



Ombech v Public Finance Management Reform & 2 others (Cause E104 of 2021) [2024] KEELRC 2200 (KLR) (13 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2200 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E104 OF 2021
J RIKA, J
SEPTEMBER 13, 2024

BETWEEN

HELLEN ACHIENG OMBECH CLAIMANT

AND

PUBLIC FINANCE MANAGEMENT REFORM 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The Claimant filed her Statement of Claim, through her previous Advocates, Ngeresa & Okallo Associates.
2. The Statement was dated 10th February 2021.
3. She stated that she was employed by the 1st Respondent, a Government Agency, as a Customer Care Assistant, in May 2010.
4. She was summarily dismissed in December 2019.
5. She claimed that dismissal was unlawful and unfair, and prayed for compensation and a raft of terminal benefits, against the 3 Government Agencies.
6. The Respondents entered appearance, and were represented by the 3rd Respondent.
7. The Claim came up for mention, for the first since it was filed, on 4th October 2022. Ms. Ngeresa appeared for the Claimant, while Principal Litigation Counsel, Christine Oyugi, appeared for the Respondents.



8. The Court was informed by the Advocate for the Claimant that: -
“The Claimant has withdrawn the Claim. We filed Notice of Withdrawal on 28th June 2022. We seek withdrawal, no order on the costs.”
9. The Respondents’ Advocate replied: -
“That is so.”
10. The Court granted the following order: -
“The Claim is marked as withdrawn, in accordance with the Notice of Withdrawal, filed on 28th June 2022.”
11. The Claimant filed an Application dated 21st February 2024. She seeks reinstatement of her Claim.
12. She instructed a new Law Firm, Nyandwat Odundo & Company to represent her. The Advocates filed a Notice of Appointment of Advocates, dated 4th April 2024.
13. The Application is founded on the Affidavit of the Claimant, sworn on 21st February 2024.
14. She explains that she did not instruct her previous Advocates, to withdraw her Claim. She was having financial challenges, and could not raise the legal fees demanded from her, by her previous Advocates.
15. She instructed her Advocates, that they were at liberty to cease acting for her. Instead of applying for leave to be discharged from representing her, her previous Advocates filed the Notice of Withdrawal of the Claim.
16. This was contrary to her instructions. She states that she is interested in pursuing her Claim to its logical end.
17. She also prays for leave to amend her Claim which was withdrawn, on the ground that the monetary reliefs sought, had not been specified.
18. It was agreed by the Parties that the Application is considered and determined, on the strength of Written Submissions.
19. The Parties confirmed filing and exchange of Submissions, at the last mention before the Court, on 9th July 2024.
20. The Claimant underscores that withdrawal of her Claim by her previous Advocates, was without her instructions.
21. She was for a long time secluded at her rural home in Kitale, due to Covid-19 pandemic. She is unemployed, and had no finances to pay her Advocates. She intended to prosecute the Claim in person, and was surprised when she enquired about the status of the Claim from the Court, to be informed that it had been withdrawn.
22. She submits that no person should be driven away from the seat of justice, without an opportunity to be heard on merit, regardless of her Advocates’ mistake. She relies on Court of Appeal decision, Martha Wangari Karua v. Independent Electoral & Boundaries Commission & 3 Others [2018] e-KLR, in making this submission.



23. The Claimant does not intend to obstruct or delay fair administration of justice. She is the one who has been unfairly driven away from the seat of justice.
24. She invokes the pronouncement of Madan J, in *Belinda Murai & Others v. Amos Wainaina*, as cited in *Rhoda Ndululu Sengete & Another v. Tabitha Kavenge Matolo* [2019] e-KLR, that: -
- “The door of justice is not closed because a mistake has been made by a Lawyer...”
25. She further relies on the Court of Appeal decision in *Philip Keipta Chemwolo & Another v. Augustine Kubende* [1986] e-KLR, holding that: -
- “Blunders will continue to be made from time to time, and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit...”
26. She submits that it is in the discretion of the Court to reinstate a Claim, to meet the ends of justice. In *John Nahashon Mwangi v. Kenya Finance Bank Limited [in liquidation]*, [2015] e-KLR, it was held that: -
- “the tests to apply in an application to reinstate a Claim, are whether there are reasonable grounds to reinstate, considering the prejudice that the Defendant would suffer, if reinstatement of the Claim was made, against the prejudice that the Claimant would suffer, if the Claim is not reinstated.”
27. The Respondents have not shown what prejudice they would incur, if the Claim is reinstated. The Claimant submits that she will not be able to file a fresh Claim, due to statutory limitation.
28. The Respondents submit that they filed a Replying Affidavit, which the Court however has not been able to trace in its physical file at the time of preparing this Ruling. The Attorney-General made an undertaking to upload its Replying Affidavit on the CTS platform on 4th April 2024. There was no confirmation subsequently from the Attorney-General on uploading of the Replying Affidavit or placement of the Affidavit in the physical file. The Parties however did confirm filing their Submissions.
29. The Respondents submit that the Application is an abuse of the process of the Court. A duly instructed Advocate, has an implied general authority to compromise and settle the action, and a client cannot avail themselves of any limitation of the Advocate’s authority, unless such limitation was brought to the attention of the other side.
30. Withdrawal of Claims is done under Order 25 of the Civil Procedure Rules, and does not permit for rescinding or revocation of Notices of Withdrawal. The Order has been the subject of interpretation at various judicial platforms, as shown below.
31. In *Joseph Kipng’etich Korir v. Litein Tea Factory Company Limited & 2 Others* [2018] e-KLR, it was held that: -
- “(a) A consent order entered into by Counsel is binding on all Parties to the proceedings, and cannot be set aside, unless it is proved that it was obtained by fraud, or collusion, or by agreement contrary to policy of the Court, or where it was given without sufficient material facts or in misapprehension or ignorance of such facts in general, for a reason which would enable the Court to set aside an agreement;



