Kenya Ports Authority Pension Scheme v Ogando & another (Civil Appeal E234 of 2024) [2025] KECA 1699 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1699 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E234 OF 2024

SG KAIRU & AK MURGOR, JJA

OCTOBER 24, 2025

BETWEEN

KENYA PORTS AUTHORITY PENSION SCHEME ..... APPELLANT

AND

JAMES OLUOCH OGANDO ..... 1ST RESPONDENT

KENYA PORTS AUTHORITY ..... 2ND RESPONDENT

(An appeal from the Ruling and Order of the Environment & Land Court at Mombasa (L. L. Naikuni J.) dated 15th October 2024 in Mombasa ELC J No. EO73 0F 2021)

JUDGMENT

1. The Appellant Scheme is a pension scheme registered under the *Retirement Benefits Act* 1997 established to collect contributions from members, invest for gain and payment of pensions to members of the Scheme upon their retirement, while the 2nd Respondent, the Kenya Ports Authority is a parastatal registered under the *Kenya Ports Authority Act* (Cap 391) and the sponsor of the Appellant Scheme.

2. This appeal arises from the Ruling of the trial Judge dated 15th October 2024 in respect of two applications brought by the 1st Respondent James Oluoch Ogando, a member of the Appellant, Kenya Ports Authority Pension Scheme being,

    i. a Notice of motion dated 12th June 2024 in respect of an application to set aside a Consent dated 20th May 2024 and ii) a Notice of motion dated 18th June 2024 where the 1st Respondent sought to have the trustees of the Appellant's Scheme cited for contempt.

3. As a brief background, the 1st Respondent filed a Plaint dated 20th April 2021 before the Environment and Land Court seeking the following orders:

1. That the Scheme cancels Tender No. KPAPS/DISP/ 001 /2021.

2. That the Appellant be directed to give vacant possession of all properties, which belong to the Scheme but which are still in their possession and control.

3. The land registry be directed not to facilitate any transfer of the properties in the Tender Notice and or including those which have issues with the land registry.

4. The cost of this suit be provided.

4. Together with the Plaint, the 1st Respondent filed an application seeking for orders that pending the hearing and determination of the suit, a temporary injunction be issued by the court restraining the Appellant Scheme, their servants and or agents from processing Tender No. KPAPS/DISP/001/2021 of March 2021. This application was declined by the trial court and the Appellant Scheme proceeded to advertise a fresh tender being Tender No. KPAPS/DISP/003/2022. Various other applications were filed by the 1st Respondent to stop subsequent tenders for disposal of the Appellant Scheme's assets, but without success as they were dismissed by the trial court.

5. Sometime in April 2024, the Appellant Scheme went on to advertise Tender No. KPAPS/DISP/002/2024 (the "2024 tender"). By this time the 1st Respondent had filed an amended Plaint dated 25th September 2023 to include a prayer for an order directing the Appellant Scheme to pay the Scheme members Kshs. 14 billion as rent accruing from 2002 until the date of filing together with interest at court rates. Thereafter, the 1st Respondent filed another Notice of motion dated 6th May 2024 seeking to restrain the processing of the 2024 tender and this time, he obtained exparte orders on 7th May 2024 restraining the sale of the Appellant Scheme's properties.

6. When the application came up for hearing before the trial Judge on 27th June 2024, Mr. Kongere, learned counsel for the Appellant Scheme informed the court that the Appellant Scheme and the 1st Respondent had negotiated and signed a Consent dated 20th May 2024 (the Consent). Counsel prayed that the Consent be adopted as an order of the court.

7. The Consent specified that:

> "Whereas the Plaintiff, Mr. James Oluoch Ogando, and the 1st Defendant have mutually consented to the following stipulations with respect to the ongoing proceedings in this case:
>
> 1. The parties have concurred that the case initiated by Mr. James Oluoch Ogando shall proceed in accordance with the substantive reliefs sought in the amended plaint,
>
> 2. The parties acknowledge that the financial condition of the K.P.A Pension Scheme is critically compromised, posing a significant risk of its inability to disburse pension payments to its beneficiaries, including the Plaintiff.
>
> 3. The parties have resolved to undertake immediate measures to avert this impending financial crisis.
>
> 4. It is mutually agreed by the parties that the investment returns currently generated by the pension scheme are insufficient to sustain the payment of pension benefits, necessitating the liquidation of certain assets.
>
> 5. In light of the aforementioned reasons, the parties have agreed that the properties listed under Tender No. KPAPS/DISP/002/2024, which are the

subject matter of the Plaintiff's application dated 6th May 2024, shall be disposed of as advertised by the Scheme.

