



Onchwari v National Authority for the Campaign Against Alcohol and Drugs (Employment and Labour Relations Cause 2036 of 2017) [2025] KEELRC 89 (KLR) (22 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 89 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2036 OF 2017**

**JW KELI, J
JANUARY 22, 2025**

BETWEEN

ENOCH NYAKUNDI ONCHWARI CLAIMANT

AND

**THE NATIONAL AUTHORITY FOR THE CAMPAIGN AGAINST ALCOHOL
AND DRUGS RESPONDENT**

RULING

1. The applicant was the claimant and obtained a favorable judgment against the respondent with interest awarded at Court rates from the date of filing suit till payment in full. The applicant stating that the interest was outstanding filed a Notice of Motion dated 18th October 2023 seeking the following orders:-
 - a. Spent
 - b. Spent
 - c. That out of abundance of caution , the honorable court be pleaded to order the Respondent to show cause why execution should not issue regarding the interest award in the matter.
 - d. That costs of this application be provided for.
2. The application was based on grounds on the face of the application and supported by the affidavit of the applicant dated 18th October 2023 and his further supplementary affidavit of 23rd July 2024. The applicant in support of the application averred that he recovered the principal sum from the respondent but interest remained unpaid as there is no court order varying the terms of the awarded. That he had differed with former advocates. He wanted to recover the interest which he feared would expire after 12 months from the date of the Decree and taxation of costs.



Response

3. The application was opposed by the respondent vide replying affidavit of Daniel O. Konyango, the Legal Services Manager of the respondent sworn on the 5th February 2024. He deponed that the parties herein had settled the payment of the damages, interest on the damages from the date of judgment till settlement thereof and costs in the matter.
4. That in the settlement the claimant herein had expressly waived payment of interest from the date of filling suit till the date of judgment in lieu of an appeal that was to be filed by the respondent against the award of interest on the general damages from the date of filling suit till the date of judgment.
5. That all the sums for the claimant in the matter as contained in the judgment and the subsequent mutual settlement by the parties had been paid to the claimant.
6. That the application was an act of mischief by the claimant and an abuse of the court process and ought to be dismissed. The deponent in support of his averments annexed as DOK-1 the deed of waiver of interest and payment vouchers for sums payable to the claimant.

Response by former advocate of the claimant Caroline Muumbo

7. The advocate responded to the application vide affidavit dated 22nd July 2024. She had represented the applicant before the lawfirm of Abidha & Co advocates came on record. The advocate gave a chronology of the events that had led to the deed of waiver of interest as awarded by court. According to the advocate on receipt of notice of appeal the claimant had initiated the process of negotiations to get paid without appeal and even engaged the CEO of the respondent directly. The Advocate in paragraph 19 of her affidavit stated that the claimant appeared physically at her office on the 6th June 2022 and informed her that he had talked with the Respondent's CEO and that he was willing to forgo the interest on both the compensation amount and the general damages for defamation which were awarded by the court from the date of filing suit so as to avoid delay in settlement.
8. That the claimant asked her to prepare a document stipulating the terms of the settlement which the advocate prepared titled "declaration (statement) to forgo the payment of interest by the respondent ". She prepared a draft which the claimant confirmed before dating and signing the final 4 sets of which she witnessed (CKM 6 was a copy of the declaration). That on the 7th of June 2022 she forwarded the document to the respondent for payment vide letter dated 6th June 2022(CMK-7). That she also forwarded the document to the new advocates.
9. The deponent averred that the claimant never denied signing the waiver agreement and/ or declaration and cannot purport to do so in court.
10. That she received a demand letter dated 27th June 2023 from the lawfirm of Musyoki Mogaka & Co. Advocates consistent with the declaration of waiver. The said letter did not mention interest was outstanding (CKM-10). In reply to the demand letter she informed the lawfirm that the claimant compromised the case and did away with the interest as awarded by court. That this was the same position in complaint of professional misconduct by the claimant against the counsel.

Further applicant's reply

11. The applicant filed a further affidavit sworn on the 10th February 2024 in response to the Respondent's response. He stated that he never signed the annexed declaration DOK-1. That the purported waiver agreement terms were not binding as the same were not made in court and was not signed in the presence of all parties.