- (b) 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 of his Advocate, unless such limitation was brought to the notice of the other side;
 - (c) An Advocate has general authority to compromise on behalf of his client, as long as he acting bona fide, and not contrary to the express negative direction. In the absence of any express negative direction, the order shall be binding.”
32. It is submitted for the Respondents, that the above principles were restated in Priscilla Nyambura Njue v. Geovhem Middle East Limited; Kenya Bureau of Standards [Interested Party] [2021] e-KLR.
 33. The Claimant has not provided any evidence, to establish that her previous Advocates, acted without authority. She has not shown that she had expressly limited her Advocates’ authority. Withdrawal of the Claim was done properly, in accordance with the law.
 34. It is submitted that in Priscilla Nyambura Njue [supra], the Court held further, that withdrawal of the Claim is itself, its end. No right is conferred on the Claimant by the law, to revoke or rescind withdrawal. Withdrawal is complete or effective as soon as it takes place. The right to revoke withdrawal can only be allowed through legislation, not by the Courts.
 35. The Respondents submit, citing George Mwangi Kinuthia v The Attorney-General [2019] e-KLR, that a Party who has withdrawn her case, has the option of instituting a fresh Claim, but cannot revive the withdrawn Claim.
 36. They draw the attention of the Court to a legal text by Stuart Sime, ‘A Practical Approach to Civil Procedure’ 9th Edition, which restates the case law cited by the Respondents above, that: -
 - “Notice of discontinuance takes effect and brings the proceedings to an end as against each defendant, on the date it is served upon the defendant...”
 37. The Respondents submit that the Application is in abuse of the process of the Court. Citing Muchanga Investments Limited v. Safaris Unlimited [Africa] Limited & 2 Others [2009] KLR, they submit that abuse of the process of the Court denotes a situation where a Party uses the judicial process to the irritation and annoyance of her opponent, and the efficient and effective administration of justice. It is a term applied to proceedings which are wanting in bona fides and which are frivolous, vexatious or oppressive.
 38. The Claimant has recourse at the Advocates Complaints Commission, under section 60, of the *Advocates Act*. She ought to present her complaint against her previous Advocates there, instead of seeking revival of the Claim.
 39. Lastly, it is admitted for the Respondents that the Claimant has waited for 1 year and 9 months, to bring her Application, which is an inordinate delay.

The Court Finds: -

40. The Court notes that the Application is brought under the E&LRC [Procedure] Rules 2016, and all other enabling provisions of the law.
41. The Respondents mainly base their objection to the Application, on Order 25 Rules 1 & 2 of the Civil Procedure Rules, as interpreted by the Civil Courts.



42. No much was said about the E&LRC [Procedure] Rules 2016 [currently 2024], by the respective Parties, on the subject of withdrawal and reinstatement of Claims.
43. There is a tendency among Litigants and Legal Practitioners before the E&LRC, to presume that the [Civil Procedure Act](#), is wholly applicable to the proceedings of the E&LRC.
44. Section 1 [2] of the [Civil Procedure Act](#) defines the scope of its application. It applies to proceedings in the High Court, and subject to the Magistrate’s Court Act [Cap 10], to proceedings in the Subordinate Courts.
45. The E&LRC is a specialized jurisdiction, not a civil jurisdiction, regulated by its own set of Rules [2016, 2024]. The Civil Procedure Rules only apply as a default mechanism, such as on execution of decrees. Rule 32 [2] of the E&LRC [Procedure] Rules, 2016 for instance, stipulates that: -