6. The parties have consented that the pending contempt application dated 17th August 2023, shall proceed as currently framed and await the court's ruling scheduled for 27thMay, 2024.

7. The parties have agreed that each party shall bear its own costs regarding the application dated 6th May, 2024, filed by the Plaintiff."

8. On that day, the trial Judge observed that though the 1st Respondent who was acting in person had signed the Consent, he was absent and as a result, the court ordered that the matter be mentioned for adoption of the Consent on 28th May 2024. However, a consideration of the record of appeal and supplementary record as presented to us does not disclose any record of the proceedings of 28th May 2024, or whether the Consent was adopted.

9. Subsequently, at the hearing of 10th June 2024, the 1st Respondent informed the court that he was not agreeable to the terms of the Consent and applied to have it expunged from the record.

10. By way of the Notice of motion dated 12th June 2024 the 1st Respondent sought to have the Consent set aside. In the application, the 1st Respondent contended that on 16th May 2024, he met the Managing Director of Kenya Ports Authority to discuss the Appellant Scheme's problems with a view to solving them. It was agreed that he meet the trustees and internal lawyers of the Appellant Scheme to discuss the possibility of referring the court cases and the suits to Court Annexed Mediation which, would resolve the dispute in a matter of weeks, rather than months or years; that the meeting took place at Sapphire Hotel, Mombasa on 18th May 2024 where a consent was drawn on the advice of the Appellant Scheme's lawyers; that later he found that he had been misled at the meeting; that while being treated to a heavy lunch by the Appellant Scheme's trustees, some of his fellow pensioners fell asleep during the afternoon session. The lawyers of the Appellant Scheme's trustees drafted the Consent which he was given to sign, but declined as he was about to fall asleep. Instead, he took the Consent to his home where he made some amendments for incorporation into the draft consent which he later e-mailed to Appellant Scheme's Administrator.

11. He claimed that on 20th May 2024, the Appellant' Scheme's Administrator brought the final Consent to his house at night to sign; that the print size was small and he could hardly read it, given the poor vision in one eye; that in good faith he appended his signature to the Consent.

12. Thereafter, the 1st Respondent filed the Notice of motion dated 18th June 2024 seeking to cite the Appellant Scheme's trustees for contempt of court for processing the Tender for 2024, notwithstanding the court's order of 7th May 2024. The application was brought under Order 40 rules 3(1), 3(2), 3(3) and 4 of the Civil Procedure Rules and Section 5 of the *Judicature Act*, Section 1B, 3 and 3A of the *Civil Procedure Act*. In the application, the 1st Respondent sought for orders that:

"b. That this Honourable Court make a finding that the following trustees of the 1st Defendant are in contempt of its Orders made on 7th May 2024:

1. Mr Justus Nyarandi

2. Mr. Ferdinand K. Malumbo 3.Mrs. Violet Mugambi 4.Mrs. Susan Leli

5. Ms. Catherine Wangari 6.Mr. Francis Tsuma

7. Mr. Emmanuel Kibet 8.Ms. Caroline Njoki Maina 9.Mr. David Bonyi

10. Mr Vincent Oweya – Scheme Secretary 11.Mr. Bernard Kibet – Scheme Administrator

c. That having made a finding that the trustees named at paragraph 2.1 and

2. 11 above have breached the order of the Court, this Honourable Court be pleased to summon the same trustees to appear before it in person and physically to show cause why they should not be detained in prison for breaching its Orders mentioned in paragraph 2 Supra.

c. That since this is the second time the 1st defendant has breached the Order of this Honourable Court, the Land registrar at Mombasa be inhibited from registering any transfer of all Pension Scheme properties to any third party until this Application is heard and determined...

