

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**ELRC APPEAL NO. E168 OF 2021**

**MORARA APIEMI & NYANGITO ADVOCATES.....**  
**APPELLANT**

**VERSUS**

**WESLEY OMBAYE NYAMANYARA.....**  
**RESPONDENT**

**RULING**

The Respondent/Applicant filed a notice of motion application dated 26/2/2025 seeking an order in the following terms:-

- (a) Spent
- (b) That this court be pleased to vary and/or set aside the orders given on the 29/1/2025 marking this matter as settled and closed.
- (c) That this court be pleased to order the Appellant/Respondent to bear the costs incurred by the Respondent/Applicant in the appeal proceedings.
- (d) Costs of the application.

The application is premised on grounds 1 to 14 set out on the face of the application and buttressed in the supporting affidavit of the Applicant the nub of which is that the Appellant had no prior knowledge and did not consent to the application from the bar on 29/1/2025 by the Appellant to have the appeal marked as settled the same having been overtaken by

events. That both parties had filed submissions as at 29/1/2025 and the appeal was just pending judgment.

That the Applicant was not in court on 29/1/2025 and the move by the Appellant amounted to sharp practice.

That neither the Appellant's Advocates nor the Respondent's Advocates addressed the issue of costs. That the Applicant had incurred substantial costs in prosecuting the matter by the time the Appellant gave post-dated cheques to settle the decretal sum, upon being set upon by auctioneers who wanted to attach his goods.

That the counsel holding brief for the Applicant on 29/2025 was newly admitted to practice and had limited instruction which were only to confirm the filing of submissions on that mention date.

That despite the matter having been marked as settled the issue of costs remains unresolved that the court should review its orders made on 29/1/2025 and address the issue of costs thereof.

The Respondent filed a replying affidavit dated 16/7/2025 sworn to by Morara Apiemi in opposition to the application in which the Respondent asserts the principles of setting aside a consent by the parties stating that the matter was marked as settled by consent of the parties, the Applicant having been properly represented by counsel in court and no misrepresentation, deception, fraud or common mistake visited and issuance of the order to mark the suit as settled on 29/1/2025.

The Respondent further deposes that no grounds for review of the order of the court in terms of Rule 74 of the ELRC (Procedure Rules 2024), being discovery of a new and important matter or evidence which despite the exercise of due diligence was not within the knowledge of the Applicant or could not be produced by the Applicant at the time when the order was made.

That there is also no mistake or error apparent on the face of the record of the court to warrant the review sought by the application and the order does not require any clarification. That the application lack merit and it be dismissed with costs.

The Applicant filed further affidavit dated 5/8/2025 in which it traversed the deposition by the Respondent in the replying affidavit joined issues with the Respondent and put the Respondent to strict proof thereof.

### **DETERMINATION**

The parties filed written submissions which the court has carefully considered together with the deposition by the parties.

The court has further carefully perused the record of proceedings on 29/1/2025 in which Advocate Laban Kengere appeared for Ms. Faith Mutuku for Respondent and M/s. Acholla appeared for Mr. Nyasim for Appellant. Mr. Acholla for the Appellant told the court that the appeal has been overtaken by events and it be marked as settled. Mr. Laban on the other hand told the court that thus; *“I confirm that the matter has been settled.”*

Neither of the parties addressed the issue of costs. The court issued an order as follows”

**“Order**

***Matter is marked as settled and file closed.”***

Nothing would have been easier than the Advocate for the Applicant herein to inform the court that the issue as to payment of costs had not been settled and that the same be left to be agreed by the parties or the same be referred to taxation.

This record of the court speaks with clarity and does not require any explanation. There is no error apparent on the record of the order since the order is consistent with the verbal submissions from the bar by Advocates of the parties. The issue of costs is not a new matter but is ever present and in the knowledge of the parties from the filing of pleadings through the hearing and determination of the case. Accordingly, the threshold for review or setting aside an order of the court, let alone an order arrived at by consent of the parties has not been met by the Applicant.

There is no iota of evidence to show that the Advocate for the Applicant had no full instructions to have the matter marked as settled nor is there any evidence that the Advocate was misled and or deceived by the Advocate for the Respondent vide fraudulent mis-representations.

In the case of ***Silas Wanyonyi Mukhabi versus John Kitui Wanyonyi [2022] eKLR***, the High Court per Nyagaka J. held;

***“when a person/learned counsel accepts instructions to hold brief in a matter, the instructions should be full and not limited to an adjournment or the specific issue that he/she is to address the court on.”***

In the present matter the counsel for the Applicant spoke with full confidence and did not hesitate to say that this suit had been settled by the parties and it be marked as settled.

Accordingly, the application is misconceived and lacks merit and is dismissed with no order as to costs

Dated at Nairobi this **2<sup>nd</sup> day of March 2026**



**Mathews Nduma**

**JUDGE**

Dated, signed and delivered in open court at Nairobi this **11<sup>th</sup> day of March 2026**

**J.W KELI**

**JUDGE**

**In presence of:**

M/s. Achola for Appellant/Respondent

M/s. Mutuku for Respondent/Applicant  
Mr. Kemboi – Court Assistant

ORIGINAL