affidavit of Francis Mburu on behalf of the Grievants herein who averred that they filed this matter through the Claimant union and they have been keen on following up with the matter to get their full terminal dues after they were unfairly terminated from employment.
3. The Applicants averred that in 2023 they were informed that there were negotiations to settle the matter out of court and that was the reason why the case was adjourned when it came up for hearing on 3rd May,2023. That when they were given the draft of the proposed tabulations they did not agree with the proposal as the amounts were inordinately low and they felt the amounts were not fair to them considering the manner in which they were terminated.
4. The Applicants averred that upon disputing the amounts they did not hear again from their union representatives for a long time. They were then advised to look for an advocate to handle their case. This is when they instructed their advocates on record who entered appearance on 2nd January,2024 and from the court e-filing system it was noted that the matter had been concluded and a consent filed in court on 20th November,2023 which consent contained the tabulations they disputed.
5. The Applicants averred that the consent was signed between the Respondents' Advocates and Interested Party without their involvement. That the consent was prejudicial to them as they were not party to it and they were not informed when the consent was signed and filed in court leading to conclusion of their case.
6. The Applicants averred that despite the consent being filed in court on 20th November,2023 they have not been made aware of it or paid the amounts stipulated in the consent. That they do not agree to amounts in the consent filed in court behind their backs.
7. The Applicants averred that they wished to have the case re-opened so that they be accorded an opportunity to give their testimonies in court to enable them get justice after they were unfairly terminated. They contended that the Respondents would not be prejudiced in any manner if the orders sought are granted.
8. In reply the 1st and 2nd Respondents filed their Replying Affidavit sworn on 31st May, 2024 and they averred that the Application did not meet the threshold for grant of orders sought, was an attempt to remedy Applicant's indolence in communicating any dissent they had to the terms of the consent and the Application was gross abuse of court process.
9. The Respondents averred that the Interested Party was the only recognized union by the 2nd Respondent which was rightfully joined in this matter following the Ruling by Lady Justice Mbaru on 6th October,2022. That the suit was filed as a representative suit and any negotiations between



the parties would be through the representative union, the Interested Party and that it was the one recognized by the 2nd Respondent.

10. The Respondents averred that the purpose of negotiations was to give parties room to compromise claims which they did and filed a consent in court. The Respondents denied allegations of fraud. The respondent further contended that the Applicants admitted being aware of the negotiations in his affidavit but failed to communicate his dissent/opposition/concerns hence was estopped from challenging the terms of the consent.
11. The Respondents averred that it would be in the interest of justice if the consent was upheld as setting it aside would be an injustice and prejudicial to the Respondents and further that the Respondents' representatives met the Interested Party representatives at their office in Nakuru for discussions and arrived at the tabulations indicated in the parties consent dated 9th November,2023, There were therefore no grounds for setting aside the consent order and the Application should be dismissed with costs.
12. The Application was dispensed of by written submissions.

Determination

13. This court has considered the application and submissions filed by the parties and notes that Order 25 Rule 2 of the *Civil Procedure Rules*, 2010, provides that;
 - 2(1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.
14. The key word are “the written consent be signed by all parties”. Was the consent in this matter signed by all parties? To answer this question, the Court will be guided by the previous Ruling of Lady Justice Mbaru of 6th October,2022 where the court noted that the union which was recognized by the 2nd Respondent was the Interested Party. The court noted that the Claimant union was not barred from representing the Grievants in the suit even if there was no recognition agreement between the Claimant and the 2nd Respondent so long as section 54(1) of the *Labour Relations Act* on “simple majority rule” was met by the Claimant union.
15. This Court (Mbaru J) had on 6th October,2022 ruled that the Interested Party was the rightful Union for the purposes of collective bargaining. This therefore meant that the Interested Party had full powers in their representative capacity to conduct, negotiate and compromise the suit herein on behalf of the grievants. There was therefore no requirement on the part of the Interested Party to revert to the grievants on each and every item of the negotiations. This would defeat the principle of agency envisioned by trade unionism and make resolving industrial disputes painfully slow.
16. A consent order can only be set aside on similar grounds that vitiates a contract. The court of Appeal in the case of *Cheruiyot v Korir* (Civil Appeal 131 of 2017) [2021] KECA 222 (KLR) (5 November 2021) (Judgment) revisited its decisions on this issue as follows: -

“This Court in *Kuwindu Rurinja Co. Limited v kuwindu Holdings Limited & 13 others* [2019] eKLR, Civil Appeal No. 8 of 2003, reiterated and buttressed the law as set out earlier as follows:-“In the seminal case of *Flora N. Wasike v Destino Wamboko* [1988] eKLR this Court stated: “It is now settled law that a consent judgment 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: see the decision of this Court in *J M Mwakio v Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983.”In



Purcell v F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676; “It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons...” In a more recent decision in *Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others* [2019] eKLR, this Court pronounced itself as follows:- “Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside...” (Emphasis Ours)

17. The Court guided by the above decisions of the Court of Appeal on the status of a consent once entered into, finds and holds that the consent dated 9th October, 2023 and adopted in court on 20th November, 2023 remains binding between the parties since no sufficient grounds recognized by law have been demonstrated to warrant setting it aside.
18. The Court however states that if the payments due under the consent have not been made then the grievants through the Interested Party or any other authorized agent, shall be at liberty to demand such payment forthwith and in default shall be free to commence execution proceedings.
19. The application dated 23rd February, 2024 is however found without merit and is hereby dismissed with no order as to costs.
20. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