..."

13. The application was premised on the affidavit of support sworn by the 1st Respondent, where it was contended that on 7th May 2024, the trial court issued interim injunctive order restraining the Appellant Scheme from processing tender for sale of properties which belonged to its members of which it had floated through the Daily Nation Newspapers of 26th April 2024; that on 7th June 2024, the Appellant Scheme publicly opened the tenders and allowed public participation, which was a breach of the court order and therefore the Appellant Scheme's trustees should be punished accordingly.

14. In a reply sworn on 19th July 2024 by the Legal Officer and Acting Scheme Secretary, for the Appellant Scheme, Vincent Oweya it was deponed that it was upon relying on the signed Consent that the Appellant Scheme processed the 2024 tender and issued awards to third parties; that if the Consent was to be set aside, it would be impossible for the Appellant Scheme to reverse the awards, and in any event, the 1st Respondent's application for injunction restraining the sales was since overtaken by the parties' binding Consent, notwithstanding it had yet to be adopted as an order of the court.

15. The trial Judge upon considering both applications to set aside the Consent and the contempt applications in a Ruling, held:

a. That the Notice of Motion application dated 12th June, 2024 be and is hereby found to have merit and the same is allowed.

b. That the Notice of Motion application dated 18th June, 2024 be and is hereby partially found to have merit and is hereby allowed only in regards to prayer 4.

c. That this Honourable Court hereby sets aside the duly executed Consent order terms and conditions stipulated thereof and dated 7th May 2024 for being presented to court in the absence of Plaintiff/Applicant.

d. That this Honourable Court do and hereby under the provision of Section 68 (1), (2) & (3) of the *Land Registration Act*, No. 3 of 2012 and Regulation 79 (1), (2) & (3) of the Land Registration (General) Regulations, 2017 directing the Land Registrar, Mombasa to forthwith

register an Inhibition against any transfer and/or any dealing pertaining to and connected with all Pension Scheme properties to any third party until this suit is heard and finally determined.

e. That for expediency sake the matter to be heard on 3rd March, 2025. There be a mention on 13th November, 2024 for Pre – Trial Conference pursuant to the provisions of Order 11 of the Civil Procedure Rules, 2010.

f. That there shall be no orders as to costs.

16. Aggrieved by the Ruling, the Appellant Scheme has filed this appeal on the grounds that the learned Judge was in error in failing to find that by virtue of Sections 46 and 48 of the *Retirement Benefits Act* No. 3 of 1997, the Environment and Land Court lacked jurisdiction to entertain the claim as contained in the amended Plaint dated 25th September 2023, or at all; that given the finding by this Court in Mombasa Court of Appeal Civil Appeal No. 50 of 2020; Trustees of KPA Pension Scheme vs Bwana Mohamed Bwana; that the learned Judge was in error in continuing to entertain the claim; in finding that there was a basis for setting aside the written and signed Consent dated 20th May 2024 merely because the 1st Respondent was not present in court for its adoption; that having dismissed the application for contempt, the learned judge was in error in granting an order of inhibition which was entirely dependent and consequential on a finding that the Appellant Scheme was in contempt; in granting the order of inhibition without affording the parties a reasonable opportunity to be heard on the issue; in granting an order of inhibition when the amended Plaint did not seek any relief relating to any specific property owned by the Appellant Scheme; in granting a blanket order of inhibition when Section 68 of the *Land Registration Act* required the order of inhibition to be specific to the property to which it was directed; in the exercise of discretion injudiciously particularly without considering the ramifications that the order of inhibition would have on the viability of the Appellant Scheme.

17. Equally aggrieved, the 1st Respondent filed a notice of cross appeal on grounds that; that in his ruling, the learned Judge was in error in stating at paragraph 86 that in a contempt application the 1st Respondent must prove beyond reasonable doubt that the contemnors are in contempt of the order of the court; that in paragraph 74 the Judge correctly identified the 4 elements which an applicant must prove in a contempt application which are that the contemnors have breached the order of the court; that in paragraph 78 the trial Judge confirmed that the 1st Respondent had provided the requisite proof and at the same time was in error by concluding that the 1st Respondent failed to prove his case for contempt; that the one and only reason the Appellant Scheme gave for not complying with the order of the trial court is that there was a signed Consent dated 20th May 2024 which was yet to be filed, recorded and adopted as an order of the court. The Consent was placed before the trial Judge by the Appellant Scheme on 27th May 2024 during an unscheduled hearing of which the 1st Respondent was unaware; that the trial Judge declined to hear the application in the absence of the 1st Respondent whereafter, the trial Judge set it aside; that the trial Judge was in error in concluding that the claim by the 1ST Respondent for breach of the court order has no merit; that the Judge was in error in failing to appreciate that the Appellant Scheme was in breach of the court order of 7th May 2024 when they processed the tender and issued awards, the very act that the order in question restrained them from doing, which order was not set aside or varied; that in setting aside the Consent dated 20th May 2024 the trial Judge failed to appreciate that this decision meant that the Appellant Scheme was left without a defense for breach of the court order. The 1st Respondent prayed: that the decision of the Environment and Land Court on the 1st Respondent's contempt application dated 18th June 2024 be reversed and the court be directed to summon the contemnors to appear before it to show cause why they should not be detained in prison for disobeying the court order of 7th May 2024 in accordance with Order 40 Rule 3 of the Civil Procedure Rules 2010; that this Court uphold the decision of the Environment

and Land Court in respect of the 1st Respondent's application dated 12th June 2024, and that prayer 4 of the 1st Respondent's application dated 18th June 2024 be upheld.

18. In their written submissions, Mr. Kongere learned counsel for the Appellant Scheme submitted that the trial court had no jurisdiction to determine the suit; that the complaints made by the 1st Respondent must be presented to the Chief Executive Officer of the Retirement Benefits Authority in accordance with Section 46 of the *Retirement Benefits Act* and that the Environment and Land Court had persisted in hearing the case together with fresh applications since 2021 every time a tender is floated to dispose of the Appellant Scheme's assets, yet, such suits have been struck out on similar grounds.

19. Counsel further submitted that the learned Judge acceded to the request to set aside the Consent not because any known grounds were established, but because the Consent was adopted in the 1st Respondent's absence; that the Consent was to have been adopted on 27th May 2024, but the 1st Respondent was absent, and it was therefore not adopted; that the learned Judge failed to consider relevant factors and, on the whole, exercised his discretion injudiciously.

20. On his part the 1st Respondent who appeared in person submitted that the Consent is not a contract and was not binding on the parties until it is adopted by the court as its own order or judgment, and that the matter was comprehensively dealt with in the application dated 16th June 2024. The 1st Respondent further submitted that the Appellant Scheme trustees were in contempt, and that the trial Judge was in error in stating that he was not provided with evidence of contempt, and it was not demonstrated that the order was ambiguous or not well understood by the contemnors.

21. Having considered the grounds of appeal and the cross appeal as well as submissions by counsel and the authorities cited, this being a first appeal, the duty of this Court is to analyze and re-assess the evidence on record and reach its own conclusions.

22. In the case of Selle vs Associated Motor Boat Co., [1968] E. A. 123, it was expressed that:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

23. When the grounds of appeal and cross appeal are distilled, the issues arising for determination are:

    i) whether the learned Judge of the Environment and Land Court had jurisdiction to entertain the claim comprised in the amended Plaint;

    ii) whether the learned judge was in error in setting aside the Consent dated 20th May 2024;

    iii) whether the trial court ought to have allowed the 1st Respondent's application for contempt;

    iv) whether the learned judge was in error in granting an order of inhibition which was entirely dependent on a finding that the Appellant Scheme trustees were in contempt, and in granting an inhibition yet the amended Plaint dated 25th September 2023 did not seek such relief.

24. In addressing the question of jurisdiction raised, the Appellant Scheme has challenged the jurisdiction of the trial court for the reason that by virtue of Sections 46 and 48 of the *Retirement Benefits Act*, the Environment and Land Court lacked jurisdiction to entertain the claim as set out in the amended Plaint. However, a consideration of the record does not disclose that the issue was raised at any time during the proceedings before the Environment and Land Court.