12. The applicant further filed a supplementary affidavit dated 23rd July 2024 in response to Ms. Muumbo's affidavit where he stated that his former advocate could not rely on confidential information between them. That the printouts were not accompanied by a certificate of electronic evidence. That the advocate relied on documents exchanged without prejudice which he stated he was advised could not be used as evidence. He asked the documents without prejudice be expunged as it violated advocate client protections. The declaration allegedly received by the respondent on 7th May 2022 was different from the copy by the respondent. That the advocate had admitted that there was no consent or agreement filed in court to vary the terms of the judgment.

Further response

13. The respondent filed a supplementary affidavit of Daniel O Konyango dated 9th August 2024 where he stated that the two documents produced by Ms Muumbo and himself, the declaration of waiver of interest, were the same. The deponent asked that the persons mentioned in the matter namely; their former CEO and the Muumbo Advocate be summoned for cross-examination.
14. The application was canvassed by way of written submissions filed by both parties.

On whether the deed of variation of interest was valid

15. During the oral hearing of the application the counsel for the applicant informed the court that the outstanding issue for determination in the application was whether interest is due or not.
16. The court found no evidence of forgery of the signature of the applicant as appearing in the document produced by the respondent as DOK -1 and by his former advocate, Ms. Muumbo as CKM 6 . The court on face value find the two documents similar. The issue of stamps have no relevance on the validity of the documents. The court found no evidence of challenge of the said declaration in the proceedings before the Law Society Kenya. The court having evaluated the evidence placed before it by the Respondent and the former advocate especially the declaration and proceedings before Law Society of Kenya finds on balance of probabilities the claimant waived the interest. The claimant was not candid with the court for he on one side stated he did not sign the declaration yet at same time stated the consent was not filed in court. The applicant took more than 12 months to file the application and raise issue of interest and this was way after receipt of payment. The court finds that this was an afterthought case. On a balance of probabilities the court finds the claimant voluntarily waived interest from date of filing suit to the judgment date.

On whether the consent not filed in court was binding on the parties .

17. The court found that the applicant's issue was with the consent not having been adopted by the court. In his supplementary affidavit, the applicant asserted that the consent or agreement was not filed in Court to vary the terms of the judgment made on 21st April 2024. He submitted that there was neither application for review filed by the Respondent nor consent signed by parties and filed for purposes of adoption. Consequently, the Respondent's position of waiver ought to be rejected in limine and relied on the case of Prabhudas Dhanji & 2 others v Mansukhlal Dhanji [2022] eKLR to the extent that: "37. The procedure for setting aside or varying a Judgment is clearly set out under Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules which provide for review. 38. Having failed to so move the court, the parties cannot purport to vary the terms of the decree by way of a consent. The prayer to have the consent adopted as an order of the court is therefore declined"



Respondent's submissions

18. The Respondent submitted that the claimant was paid his decretal sum in full on or around 15th July 2022 (see pages 7-10 of the respondent's response). From when payment was made to the date of the claimant's application, it has taken the Claimant eighteen (18) months post-receipt of his settlement to institute this application. Therefore, the applicant was guilty of laches/inordinate. Since the applicant has come seeking equity, he should not benefit as equity aids the vigilant and not the indolent. The Respondent relied on the decision of Court of Appeal in relation to situation where a party accepts and rejects the same instrument as the petitioner is doing with his declaration/consent on interests from the time of filing suit till the time of judgment as in Civil Appeal No. 72 of 2017 between National Bank of Kenya Limited v Hamida Bana & 103 others [2017] eKLR, where the bench adopted with approval the reasoning in State of Punjab & Others vs. Dhanjit Singh Sandhu - Civil Appeal No. 5698-5699 of 2009 where the Supreme Court of India expressed itself as follows:- "The principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. (emphasis ours) "The Supreme Court in the Rajasthan State Industrial Development and Investment Corporation and Another vs. Diamond and Gem Development Corporation Ltd and Another AIR 2013 SC 1241, made an observation that a party cannot be permitted to blow hot and cold, fast and loose or approbate and reprobate. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such a contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of good conscience."
19. The respondent submitted that the declaration/consent is valid considering it took the claimant 18 months after payment of the decretal sum to file this application only implies that the declaration was valid for the period he was spending the cash and when he exhausted the decretal sum the declaration became invalid so as to derive some other advantage. They asked the court to tell the claimant:- "Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such a contract or conveyance or order. This rule is applied to do equity".
20. The Respondent submitted that if at all there was forgery of the claimant's signature and the waiver was entered without instructions, the claimant ought to have brought this fact to the attention of the respondent immediately. Since it was not brought to the attention of the respondent and considering the decretal sum was paid through the former advocates makes render this application an after thought and brought for ulterior motive otherwise the respondent would not have paid the decretal sum through the advocates until the issue of acting without instructions was resolved between the claimant and his former counsel. On this account, they relied on case in Kenya Commercial Bank Limited vs Specialised Engineering Co. Limited (1982) KLR 485 where the court held that: - "A duly instructed advocate has an implied authority to compromise and settle the action and the client cannot avail himself any limitation by him of the implied authority to his Advocate unless such limitation is brought to the notice of the other side."
21. The respondent acknowledged that the deed of waiver was not filed in Court to be adopted as an Order but urged that this does not negate the fact that it was binding on the parties as was held in Kenya Commercial Bank vs Specialized Engineering Company Limited (1982) KLR. They urged that a ruling that the deed/declaration is void would curtail the spirit of Article 159(2)(c) which encourages/promotes alternative dispute resolution mechanisms. In any case, there is no legal principle to the effect



that parties cannot mutually decide on how to execute a Court order. The Respondent relied on the case of Haraf Traders Limited v Narok County Government (2022) eKLR where the court held that: - “A consent ordinarily burry everything beneath it, and the court will not inquire into the reasons for settlement by parties. Except, it is desirable that parties should clearly spell out the terms of settlement to avoid disputes on the scope of the consent. In this case, parties seem to blame each other for breach; and it is safe to leave them at where I found them. Accordingly, I find no basis to order interest on the principal sum in such matter full of obscurities on interest; and the conduct of the parties which generally is not inspiring or seductive of equity into resolving the question of interest for one party and against the other. I decline to award interest on the principal sum in light of the amicable settlement of the claim between the parties.”

Decision

22. The court perused the decision relied on by the applicant in Prabhudas Dhanji, Jayantilal Dhanji, Kishorlal Dhanji (Suinas the Administrators of The Estate of the Late Chandulal Dhanji) & Kishorlal Dhanji v Mansukhlal Dhanji [2022] KEELC 762 (KLR) and found that in the said case the court was not functus officio. The court stated:- ‘23. The Respondent is seeking for injunctive orders on the basis that the Applicants are attempting to evict him before resorting to the court as stated in the decree and further that the Applicants are resisting any attempts to engage and ensure compliance with the decree. Taking into account the terms of the judgment, and the basis upon which the Respondent has moved this court, the court is of the opinion that it is not functus officio.

23. Clearly, the Judgment of this Court has not been perfected or executed. Further, the judgment in itself dictates that some actions can only commenced upon having further resort to the court..’

24. In the instant case the Court holds that the trial court was functus officio and the parties were free to engage as they did. The court holds that the failure to file the deed of variation in court did not vitiate the contents leading to waiver of interest as stated.

Conclusion

25. The court holds that the trial court on delivery of judgment was functus officio and the parties were free to deal with the said judgment as they deemed fit. That the deed of waiver varying interest need not have been filed in court. The court finds that the claimant was raising technicalities to defeat a valid agreement between the parties while having already benefited from the said agreement. The court having perused the documents annexed by the applicant, Muumbo Advocate and the Respondent found not iota of evidence that would vitiate the Deed/consent to waive interest payable under the Decree.

26. The application is held to be an abuse of court process and is dismissed with costs to the respondent. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF JANUARY, 2025.

JEMIMAH KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno



Applicant : -Abidha Nicholus with Ms Mutua

Respondent: absent

