Kenya Hotels & Allied Workers Union v Nyando Enterprises t/a Merry Land hotel & another (Cause E069 of 2024) [2026] KEELRC 630 (KLR) (3 March 2026) (Ruling)

Neutral citation: [2026] KEELRC 630 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E069 OF 2024

NZIOKI WA MAKAU, J

MARCH 3, 2026

BETWEEN

KENYA HOTELS & ALLIED WORKERS UNION ..... CLAIMANT

AND

NYANDO ENTERPRISES T/A MERRY LAND HOTEL ..... 1ST RESPONDENT

ERICK NYAMUNGA ..... 2ND RESPONDENT

RULING

1. By way of background, the Claimant filed this suit via an amended memorandum of claim dated 4th March 2025 on behalf of its Grievants, alleging noncompliance with clause 31 of the CBA, which resulted in salary arrears amounting to Kshs. 7,730,213/-. When the matter came up for hearing on 1st April 2025, Mr. Ng'ame for the Claimant indicated that he was ready to proceed with one witness. However, Counsel Lumumba, appearing for the Respondents, informed the Court that settlement discussions had been ongoing. He stated that the parties had largely agreed on the amount payable, with only the mode of payment remaining unresolved. He further expressed optimism that, if given time, the parties would finalise the remaining details and return with a consent. Mr. Ng'ame acknowledged that negotiations had indeed been ongoing and indicated that he was amenable to recording a consent, provided the Respondents demonstrated seriousness in resolving the matter. Having heard both parties, the Court granted them two weeks to negotiate and fixed the matter for mention on 6th May 2025 to record any partial settlement reached.

2. When the parties next appeared in court on 15th May 2025, they presented a consent, which was adopted as a judgment in the sum of Kshs. 4,638,128/- payable by the Respondents as follows:

    i. Kshs. 1,160,000/- on or before 15th July 2025;

    ii. Kshs. 1,160,000/- on or before 15th October 2025;

iii. Kshs. 1,160,000/- on or before 15th January 2026; and

iv. Kshs. 1,158,128/- on or before 15th April 2026

3. The consent also awarded costs to the Claimant and stipulated that, in the event of default on any instalment, the Claimant would be at liberty to execute for the entire decretal sum. As matters turned out, none of the instalments were paid. The Claimant therefore commenced execution, prompting the present application dated 7th December 2025.

The Application

4. In the application, the Respondents sought the following orders:

i. Spent

ii. That the law firm of Amondi and Company Advocates comes on record for the Respondents in place of the law firm of M/s Otieno Oyoo & Company Advocates.

iii. Spent

iv. Spent

v. That this Court be pleased to recall, review and set aside the consent judgment entered on 15th May 2025.

vi. That costs be provided for.

5. The application is supported by the grounds on its face and the Supporting Affidavit sworn by the 2nd Respondent. He deposes that the Respondents have formally instructed the firm of Amondi & Company Advocates to act on their behalf and annexes a board resolution dated 3rd December 2025. He contends that their former advocates, M/s Otieno Oyoo & Company Advocates, neither obtained a board resolution authorizing them to act nor sought instructions on how to respond to the suit, and in particular did not obtain authority to enter into the consent judgment. He further asserts that it would have been improbable for the Respondents to sanction such a consent in light of the financial difficulties they were experiencing following the effects of the COVID-19 pandemic. According to the deponent, the Respondents only discovered that the matter had been settled by consent when their new advocates perused the court file, which discovery, he contends, constitutes a new and important matter not previously within their knowledge despite due diligence. He further contends that the consent ought to be set aside on account of this error, which he says is compounded by the inadequacy of the defence filed by their former advocates, the same being confined to issues of misjoinder and the absence of a signed CBA. He notes that they have since annexed a draft defence raising more substantive issues. He adds that execution has already commenced and, unless halted, will occasion the Respondents substantial loss.

6. The Claimant opposes the application through a Replying Affidavit sworn by Mr. Erick Ng'ame. He deposes that the firm of Otieno Oyoo & Company Advocates was properly instructed and duly authorized to enter into the consent. He refers to a meeting held on 26th September 2024 at the chambers of Otieno Oyoo Advocates, attended by the 2nd Respondent, during which the claim for salary arrears was reduced from Kshs. 7,730,213/- to Kshs. 4,638,128/-, taking into account the economic effects of the COVID-19 pandemic. He further avers that the Respondents have exhibited a pattern of reneging on settlement agreements, citing their failure to honour a similar consent entered into on 5th February 2024 at the Ministry of Labour. In his view, the Respondents' conduct disentitles

them to the equitable relief sought, and he therefore urges the Court to dismiss the application with costs.

7. The firm of Otieno Oyoo & Company Advocates also filed a replying affidavit sworn by Mr. Patrick Lumumba Otieno Oyoo, the Respondents' former Counsel. This was somewhat unusual, given that he is not a party to the suit. Nevertheless, he deposes that he does not oppose the firm of M/s Amondi & Company Advocates taking over the matter, subject to payment of his fees of Kshs. 200,000/-. He states that the 2nd Respondent instructed him to act after confirming his directorship in the 1st Respondent. He further asserts that settlement negotiations were conducted with the instructions and in the presence of the 2nd Respondent, following which the 2nd Respondent instructed him to enter into the consent judgment. Counsel avers that after filing the consent, he notified the Respondents and emphasised the importance of paying the instalments on time. When the Respondents failed to honour the first instalment, he was notified by the Claimant and relayed that information to them. He also contends that the judgment was against the 1st Respondent only, and that the warrants of attachment had therefore been erroneously issued against both Respondents. The application was canvassed by way of written submissions.

Respondents' Submissions

8. The Respondents invited the court to determine the following issues:

    i. Whether the consent judgment and orders dated 15th May 2025 ought to be recalled, reviewed and set aside;

    ii. Whether the Respondents have demonstrated sufficient cause, discovery of new and important matter, mistake or error apparent on the face of the record, and/or misapprehension or ignorance of material facts; and

    iii. Who should bear costs of the application.

9. On the first issue, the Respondents submitted that the consent judgment was fundamentally defective and incapable of binding them in law, having been entered into without their instructions. They asserted that there was no board resolution from the 1st Respondent and that the consent was recorded without disclosure or consideration of material facts, thereby imposing a prejudicial and substantial financial burden on them. They contended that the consent met the threshold for setting aside as articulated in Hirani v Kassam (1952) 19 EACA 131, which, citing Flora Wasike v Wamboko (1982-88) 1 KAR 625, held that a consent may be varied where it is obtained by fraud, collusion, an agreement contrary to policy, or where it is entered into without sufficient material facts, in misapprehension or ignorance of such facts, or for any reason that would justify setting aside an agreement. On the second issue, the Respondents submitted that their realisation that the matter had been fully settled by consent constituted discovery of a new matter previously outside their knowledge. They asserted that critical facts going to the root of the dispute including operational losses arising from COVID-19 were not placed before the court prior to entry of judgment because they were not involved in the decision to compromise the suit. They therefore contended that this amounted to discovery of a new and important matter within the meaning of section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules, and Rule 33 of the Employment and Labour Relations Court Rules, 2016.

10. In further support of the application, the Respondents submitted that disposal of the suit without a hearing on the merits, particularly in the absence of their instructions to enter the consent, constituted an error apparent on the face of the record. They maintained that they were condemned unheard contrary to Article 50 of *the Constitution* and urged the court to allow the application in the public

interest, given the adverse consequences the closure of the 1st Respondent would have on its employees and the local community.

Claimant's Submissions

11. The Claimant submitted that the application is unmerited as the Respondents have not met the threshold for review set out in Rule 74 of the Employment and Labour Relations Court Rules, section 80 of the Civil Procedure Rules and Order 45 Rule 1 of the Civil Procedure Rules. It highlighted the fact that there was no denial that the 2nd Respondent took part in the negotiations leading up to the consent. It also drew attention to the Respondents' earlier refusal to honour the consent recorded at the Ministry of Labour, to support the contention that they had approached court with unclean hands. The Claimant further submitted that there had been no discovery of a new and important matter, mistake or error apparent on the face of the record, nor any misapprehension or ignorance of material facts, as the 2nd Respondent was fully aware of the events as they unfolded. To support this position, the Claimant cited Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd [1980] KEHC 11 (KLR), in which the court held:

> " The circumstances that a material fact within the knowledge of the client and his solicitor had not been communicated to counsel at the time when he gives his consent to an order in court, is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if counsel states that he would not have given his consent if he had known of the fact."

12. Consequently, the Claimant urged the court to dismiss the application with costs.

Disposition

13. The Court distils the issues for determination to be

    (i) whether the consent entered into between the parties can be vitiated on account of mistake, error or fraud and

    (ii) what are the consequential orders upon determination of issue (i).

14. The Respondents were employers of the Grievants represented by the Claimant Union herein. That is not disputed. The Respondents have asserted the firm of M/s Otieno Oyoo & Company Advocates was not properly instructed allegedly because there is no board resolution annexed. The 2nd Respondent is a director of the 1st Respondent and as such factor, agent or representative of the 1st Respondent, he was always aware of the matter. The Respondents participated in negotiations at the Labour Office and when they failed to act as directed, the Union moved the Court. After many appearances the parties agreed to settle. At no time did the 2nd Respondent indicate there were no instructions issued to the law firm of M/s Otieno Oyoo & Company Advocates who represented the 2 Respondents in court. From a careful reading of the matter, the Respondents are trying to be clever by a half. They want to have their cake and eat it too. Having dragged the matter out for all its worth, they now try to go to technicalities. Under the *Employment Act*, the employer is defined in section 2 as follows:-

> " employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

[Emphasis supplied]

15. The Respondents as employers did not need to have a board resolution to employ the Grievants. They did not need to have a board resolution to pay salaries. The sums claimed are salaries and it matters not that there was Covid 19. Liabilities fell due, negotiations were entered into and now attempting to be somewhat 'clever', the Respondents have discovered that *companies act* through board resolutions. If they were serious about the compliance with the *Companies Act*, they would have filed returns of the company as well as audited books of account to show the alleged effects of covid 19 on the company. The motion seeking to set aside the consent judgment is found to be so devoid of merit that it warrants dismissal with costs on the higher scale.

16. Application dismissed with costs to the Claimant. Costs on the higher scale.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF MARCH 2026

NZIOKI wa MAKAU, MCIArb.

JUDGE