25. But having said that, in the case Floriculture International Ltd vs Central Kenya Ltd & 3 Others [1995] eKLR, this Court held that the issue of jurisdiction can be argued at any time. The Court held:

> " It has been held in the case of Kenindia Assurance Co. Ltd v Otiende (1989) 2 KAR 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction."

26. In the case of Kenya Ports Authority vs Modern Holdings [E.A] Limited [2017] eKLR, it was stated that:

> "We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised: ....at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard."

27. A court's jurisdiction is conferred either by *the Constitution* or other written law or both. Accordingly, a court of law cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. In the Supreme Court decision case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others [2012] eKLR the Court addressed the question of jurisdiction thus:

> " A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."

28. A consideration of the amended Plaint shows that the 1st Respondent sought orders for the 2nd Respondent to remit to the Appellant Scheme Kshs. 14 billion being rental monies due to the Appellant Scheme since 2002, but which the 2nd Respondent continues to retain. It stated in relevant part:

> " 2. In 1999 the 2nd Defendant formed Kenya Ports Authority Pension Scheme (the 1st Defendant herein) and had it registered by Retirement Benefit Authority in the year 2002.
>
> 3. By direction given by the Retirement Benefit Authority the 2nd Defendant had to handover all the Properties it acquired from Kenya Cargo Handling Staff Pension Scheme plus some of its own properties to Kenya Ports Authority Pension Scheme to make this new Scheme viable as the Actuary discovered actuarial deficit of over 9 Nine Billion Kenya Shillings).

4. The 2nd Defendant agreed to handover the properties but did not comply and thus failed to give vacant possession to the 1st Defendant a voiceless institution for the reasons given supra and allowed its own employees (KPA employees) to continue occupying the properties whose owners (the Pension Scheme) they had not entered into any rental agreement.

...

7. Since rental income was intended to be a major source of income to the scheme. This means that the members have suffered heavy losses in terms of their accrued revenue and have never been paid their annual pensions increase and occasional provisions. Pensions review to cushion them against inflation since 1915.

8. The unremitted rent in my opinion is more than 14 billion shillings unless this money is remitted to wipe out the deficit not only life will be much more miserable to pensioners but the pension scheme is going to collapse resulting in early graves to the pensioners".

29. Section 46 of the *Retirement Benefits Act* sets out the framework for resolution of disputes relating to decisions made by managers, administrators, custodians or trustees of Retirement Benefits Schemes thus:

1. Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.

2. A copy of every request under this section shall be served on the manager, administrator, custodian or trustees of the scheme.

30. While Section 48 of the Act provides the mechanisms of appeal against any decision made by the Chief Executive Officer of the Retirement Benefits Regulatory Authority (RBA) pursuant to Section 46. It specifies that:

(1) Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.

(2) Where any dispute arises between any person and the Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed."

31. What becomes clear is that, the above provisions allow for members of the Appellant Scheme to have decisions made by the Scheme's management reviewed by the Chief Executive Officer, where such decisions are arrived at contrary to the Scheme's rules and regulations. A person dissatisfied with such decision can appeal to the Tribunal within 30 days of the decision having been rendered.

32. With the forgoing in mind, it emerges from the amended Plaint, that the matters for determination concern claims for outstanding rent of Kshs. 14 billion for Scheme properties that should have been transferred to the Appellant Scheme, but which properties continue to be held by the 2nd Respondent, and leased to other third parties. In our view, these are not issues that arise from decisions of the Chief

Executive Officer or the Appellant Scheme management, but are with respect to demands for rent which is an environment and land use matter the preserve of the Environment and Land Court, under Sections 3 and 13 and the *Land Registration Act*, and of which it is only the Environment and Land Court that has jurisdiction to determine. As a consequence, the question of the lack of jurisdiction of the Environment and Land Court does not arise given the circumstances of the case. This issue is devoid of merit.