“ Rules on execution of an order shall be enforceable in accordance with the Civil Procedure Rules.”
46. Withdrawal of the Claim was done through a Notice of Withdrawal of the Claim, dated 20th June 2022, and which Parties agree, was filed on 28th June 2022.
47. A Notice of Withdrawal is not necessarily a consent order. It is filed by the Party who initiated the proceedings sought to be withdrawn. Its adoption as an order of the Court, does not depend on the concurrence of the adversarial Party. The adversarial Party has the liberty to pursue such other orders, for instance on the costs of the Claim, once a Notice of Withdrawal has been endorsed by the Court.
48. In the dispute before the Court, the Notice of Withdrawal was recorded and adopted as an order of the Court, in the presence of Advocates for both Parties, on 4th October 2022. The Claimant’s Advocate made a proposal to withdraw the Claim, to which the Respondents’ Advocate did not oppose.
49. The Notice therefore, assumed the form of a consent order, as submitted by the Respondents.
50. Rule 19 [2] of the E&LRC [Procedure] Rules 2016, states that Parties may reach a consensus, at any time before Judgment is rendered.
51. Rule 19 [3] states that the Court shall record and adopt the consent, as its own Judgment or Ruling in that matter.
52. Rule 31 obligates the Registrar of the Court to draw, seal and issue orders or decrees of the Court. This includes orders and decrees reached after a contested hearing, or those that are entered into by the Parties, and adopted by the Court consensually.
53. Rule 33 allows the Court to review its orders and decrees, on any of the specified grounds, which include any other sufficient reasons. The power to review on other sufficient reasons, is an expression of the inherent power of the Court under Section 12 [3] [viii] of its constitutive Act, The Employment & Labour Relations Court Act, Cap 234B, of the Laws of Kenya, which states that, the Court may grant any other appropriate relief, as it may deem fit to grant.
54. It is not the position, anywhere in the E&LRC procedural regime, that once a consent order has been entered, withdrawing a Claim, it is the end of that Claim, and it cannot under any circumstances, be revived.
55. The issue is not whether withdrawal of a Claim is itself, its end, as proposed by the Respondents on authority of Pricilla Nyambura Njue; the issue ought to be whether the recording and adoption of a Notice of Withdrawal, has the effect of rendering the Court functus officio. There are various ways



proceedings are brought to a close, and unless it can be shown that the Court has dealt with the matter to the end of its jurisdictional limit, unless it is shown that the mandate of the Court has expired, reopening of a Claim, cannot be beyond the powers of the Court.

56. In both specialized and civil jurisdictions, the Courts are clothed with wide powers of review of all their orders and decrees. The importance of this power of review was underscored by the Supreme Court of India, in *P.N. Eswara Iyer & Others v. Registrar*, Supreme Court of India [1980] 2 S.C.R stating: -
- “The substantive power of review and the procedure for its exercise, are essential for any judicial system, if unwitting injustice is to be obviated, to the extent pragmatically possible... such is the high-minded tolerance with which this Court re-examines its own orders, to eliminate the happenstance of injustice, unhampered by judicial hubris.”
57. The Respondents submit that order 25 of the Civil Procedure Rules, [assuming the Order can be applied to the proceedings herein], does not allow for rescinding or revocation of Notices of Withdrawal of Claims.
58. The Indian Supreme Court, in *Jet Ply Wood Limited & Another v. Madhukar Nowlakha & Others* [ALL SC 2006], stated that in the absence of a specific provision, in the Indian Code of Civil Procedure, providing for application for recalling of an order permitting withdrawal of a Claim, the Courts can resort to their inherent powers, in the interest of justice.
59. The submission by the Respondents that recall of Notices of Withdrawal of Claims should be legislated, rather than dealt with by the Courts invoking their inherent powers, was dealt with by the Indian Supreme Court, in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*, AIR [1962] SC 527. The Court observed that it is well-settled, that provisions of the Civil Procedure Code are not exhaustive for the simple reason, that Legislature is incapable of contemplating all procedural challenges, which may arise in future litigation. The Courts are therefore allowed to exercise their inherent powers, in allowing Parties who have withdrawn their Claims, to recall Notices of Withdrawal.
60. This principle upholds substantive justice, and has constitutional anchorage under Article 159 [2] [d] of our Constitution, which demands that justice shall be administered, without undue regard to procedural technicalities.
61. It cannot be the intention of the law, that Notices of Withdrawal of Claims, once filed, are cast in bronze, and not recallable as the Respondents appear to submit, relying on the case of *Priscilla Nyambura Njue* cited above.
62. The Court adopts the dicta of Madan J, in *Belinda Murai & Others* [supra], that the door of justice is not closed, because a mistake has been made by a Lawyer. This dicta, is amplified in *Martha Wangari Karua v. Independent Electoral & Boundaries Commission & 3 Others* [2018] e-KLR, and in the comparative jurisprudence from the Indian Supreme Court [see *P.N. Eswara Iyer & Others*], where the Court underlined the need for Courts to re-examine their own orders, to obviate unwitting injustice.
63. Admittedly, there is no specific Rule under the E&LRC procedural regime, or Order 25 of the Civil Procedure Rules, which expressly allows recall of Notices of Withdrawal of Claims.
64. The Court is however not limited, in exercising its inherent power, and to recall Notices of Withdrawal of Claims, whenever it is persuaded that there is sufficient reason, and it is in the interest of justice, to do so.



