



**Matsitsi (Suing as Personal Representative of the Estate of Benson Shilibwa
- Deceased) v China Communications Construction Company Ltd (Cause
2178 of 2017) [2024] KEELRC 628 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 628 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2178 OF 2017
JK GAKERI, J
MARCH 19, 2024**

BETWEEN

**ADELAIDE MUCHANJI MATSITSI (SUING AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF BENSON SHILIBWA - DECEASED) CLAIMANT**

AND

**CHINA COMMUNICATIONS CONSTRUCTION COMPANY
LTD RESPONDENT**

RULING

1. Before the court for determination is the Respondent's Notice of Motion filed under Certificate of Urgency dated 15th October, 2023 seeking orders that;
 1. This suit be marked as withdrawn and/or fully settled.
 2. Each party to bear their own costs.
2. The Notice of Motion is not expressed under any law and is based on the grounds set out on its face and the Supporting Affidavit sworn by Luo Xiang on 15th November, 2023 who deposes that the matter was filed on 7th November, 2017 and the Claimant passed on on 7th February, 2022.
3. The affiant deposes that prior to the Claimant's death, the matter herein was settled out of court on consideration that the Respondent pays the Claimant Kshs 15,054.45 as underpayment for September and October 2017 and the sum of Kshs 15,054.45 was paid and it was accepted and acknowledged by the Claimant.
4. That the Claimant had agreed to withdraw the demand letter and the case he had filed against the Respondent.



5. That after the suit was dismissed for want of prosecution, it was reinstated by the court unaware that the suit had been settled on 23rd June, 2018 and it ought to be marked as withdrawn and/or fully settled.

Response

6. In the Replying Affidavit sworn by Mr. Samuel Oyugi Ondieki Advocate, the affiant deposes that although he had been on record for the Claimant since 2017, there had been no communication on settlement of the matter and the Respondent's allegations were fabricated and the details of a settlement were shocking to the Claimant and no evidence of payment has been placed before the court and no record of acknowledgement of the amount allegedly paid.
7. The affiant states that as the advocate on record, he ought to have been informed of the settlement.
8. The affiant further states that he doubted why the documents had not been filed earlier and reads malice and bad faith.
9. The affiant urges the court to dismiss the application.

Determination

10. As regards withdrawal of a suit, Order 25 Rules 1 and 2 of the *Civil Procedure Rules*, 2010 provides that;
 1. At any time before setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defense to any subsequent action.
 2. Where a suit has been set down for hearing, it may be discontinued or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.
11. The foregoing provisions of Order 25 are explicit that only the plaintiff or claimant may withdraw or discontinue a suit and the same must be in writing.
12. The applicant seeks an Order that the suit herein be marked as withdrawn but has not filed any notice or letter of withdrawal of the suit which the employee filed and served on it or served without filing.
13. Copies of the letter allegedly authored by the Claimant in 2018, computation of dues and letter from counsel for the Respondent and the Disclaimer allegedly executed by the Claimant is not yet evidence before this court and cannot be relied upon on this instance.
14. In sum, the court has no basis on which to grant the order sought as the material placed before it is insufficient to warrant its issuance.
15. Relatedly, the applicant in the alternative prays that the suit be marked as fully settled.
16. Analogous to the prayer of having the suit marked as withdrawn, the Applicant uses the same material to urge that the suit was settled in 2018 and ought to be marked as such.
17. It is trite that for a suit to be marked as fully settled, parties must ordinarily exchange and file the relevant consent which the court adopts or the parties or their counsel's jointly record the consent in court that the suit be marked as fully settled and the file closed.
18. The order cannot be made at the instigation of one party unless the written consent is on record duly executed by the parties and in the court's view not by way of a notice of motion application.



19. The materials placed before the court as the basis of the order sought are insufficient and the order is declined.
20. It is clear to the court that the Applicant herein is jumping the gun.
21. The documents annexed to the Notice of Motion may be evidence the applicant may seek to rely on at the trial as it is yet to be produced as such.
22. Flowing from the foregoing, it is clear that the applicant's Notice of Motion dated 15th October, 2023 is for dismissal and it is accordingly dismissed with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF MARCH 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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