33. The next issue is with respect to the impugned Consent and whether it was set aside. In this regard the trial Judge had this to say:

> This case will only benefit from the fact that the Plaintiff Applicant was not in court when the consent was being proposed for adoption as an order of the court. Given the forgoing, in order to sustain the spirit of fair hearing and natural justice under the provisions of Article 25(c) and 50 (1) and (2) of *the Constitution* of Kenya 2010, the Honourable Court will grant the prayer of the Plaintiff/ Applicant and defer the adoption of the consent order to allow the parties to reach a consensus on the consent or list the suit for hearing".

34. The law on setting aside of Consent orders is well settled. A Consent is a contract between the parties, which when adopted by the court as a judgment or order can only be vitiated, on limited grounds which include fraud, collusion, illegality, mistake, and where the agreement is contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. See Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd [1982] KLR P. 485.

35. While in the case of Flora Wasike vs Destimo Wamboko [1982 -1988] 1 KAR 625, Hancox JA (as he then was) held that:

> 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."

36. Further in the case of Hirani vs Kassam [1952], 19EACA 131, this Court cited with approval Seton on Judgments and Orders, 7th edition, Vol.1 p.124 thus:

> Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement."
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> See also Kuwinda Rurinja Co. Limited vs Kuwinda Holdings Limited & 13 others [2019] eKLR, Civil Appeal No. 8 of 2003.

37. In the case of Purcell vs F C Trigell Ltd [1970] 2 All ER 671, Winn LJ held:

> 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..."

38. When the above cited authorities are considered, what comes out clearly is that they are with reference to a consent that has been adopted as an order of the court. But in the instant case, the issue here turns on whether or not the impugned Consent was adopted as an order. According to the record, when the

Consent dated 20th May 2024 was presented in court on 27th May 2024, the trial Judge observed that though the 1st Respondent who was acting in person had signed the Consent, he was absent; that as a result the court ordered that the matter be mentioned for adoption of the Consent on 28th May 2024 to enable the 1st Respondent confirm the contents of the Consent prior to adoption. The proceedings for 28th May 2024 as presented to us in the Record of appeal and supplementary record appear to be missing, but the trial Judge's ruling is instructive. The Ruling stated on page 418 paragraph 64 that, "... the Honourable Court will grant the prayer of the Plaintiff/ Applicant and defer the adoption of the consent order to allow the parties to reach a consensus on the consent or list the suit for hearing." The reference to deferring the adoption of the Consent would infer that at no time was it adopted as an order of the court. The effect of this is that, though the Consent made between the parties remained a contract between them, the record is clear that the Consent was never adopted as an order by the court.

39. Having so found that the Consent was not adopted as an order of the court, the learned Judge went on to set aside "...the duly executed Consent order terms and conditions.... for being presented to court in the absence of Plaintiff/Applicant..." In effect, the learned Judge ordered that the parties' Consent be set aside. This would beg the question of whether the trial Judge rightly set aside the parties' Consent? As seen earlier, the Consent was a product of negotiations between the Appellant Scheme and the 1st Respondent. In the case of National Bank of Kenya Limited vs Pipe Plastic Samkolit (K) Limited [2002] 2 EA 503 [2011] eKLR at 507, this Court stated:

> A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved."
>
> See also Pius Kimaiyo Langat vs Co-operative Bank of Kenya Limited [2017] eKLR.

40. This means that the Consent as negotiated between the parties was a binding contract between them, and unless the contract was as a result of fraud, coercion or undue influence, of which should have been pleaded and proved, the court has no basis upon which to set it aside.

41. In his sworn affidavit, the 1st Respondent deponed that he participated in negotiations with the trustees of the Appellant Scheme, and was thereafter presented with a draft Consent which he did not immediately sign, but which he took home to review. He confirmed that he later signed the Consent. We have considered the facts as presented to us and can find no evidence that is demonstrative of fraud, coercion or undue influence leading up to the signing of the Consent. No evidence was led showing that the 1st Respondent was either fraudulently misled, or that he was coerced or unduly influenced into signing it. We find therefore that no basis was laid for setting aside of the parties' Consent by the trial court.