65. The Claimant explained that she had instructed her previous Advocates to apply for leave to cease acting for her, because she was not able to raise their legal fees. They instead applied for withdrawal of the Claim without her instructions.
66. This explanation has not been seriously contested or dislodged by the Respondents. The Claimant was not present in Court, when the order for withdrawal was recorded.
67. There is no Affidavit from her previous Advocates contradicting her, and affirming that they had instructions to withdraw the Claim.
68. The decisions cited by the Respondents on the apparent authority of Advocates to compromise their clients' cases, all uniformly make it clear that authority is only apparent, and that compromise must be done in good faith. In Priscilla Nyambura Njue, the Court emphasized that an Advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide. These decisions may be read alongside Mbugua v. Mbugua & 5 Others [2022] KEHC 1192 [KLR]. It must be emphasized that, the authority of an Advocate to act and compromise the Client's position, is apparent, and must be shown to have been exercised in good faith.
69. The Advocates for the Claimant were not shown to have acted bona fide, in presenting the Notice of Withdrawal of the Claim. There is a serious, and unanswered allegation by the Claimant, that she instructed her Advocates to cease acting, not withdraw her Claim. Her Advocates either did not understand her instructions, or deliberately opted to act contrary to instructions. The scope of their instructions is not clear, in the absence of their Affidavit explaining the circumstances of withdrawal. There is no evidence of bona fide exercise of apparent authority, by the Claimant's previous Advocates, for the submission by the Respondents, that her Advocates were fully seized of her instructions and authorized to act, to hold.
70. The proposal by the Respondents, that the Claimant has the option of instituting a fresh Claim, following the principle in George Mwangi Kinuthia v. The Attorney-General, is not legally sound. The Claimant correctly submits, that such a Claim would be time-barred under Section 90 of the *Employment Act*, which sets a time-limit of 3 years, on filing an employment dispute, from the date the cause of action arose. Her withdrawn Claim shows that she was summarily dismissed by the 1st Respondent, about 5 years ago, in December 2019. A fresh Claim would be dead on arrival. The Claimant would forever be barred, from accessing the throne of justice.
71. From the perspective of the constitutional right of access to justice, under Article 48 of *the Constitution*, it would be wrong for the Court to impose on a lady who is unemployed, and who disagreed with her previous Advocates on account of her inability to raise their legal fees, the burden of fresh filing fees. The Respondents had entered appearance and filed witness statement. It is not clear from the record, whether they had filed a Statement of Response. Parties must be facilitated by the Court in accessing a cost effective justice.
72. It is open to the Claimant to approach the Advocates Complaints Commission as suggested by the Respondents. But would this address the substantive dispute concerning the Claimant's employment and termination of her service by the 1st Respondent? It seems to the Court that the avenue proposed by the Respondents, would only address her dispute with her previous Advocates, while letting the substantive dispute she has with the Respondents, die a very unnatural death.
73. Although the Claimant took 1 year and 9 months before filing her Application, she has given an acceptable explanation for delay. She had retreated to her rural home in Kitale; she is unemployed; and was hampered by lack of finances in prosecuting her Claim. She does not appear to have been



in communication with her previous Advocates, and she was not advised that the Claim had been withdrawn. She only learnt of withdrawal from the Court, when she asked about the status of her Claim.

74. The Court is satisfied that there is sufficient reason established by the Claimant, to review and set aside the order recorded and adopted by the Court, on 4th October 2022, withdrawing the Claim.
75. The second limb to the Application should not have been made simultaneous with the Application for reinstatement of the Claim. A Party must first have a live Claim, before asking the Court to be allowed to amend that Claim.
76. There is no merit in the submission made by the Respondents that the Application, is in abuse of the Court process. The Claimant has not moved the Court, to irritate or annoy the Respondents, and her Application, can hardly be said to be frivolous, vexatious or oppressive.

IT IS ORDERED: -

- a. The order made on 4th October 2022, withdrawing the Claim, is reviewed and set aside, and the Claim is hereby reinstated.
- b. The prayer for amendment of the Claim is struck out, with leave to the Claimant to renew the Application for amendment.
- c. Costs in the cause.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, THIS 13TH DAY OF SEPTEMBER 2024.

JAMES RIKA

JUDGE

