IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: G.B.M. KARIUKI, F. SICHALE & KANTAI JJA)

CIVIL APPEAL NO. NYERI 105 OF 2016

BETWEEN

FRANCIS KIMUTAI BII.....APPELLANT

AND

KAISUGU (KENYA) LTD.....…...RESPONDENT

(Being an appeal from the Ruling and Order of the Employment and Labour Relations Court of Kenya at Kericho (Marete, J.) dated 28th January, 2016)

in

E.LR.C NO. 25 OF 2015)

****

JUDGMENT OF THE COURT

This is an appeal against the decision of MARETE, J. delivered on 28th January, 2016.

A brief background to the appeal is that FRANCIS KIMUTAI BII, the appellant herein and the then claimant filed a statement of claim dated 5th February, 2015. KAISUGU (KENYA) LTD, the respondent herein was named as the then respondent. The appellant's complaint was that on 10th February, 2012 he was unlawfully terminated by the respondent, inspite of having been on the respondent's employment since 4th January, 2000 as a tea plucker. His prayers were that he be paid:-

> ***"(a) 3 months' salary in lieu of Notice.***
>
> ***(b) Unpaid leave allowance.***
>
> ***(c) Unpaid transport allowance,***
>
> ***(d) Gratuity,***
>
> ***(e) Unpaid education fund***

(f) Any further relief that this honourable court may deem fit and just to grant."

The respondent filed a response to the appellant's statement of claim. It averred that the applicant **"… was sufficiently notified…"** of the intention to be laid off vide a letter to the claimants Union Branch Secretary; that the claimant was not entitled to gratuity as the respondent paid his NSSF dues and further that the appellant was not entitled to leave allowance nor transport allowance as per the collective bargaining agreement as he was a "**seasonal**" employee. In a reply to the respondent's response, the appellant joined issue with the respondent's response.

On 30th June, 2015 and by consent of all the parties it was agreed that ELRC Cause No. 25 of 2015 be the test suit in respect of all causes from number 26 of 2015 to number 95 of 2015. The trial commenced in earnest on 23rd July, 2015 when the court recorded the evidence of FRANCIS KIMUTAI BII (COI) and MARY CHEPKORIR RUTO (CO2). On the following day (24th July, 2015) the evidence of HENRY CHERUIYOT (DW1) was recorded. Thereafter counsel on record agreed to file written submissions and a mention date of 17th September, 2015 was taken to ascertain compliance.

However, before the mention set for the 17th September, 2015, a consent dated 4th September, 2015 was signed by the respondent's then Human Resource Manager Mr. Henry Cheruiyot and the appellants counsel on record. On 8th September, 2015 the filed consent was adopted as the judgment of the court. It provided:-

"***By consent of both parties judgment be and is hereby entered for the claimant against the respondent as follows:-***

That claimant be awarded four month's salary at the rate of 8008/- totaling Ksh.32,032/-. That the claimant be given certificate of employment. That the respondent undertakes to update the claimants NSSF contribution up to 10/02/2012, that the costs of this cause be to the claimant to be agreed by the parties and/or taxed. That this judgment be replicated/adopted in Cause Nos. 26 to 95 all of 2015."

Pursuant to the consent, the respondent made two separate payments of Kshs 800,000/- each on 25th September 2015 and on 30th October, 2015. The above notwithstanding, on 1st December, 2015 the respondent filed a motion and sought the following orders:

"***a) Spent.***

b) That the firm of M/s E.M. Orina & Co. Advocates be granted leave to come on record in place of the firm of M/s Kiplenge & Kurgat Advocates.

c) That pending the hearing and determination of the present application this Honourable Court be pleased to order for a stay of execution of the judgment and decree arising from the consent order dated 4th September, 2015 and adopted as a judgment of the Court on 8th September, 2015 and all consequential orders.

d) That this Honourable Court be pleased to set aside the judgment and decree arising from the consent order dated 4th September, 2015 and adopted as a judgment of the court on 8th September, 2015 and all consequential orders herein do apply to the series in causes Nos. 26 of 2015 to 95 of 2015.

f) That costs of this application be provided for."

The motion was grounded *inter alia*, on the reasoning that the consent order dated 4th September, 2015 and adopted as judgment of the Court on 8th September, 2015 was "***defective***" as it was executed by a person who had no authority, and that it was irregularly and unlawfully entered on 28th January, 2016.

Marete, J. allowed the motion and ordered as follows:-

> "***i) That the judgment arising out of the consent dated 4th September, 2015 and adopted as a judgement of court on 8th September, 2015 and all decrees and orders arising thereof be and are hereby set aside***.
>
> ***ii) That the orders of court granted in this application do and hereby apply to causes Nos. 26 of 2015 all the way to 95 of 2015.***
>
> ***iii) That all actions and or inactions derived from the consent judgment be and are hereby declared null and void and terms of the consent judgment be and are hereby nullified.***
>
> ***vi) That a refund of all payments in respect of the consent judgment made by the respondent to the claimant be made by the claimant within fourteen (14) days of these orders of court.***
>
> ***v) That the costs of this application shall be borne by the claimant/respondent."***

The appellant was dissatisfied with the outcome, hence this appeal.

On 25th September, 2017 the appeal came before us for hearing. Mr. Meroka teaming up with Mr. Gichaba supported the appeal whilst Mr. Orina teaming up with Mr. Chelimo opposed the appeal. Apart from oral submissions, the appellant relied on his submissions filed on 5th July, 2017 and its list of authorities filed on 20th June, 2017. On its part the respondent relied on its submissions filed on 20th July, 2017 and its list of authorities filed on 27th July, 2017. In the submissions the appellant contended that the contents of the consent order are not disputed, the only issue is that the consent was signed by a person not authorized; that two installments of Ksh.800,000/- each had been made and further that the respondent's counsel had taken part in the taxation of the appellant's bill of costs. The appellant faulted the judgment of the trial judge in expunging the replying affidavit of ISAAC MEROKA in opposition to the motion filed on 1st December, 2015 on the basis that counsel was not competent to swear the affidavit. For this proposition the appellant relied on the authority of ***KAMLESH PATTNI VS NASIR IBRAHIM ALI & 2 OTHERS CA NO. 354 of 2004 (2005) eKLR*** at page 63 wherein it was stated:-

> "***There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client….The court would itself examine the affidavit and determine from a clear reading of it, which averments emanate from what source, only the offending portions would then be rejected."***

Further, the applicant contended that the setting aside of the consent order went contrary to the legal tenets of setting aside a consent.

In opposition to the appeal, the respondent attacked the veracity of the consent on the basis that it was signed by one Mr. Cheruiyot who was not an advocate and neither had there been a notice of intention to act in person filed contrary to Order 9 rule 8 of the Civil Procedure Rules.

We have considered the oral arguments, the written submissions the authorities cited, the record of appeal and the law.

In our view, the issue for our consideration is whether the trial Judge erred in setting aside the consent dated 4th September, 2015. From a long list of authorities emanating from the court, the position of this court has been that a consent binds all parties and that it can only be varied or rescinded in circumstances that would afford ground/s for rescinding a contract between parties.

In the ***FLORA WASIKE VS DESTIMO WAMBOKO KSM CA NO. 81 of 1984*** it was held:

> ***"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 decision of this court in* ***J.M. Mwakio v. Kenya Commercial Bank Ltd. NBI App. No. 28 of 1982 and 69 of 1983."***

Similarly in ***SAMUEL MBUGUA IKUMBU VS BARCLAYS BANK OF KENYA LIMITED, NBI CA NO. NAI. 1 of 2015,*** this court addressed itself to the circumstances that would lead to a consent order which has been adopted as an order of the court being varied. It stated:-

"The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts."

In the appeal before us, Mr. Meroka for the applicant entered into a consent with the respondents then Human Resource Manager. The firm of Meroka & Co did not deal directly with Mr. Cheruiyot but it forwarded the consent to the respondent's then counsel, Ms. Kiplenge & Kurgat Advocates. The firm of Kiplenge & Kurgat Advocates sent the consent to the respondent's then Human Resource Manager, Mr. Cheruiyot who duly executed the consent. Subsequently the consent was filed in court and adopted as an order of the court. What followed thereafter is the taxation of the bill of costs and payment of two instalments of Ksh.800,000 each. The two payments were made by the respondent on 25th September, 2015 and 30th October, 2015. Given the above, it cannot be said that the consent was obtained through fraud, collusion, mistake and neither was it obtained illegally. It is not denied that Mr. Cheruiyot worked for the respondent. In our view we think it was *ex abudanti cautela* for the firm of Kiplenge & Kurgat Advocates to have asked the respondent's Human Resource Manager to append his signature on the consent. On our part we find no reason to rescind the consent order entered between the parties and progressed further by payment of two instalments of the decretal sum.

We further hasten to add that in the judgment of Marete, J. heavy weather was made of the fact that the order adopting the consent on the judgment of the court was entered by one George Ong'ondo, a Senior Principal Magistrate who was not a Registrar or Deputy Registrar of the ELR Court. The learned Judge proceeded to state:-

"… that Hon Ong'ondo is not an appointed registrar or deputy registrar of this court in accordance with Section 9 of the Act. He is not a designated officer or even a member of staff of this court as established. Even if he was, and indeed a deputy registrar of this court he still would not have the power, authority and competence to enter a judgment of this court. This is strictly the province of the judges of court.

The practice of the honourable Senior Principal Magistrate is rare and to say the least strange. It is unprecedented and therefore the need to address it substantively. Administrative investigations into the matter point out to a case of relations. This is not unusual bearing in mind that the practice of employment and labour relations has for a long time been, to a large extent out of the domain of the judiciary. However, this does not ameliorate the situation and the consent judgment remains a nonstarter for having been recorded by a person without the requisite authority, competency and jurisdiction.

What we have in the instant case is not a judgment of court. It is a strange element in the proceedings of this court. It is in my view made and entered into by a stranger. This was done per incuriam. It is unfortunate. Adequate operational consultations would have cured this but these were not bad."

With profound respect, the issue addressed by the Judge was not raised in the motion dated 1st December, 2015. The learned Judge took it upon himself to determine an issue not canvassed before him. He erred.

The upshot of the above is that we find that the appeal before us is merited. Accordingly the ruling of 28th January, 2016 is hereby set aside and the consent adopted as a judgment of the court on 8th

September, 2015 is upheld. These orders shall apply to Kericho ELR Cause No. 26 - 95 of 2015. Costs of this appeal to the appellant.

Dated and delivered at Nakuru this 22nd day of November, 2017

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR