



Kenya Union of Commercial, Food and Allied Workers v Nestle Kenya Limited; Gicobi & 7 others (Applicant) (Cause E811 of 2023) [2025] KEELRC 138 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 138 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E811 OF 2023
S RADIDO, J
JANUARY 30, 2025**

BETWEEN

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS CLAIMANT

AND

NESTLE KENYA LIMITED RESPONDENT

AND

MICHAEL GICOBI APPLICANT

SIMON KAMAU APPLICANT

JOSEPH WAWERU APPLICANT

ALEXANDER NGANGA APPLICANT

EDWARD NDEGWA APPLICANT

JULIUS OWINYO APPLICANT

LINCOLN NJERU APPLICANT

JOHN OHONO APPLICANT

RULING

1. The Kenya Union of Commercial, Food and Allied Workers (the Union) sued Nestle Kenya Ltd (the Respondent) alleging unlawful termination of employment through redundancy of 14 Grievants.
2. The Respondent filed a Response on 7 November 2023 and on 16 November 2023, the Union and Respondent entered into a consent that the Cause be marked as settled and that each party bears own costs.



3. On or around 11 December 2023, some 8 Grievants namely Julius Owinyo, Michael Gicobi, Lincoln Njeru, Edward Ndegwa, Joseph Waweru, Alex Nganga and John Ohono (hereinafter the applicants) filed a Motion seeking orders that the firm of Muthoni Njagi Advocates be granted leave to come on record on their behalf; that the consent dated 16 November 2023 be declared null and void and leave be granted to amend the Statement of Claim.
4. The Court heard the Motion and, in a Ruling, delivered on 14 May 2024, dismissed the application.
5. On the same day, the Respondent wrote to the Deputy Registrar seeking that the consent be placed before the Court for adoption. It is not clear from the record why the Deputy Registrar did not act on the request.
6. On 24 June 2024, the applicants filed another Motion seeking orders:
 - i. ...
 - ii. That the firm of Muthoni Njagi Advocates be and is hereby allowed to enter appearance on behalf of the applicants.
 - iii. That this Honourable Court be pleased to stay the Ruling delivered on 14th May 2024 and the main suit pending the hearing and determination of this Review application.
 - iv. That this Honourable Court be pleased to review and or set aside its Ruling delivered on 14th May 2024 and any further subsequent orders issued thereto.
 - v. That costs of the application be in the cause.
7. The main grounds supporting the Motion were the discovery of new material evidence that was not available when the initial application had been made and an apparent error on record. The new evidence was the discovery of a Settlement Agreement.
8. The applicants attacked the Settlement Agreement on the basis that they did not participate in reaching it; it was procured fraudulently without disclosure of material facts and there was misrepresentation on the dues payable.
9. On the ground of an error apparent on the face of the record, the applicants contended that the Court had assumed that the consent had been adopted whilst the Motion then under consideration had attempted to have the intended consent declared null and void before adoption by the Court.
10. The Union filed a replying affidavit sworn by its 1st Deputy Secretary-General on 9 September 2024 in opposition to the Motion.
11. According to the Union, the applicants were calling upon the Court to sit on appeal over its decision; that the review order did not meet the threshold set out by Rule 33 of the Employment and Labour Relations Court (Procedure) Rules; the application was not only res judicata but an abuse of the court process by relitigating decided issues; the copy of Settlement Agreement filed was inadmissible for lack of signatures and the applicants had been paid dues in excess of Kshs 90,000/- and ranging from Kshs 3,670,334/- to Kshs 5,975,417/-.
12. The Respondent filed a replying affidavit opposing the Motion on 23 August 2024.
13. The Court gave directions on 11 November 2024.
14. The applicants filed their submissions on 9 November 2024. The Respondent had filed its submissions on 18 September 2024 and the Union on 4 October 2024.



15. The Court has considered the Motion, affidavits and submissions.

New advocate on record/res judicata

16. One of the orders sought by the applicants and which order was declined by the Court in the Ruling delivered on 14 May 2024 was the coming on record of the firm of Muthoni Njagi Advocates.

17. It is not open to this Court to entertain the prayer again since the Court would not only be sitting on appeal over a decision by a Court of concurrent jurisdiction but reopening a determined issue.

18. The applicants' option was to appeal against the decision declining to allow their advocate to come on record.

Stay of Ruling and Cause

19. The applicants requested the Court to stay the Ruling delivered on 14 May 2014. The Ruling dismissed the applicants' initial Motion. The order emanating from the Ruling was a negative order.

20. There are a myriad of authorities to the effect that a Court cannot stay a negative order.

21. The applicants also sought in the same proposed order an order staying the hearing of the Cause pending the hearing and determination of the instant Review Motion.

22. The Cause stood settled when the consent between the parties was filed and it would be illogical for the Court to stay the hearing of a Cause that has been settled.

23. In other words, upon the execution of the consent, technically and legally, there is no Cause pending before the Court for a hearing on the merits, even if the consent of 16 November 2023 has not been adopted as an order of the Court.

Review/setting aside the Ruling of 14 May 2024

24. Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024 (previously Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016) sets out the grounds for review.

25. The applicants urged the Court to review or set aside the Ruling of 14 May 2024, purportedly because of the discovery of new material evidence which was not available to them at the point of making the initial Motion.

26. The applicants drew the attention of the Court to section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules as well as to case law.

27. The Court notes two facts. First, the applicants have not disclosed when they came across the Settlement Agreement. Second, the copy of the Settlement Agreement filed in Court and relied on is not signed making its antecedents doubtful. Simply put, it does not meet the standard for admissibility.

28. The applicants further asserted that there was an error apparent on the face of the record particularly in paragraph 20 of the Ruling.

29. The paragraph stated:

The applicant seeks to have the consent herein set aside. They assert their interests were not catered for in the consent entered into between the Claimant Union and the Respondent. The Court notes that the Applicants were represented by the Union in the matter before Court and that subsequent to



negotiations between the Union and the employer, there was a consent recorded herein. The terms of the consent were implemented and it is this consent that the Applicants now seek to overturn.

30. The applicants have not suggested that there is no consent. Their qualm appears to be that the consent had not been adopted by the Court by the time of the Ruling.
31. The applicants have conflated two distinct but related issues. The validity of a consent such as was in contention as between the parties did not depend on adoption by the Court. The adoption by the Court would have been of legal utility in terms of enforcement if one of the parties reneged in fulfilling its obligations under the consent.
32. The other issue is that to set aside the consent, the applicants had to meet the test set out by the Courts.
33. In the Ruling of 14 May 2024, the Court cited the Court of Appeal authority of *Kuwinda Rurinja Co Ltd v Kuwinda Holdings Ltd & 13 Ors* (2019) eKLR in dismissing the plea for nullification.
34. The Court held that the applicants had not demonstrated fraud or non-disclosure of material facts. The applicants want this Court to revisit the question.
35. The Court is of the view that by entertaining the review application it will be invoking a jurisdiction which is properly an appellate jurisdiction.

Orders

36. In light of the above, the Motion dated 24 June 2024 is found without merit and it is dismissed with costs to the Claimant and Respondent.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI ON THIS 30TH DAY OF JANUARY 2025.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For applicants Muthoni Njagi Advocates

For Union Mr Munda, Industrial Relations Officer

For Respondent Mr Bett instructed by Kaplan & Stratton Advocates

Court Assistant Wangu