42. Having deferred adoption of the Consent, there was no order for the trial Judge to set aside. Equally, there was no justification for the Consent to be set aside. We find that in setting aside the Consent, the trial Judge failed to take into account matters he ought to have taken into account and had he done so, he would have concluded that no basis was established for setting it aside. As a consequence, we find it necessary to interfere with that decision, to reinstate the parties' Consent dated 20th May 2024.

43. This would then lead us into the motion for contempt of court. As seen above, the 1st Respondent sought for the Appellant Scheme trustees to be found in breach of the order of 7th May 2024 and for the court to summon them to appear in person and for them to physically show cause why they should not be detained in prison for breaching the court's orders; that the Appellant Scheme's trustees' conduct or actions defied or disrespected the authority of the court.

44. After discussing this issue at length, the trial Judge found that:

> "...since the 1st Defendant/Respondent acted under the impression, reasonably they added, that the consent opened the way to it to process the year 2024 tender, then a key ingredient necessary to be established in contempt applications was missing. The Learned Counsel submitted that here, the 1st Defendant/Respondent was faced with an order, made exparte, that had the potential of spelling doom on its very existence. Its first attempt at setting aside the order was by coming back to the court. The attempt did not generate much success."

45. In other words, though the Appellant Scheme was aware of the court order, it nevertheless proceeded to opened the 2024 tender albeit, upon reliance on the terms of the Consent.

46. Black's Law Dictionary, 9th Edition, defines 'contempt' as:

> The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

47. Differently put, contempt is conduct that impairs the fair and efficient administration of justice. Section 5 of the *Judicature Act* confers jurisdiction on the superior courts to punish for contempt.

48. It is settled that for a party to succeed in an application for contempt of a court order or decree at least four elements must be satisfied, which are that:

i) the terms of the order (or injunction or undertaking) are clear and unambiguous and are binding on the defendant;

ii) the defendant has knowledge of or proper notice of the terms of the order;

iii) the defendant has acted in breach of the order; and

iv) the defendant's conduct is willful and deliberate.

49. In this case it is not disputed that first, the terms of the order were clear and ambiguous, second, the Appellant Scheme had proper notice of the order, and third, the order was breached. In point of fact the Appellant Scheme largely admitted that it went ahead to progress the 2024 tender despite the existence of the court order, but did so on the strength of a consent. But given the peculiar circumstances of the case, the question that is crucial for determination at this juncture is whether the Appellant Scheme's actions were willful and deliberate so as to constitute a contempt of the court's order.

50. In the Supreme Court of India in Mahinderjit Singh Bitta vs Union of India & Others 1 A NO. 10 of 2010 (13th October, 2011):

> In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution.

51. The Supreme Court in the case of Republic vs Ahmad Abolfathi Mohammed & Another, Cr. App. No. 2 of 2018 emphasized that to commit for contempt of court, it must be proved that a person has willfully and deliberately violated a court order.

52. In addition, the Supreme Court of India held in Indian Airports Employees Union vs Ranjan Catterjee & Another [AIR 1999 SC 880: 1999 (2)] SCC:537, that in order to amount to "civil contempt" disobedience must be willful. If disobedience is based on the interpretation of court's order, notification and other relevant documents, it does not amount to willful disobedience.

53. In the instant case, the Appellant Scheme asserted that while the trustees were aware of the court orders, by virtue of the Consent entered by the parties, they proceeded to process the 2024 tender. It was their argument that, the parties' having duly signed the Consent agreement, notwithstanding that restraining orders were in place, and the Consent had yet to be adopted, their actions were prompted by the existence of a signed Consent and reliance on the agreed terms; that as a result, their actions were not willful or deliberate or intended to disregard the court order, but were supported by the mutual Consent of the parties, which would mean that the 1st Respondent did not prove the fourth element of willful disregard of the court order.

54. As concerns the fourth element, we begin by observing that the trial court did not address the question of whether or not there was willful disobedience of the court order. But the court nevertheless, reached a finding that contempt by the Appellant Scheme was not established. In this regard, the record shows that once the Consent was signed by the parties, the Appellant Scheme trustees acted on the terms and processed the 2024 tender. It was a specific term of the Consent that the properties listed under the 2024 tender, the subject matter of the 1st Respondent's application dated 6th May 2024, shall be disposed of as advertised by the Appellant Scheme. So that, notwithstanding the 1st Respondent's belated claim that the Consent was invalid, it is patently clear that the Appellant Scheme's actions were prompted solely by the contents of the mutually agreed Consent. As a consequence, their actions cannot be construed as willful disobedience of the court order, as to lead us to conclude that they were in contempt of the order. And since the presence of willful disobedience in the Appellant Scheme's actions was not proved, we find that contempt of court was not established, and the trial Judge cannot be faulted for so holding.

55. We would go further to add that, the Appellant Scheme's actions were pursuant to a valid Consent made between the parties. And in as much as we do not condone actions that seek to flout or disregard court orders, the attempt at settlement, in terms of Article 159 (2) (c) of *the Constitution* which provision enjoins courts to promote alternative dispute resolution, would militate against a finding of contempt in these circumstances. The parties having entered into the Consent in the hope of resolving the impasse between them, we consider that it would be unjust, on the one hand to promote a negotiated settlement, and then turn around and sanction a party for adhering to the terms agreed upon between them, merely because the Consent was not adopted as an order of the court. For the forestated reasons, this ground fails.

56. Finally, we turn to the question whether the trial Judge rightly granted the inhibition orders. In the application for contempt, the 1st Respondent sought the following order at prayer 4 (which was specified as prayer 'd');

> THAT, since this is the second time the 1st Defendant has breached the Order of this Honourable Court, the Land Registrar at Mombasa be inhibited from registering any transfer of all Pension Scheme properties to any third party until this Application is heard and determined."

57. However, in the Ruling, the trial Judge held as follows:

> I find that it would be in the interest of justice to order an inhibition restricting the registration or any disposition of the suit property until the suit is heard and determined. Therefore, I hold that the application is allowed with regard to prayer 4 of the notice of motion application."

58. It is trite that parties are bound by their pleadings. The Malawi Supreme Court of Appeal in the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 where the author stated:

59. As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice..." (emphasis ours)

60. An interrogation of the prayer No. 'd' discloses that for all intents and purposes the 1st Respondent sought ex-parte prayers for an inhibition against disposal of the properties pending hearing and determination of the application, and not for the pendency of the suit as held by the trial Judge. Therefore, we find that the trial Judge was wrong to grant an order, that was not sought by the 1st Respondent. Furthermore, given that the order prayed was in respect of the pending application, it goes without saying that the order having lapsed upon delivery of the Ruling, the effect was that the inhibition order was overtaken.

61. In sum, the appeal is allowed and succeeds in substantial part. The cross appeal is lacking in merit and is accordingly dismissed.

62. And we make the following orders:

1. The Environment and Land Court has jurisdiction to determine Mombasa ELC J No: EO73 0F 2021.

2. The Ruling and order of the Environment and Land Court dated 15th October 2024 in respect of the Notice of Motion dated 12th June, 2024 be and is hereby set aside, and substituted with an order dismissing the motion.

3. In so far as the Ruling and order of the Environment and Land Court dated 15th October 2024 in respect of the Notice of Motion dated 12th June, 2024 sets aside the duly executed consent dated 7th May, 2024, the order be and is hereby set aside.

4. The Ruling and order of the Environment and Land Court dated 15th October 2024 in respect of the Notice of Motion dated 18th June, 2024 be and is hereby upheld, save that the order of inhibition against any transfer and/or any dealing pertaining to and connected with the

Appellant Scheme's properties to any third party until this suit is heard and finally determined be and is hereby set aside.

5. Costs are awarded in favour of the Appellant Scheme.

63. The Judgment is signed under Rule 34(4) of the Court of Appeal Rules (2022), since the Hon. Mr. Justice F. Ochieng, JA ceased to hold office of Judge of Appeal upon death. As Hon. Mr. Justice S. Gatembu, Kairu, JA agrees, the above are the orders of the Court.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF OCTOBER, 2025.

S. GATEMBU KAIRU C.Arb, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR