



**Menon v Windsor Golf Hotel & Country Club (Cause E041 of 2023)
[2024] KEELRC 2609 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2609 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E041 OF 2023
SC RUTTO, J
OCTOBER 25, 2024**

BETWEEN

VIJAY KRISHNAN' V MENON APPLICANT

AND

WINDSOR GOLF HOTEL & COUNTRY CLUB RESPONDENT

RULING

1. At the outset, I find it imperative to trace the genesis of this matter. The suit herein was commenced by way of a Statement of Claim dated 24th January 2023, in which the Claimant sought the following orders against the Respondent:
 - a. Terminal dues amounting to US Dollars 62,418.90 which has remained unpaid pursuant to the agreement dated 18th February 2022.
 - b. Costs of the Claim.
 - c. Certificate of Service.
 - d. Interests on (a) above at court rates from 18th February 2022 till payment in full.
 - e. Any other relief that this Honourable Coue may deem fit to grant.
2. Upon being served with the Statement of Claim, the Respondent filed a Notice of Preliminary Objection dated 28th February 2023, premised on the following grounds:
 1. The Claimant and Respondent are both parties to an Arbitration Agreement as stipulated in the letter of offer of employment dated August 17, 2017, which requires that all disputes between them be referred to arbitration.



2. Section 6 of the *Arbitration Act* empowers a Court before which proceedings are brought in a matter which is subject to an Arbitration Agreement to strike out and/or stay proceedings and refer parties to arbitration.
3. This Honourable Court lacks jurisdiction to hear and determine the Claim against the Respondent.
4. Jurisdiction is everything and a court without jurisdiction must down its tools.
3. The court overruled the Preliminary Objection vide its Ruling which was delivered on 6th October 2023. In the said Ruling, the court observed that the subject matter constituting the dispute before it is not covered by the arbitration clause in the Claimant's letter of offer of employment. The court further found that there is no dispute to be referred to arbitration within the arbitration clause in the said letter of offer of employment.
4. Subsequently, the Court granted the Respondent 21 days within which to comply with the pretrial requirements. Accordingly, the matter was scheduled to come up for mention on 1st November 2023 for purposes of confirming compliance and taking further directions.
5. Come 1st November 2023, the Respondent's Advocate was not present in court and further to that, had not complied with the pretrial directions. Subsequently, the Claimant's Advocate asked the court to set the matter down for formal proof hearing.
6. On 5th December 2023, when the matter was set to come up for formal proof hearing, Mr. Ngatia the Respondent's Advocate on record, informed the court that the Respondent had intended to file a Counterclaim which is subject to arbitration hence the reason they did not file a Defence to the Claim. He further informed the court that the Claim was admitted and that they were seeking a stay of execution during which time they would prosecute their claim against the Claimant in the arbitration proceedings which had already commenced. Counsel further proposed that the decretal amount be deposited in a joint interest earning account to be held by both parties herein pending the arbitration proceedings.
7. Ms. Atieno who was holding brief for Ms. Obiri, counsel on record for the Claimant, informed the court that she had no objection to the proposal by Mr. Ngatia and that the decretal amount could be deposited in an escrow account.
8. In light of the foregoing, the court entered the following consent judgment:
 1. Judgment is hereby entered in favour of the Claimant for the sum of Usd 62,418.90.
 2. The said amount of money to be deposited in a joint interest earning account in the names of the Advocates on record for both parties in the matter.
 3. The said amount shall be so held pending hearing and determination of the arbitration proceedings alluded to by the Respondent's Counsel.
 4. Mention on 4th March 2024 to ascertain the status of the arbitration proceedings.
9. On 4th March 2024, when the matter came up for mention, Ms. Obiri Counsel on record for the Claimant, informed the court that there were no arbitration proceedings that were pending and that the Claimant was not aware of any dispute between the parties herein. Consequently, Ms. Obiri asked the court to review the orders of 5th December 2023. Mr. Ngatia objected to Ms. Obiri's oral application and contended that the court was functus officio. It is worth mentioning that the Respondent's Counsel only conceded to the issuance of a Certificate of Service to the Claimant.



10. Subsequently, the Claimant filed the instant Application dated 15th March 2024 seeking the following orders;
 1. Spent;
 2. That the orders issued on 5th December 2023 staying execution of the judgment and directing the decretal amount be placed in a profit earning account and is hereby set aside/varied.
 3. That the Claimant herein be awarded costs and interests of the Suit from 18th February 2022 in addition to the principal amount.
 4. That the costs of their application be provided for.
 5. The Honourable Court be pleased to make and/or issue such orders as it may deem fit.
11. The Motion Application is supported by the grounds on its face and the Affidavit of Vijay Krishnan' V Menon, the Claimant herein. Grounds in support of the Motion are that the Court entered judgment for the Claimant for the principal amount but omitted to award the costs as well as the interest accrued as per prayers (b) and (d) of his Statement of Claim. That further, the orders were made based on the misleading information availed to the court by the Respondent's Counsel that there were ongoing arbitration proceedings when there were none.
12. That no evidence of such arbitration proceedings had been tabled in court to warrant the stay orders being issued and that there was only a letter requesting for appointment of an arbitrator to which the Claimant is opposed to, noting that there is no substantial dispute to be determined by an arbitrator.
13. That further, the claimed arbitration proceedings are in no way related to the instant suit whose subject matter is terminal dues. That the said arbitration involves negligence in the course of duty which has not been substantiated in any way but was rather brought forth in bad faith in order to intimidate the Claimant and also delay his efforts to enjoy the fruits of his judgment.
14. In his Affidavit, the Claimant avers that the orders granted were based on a consent given by an Advocate who had no proper instructions to do so. He deposes that the Advocate handling the matter was ready to proceed for formal proof hearing and had requested a colleague to take time allocation since she was on her feet at Ngong Law Courts for a traffic matter.
15. That the said counsel who held brief was not versed with the file and was not aware that there were no arbitration proceedings which the Respondent's Advocate took advantage of to mislead the court.
16. The Claimant further states that the Respondent had failed to disclose all material facts with intent to mislead the court. He contends that the orders staying execution having been obtained by suppression of facts by the Respondent that there were no arbitration proceedings at the time, ought to be vacated.
17. It was the Claimant's assertion that the stay orders are prejudicial to him and has subjected him to unnecessary hardship by delaying the fruits of his judgment. That there are sufficient reasons to warrant the Court to review its order made on 5th December 2023.
18. The Application is opposed by the Respondent through the Replying Affidavit of Mr. Ngatia Wambugu, its counsel on record. Mr. Ngatia deposes that on 1st March 2024, his firm wrote to the Claimant's Advocates and requested that they select their bank of choice and send to them the account opening forms for execution. On the same day in a separate letter, they notified the Advocates for the Claimant that they would proceed to appoint Mr. Cecil Kuyo as the Arbitrator within the next fourteen (14) days considering their default in concurring in the appointment of an arbitrator



following a declaration of dispute and an invitation to concur in the appointment of an arbitrator contained in their letter dated November 30, 2023.

19. According to Mr. Ngatia, no response has been forthcoming from the Claimant's Advocates regarding the opening of the bank account or concurrence in the appointment of an Arbitrator. It is Mr. Ngatia's contention that arbitral proceedings in respect of the Respondent's Claim commenced on the day when the Claimant was invited to concur in the appointment of an Arbitrator and that was on November 30, 2023.
20. That the record of the court estops the Claimant from reneging on the representations made by his Counsel in Court on 5th December 2023, when the consent judgment was entered.
21. He believes that if Advocate Sharon Ocholla, was duly admitted to the bar and good enough in the estimation of the Claimant to hold brief in this Honourable Court on December 2023, then she was equally good enough to bind the Claimant with her representations as to concurrence with his submissions regarding orders to be issued.
22. Mr. Ngatia believes that if the said Advocate did not have instructions in respect of the matter, nothing would have been easier for her to say so in which case the Court would have given appropriate instructions.
23. In Mr. Ngatia's view, with the subject suit having been marked as settled, this Honourable Court is functus officio in respect of determination of the merits of the matter including the issue of costs.
24. That further, his client has consistently shown willingness to resolve the matter outside of court. Despite this, the Claimant proceeded with the case until its conclusion with the entry of the consent judgment. However, the Claimant has been unnecessarily prolonging the process, causing themselves undue hardship and delaying their realization of the judgment.

Submissions

25. On 9th May 2024, the court directed that the Application be canvassed by way of written submissions. On the part of the Claimant, it was submitted that costs follow the event and that this court is empowered under Section 27 of the *Civil Procedure Act* to, in exercise of its judicial discretion, award costs to a successful party in the proceedings. To this end, the case of *Haraf Traders Limited vs Narok County Government* (2022) eKLR was cited in support of this argument. The Claimant further posited that he has incurred costs in seeking to enforce the contract for payment of terminal dues and thus the Respondent should meet the costs on a full indemnity basis for the suit.
26. Placing reliance on the case of *Sofia Mohamed vs Rodah Sitienei* (1992) eKLR, the Claimant submitted that the consent was entered into due to the misleading information given by the Respondent's Counsel and due to non-disclosure of sufficient material facts. In the same vein, the Claimant posited that the court was not aware that there were no arbitration proceedings ongoing or even about to commence and that the Respondent only purported to initiate the same by declaring a dispute vide a letter dated 1st December 2024(*sic*) served on him on 3rd December 2024(*sic*) which was two (2) days to the consent order being obtained.
27. It was further submitted by the Claimant that the consent order staying execution of the judgment herein results into an illegality which should not be sanctioned by the court as the decretal sum involved is not just a debt but rather constitutes terminal dues owed to him by the Respondent. This position was supported by the case of *Shop and Deliver vs Fred Gitonga Njagi* (2023) eKLR.



28. On the other hand, the Respondent submitted that the declaration of a dispute vide a letter dated 1st December 2024 (*sic*) was received by the Claimant which indicates that there is no doubt that there was and still is a dispute which had been declared but is yet to be resolved between the parties. In support of this argument, the case of *Bellevue Development Company Limited vs Vinayak Builders Limited & another* (2014) eKLR was cited.
29. It was the Respondent's contention that the Claimant is estopped from retracing their previous representations. Referencing the case of *Munya vs Kitbinji & 2 others* (Civil Appeal Application) 38 of 2013 (2014) KECA 876 (KLR), the Respondent submitted that the Claimant made representations that the Respondent placed reliance on and proceeded to act upon them. Therefore, he is estopped from contradicting his earlier representations. That consequently, the said representations cannot be varied, reviewed or set aside.
30. With respect to the issue of the award of costs and interests, it was the Respondent's position that the matter was marked as settled thus rendering this court functus officio concerning the substantive merits. In this regard, the court was invited to consider the case of *In Re Estate of Kinuthia Mahuti (deceased)* (2018) eKLR in support of this argument.

Analysis and Determination

31. I have considered the instant Application, the Respondent's Replying Affidavit, the proceedings herein as well as the rival submissions and I find the singular arising for determination being whether there are grounds to set aside or review the consent judgment entered by the court on 5th December 2023.
32. The law on variation of a consent judgment is now settled to the effect that 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.
33. This position was reaffirmed by the court in the case of *Brooke Bond Liebig vs Mallya* (1975) EA 266 where Mustafa Ag. VP stated thus;

“It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract.”
34. Similarly, in the case of *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd* [1982] KLR 485, Harris J held that;

“1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”
35. In this case, the Claimant's main contention is that the Counsel who held brief for Ms. Obiri had limited instructions and was only instructed to take time allocation. That further, the consent judgment was entered into based on misleading information availed to the Court by the Respondent's Counsel that there were arbitration proceedings that had been commenced when in actual sense, there were none.



36. This position has been disputed by the Respondent's Advocates who aver that by dint of Section 22 of the *Arbitration Act*, arbitration proceedings commenced on the day they declared a dispute and notified the Claimant's Advocates as much and invited him to concur with the appointment of the arbitrator.
37. With respect to the Claimant's assertion that the Counsel who held Ms. Obiri's brief had no authority to consent to the terms of the settlement, I hold the view taken by the Court in the case of *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd* [supra] that a duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.
38. In this case, the court record bears that Ms. Atieno, Counsel who held brief for Ms. Obiri on 5th December 2023, fully consented to the entry of judgment in favour of the Claimant and stay of execution pending the arbitration proceedings alluded to by the Respondent's Counsel. Indeed, I cannot help but question why Ms. Atieno did not at least request the court to place the file aside to allow her obtain further instructions if at all she was deprived of full instructions. I further question the usefulness of the said Counsel holding brief and not taking interest in the client's case.
39. In the same vein, I hasten to add that when a Counsel agrees to hold brief then he/she should be given full instructions to be able to be useful to the client and the court. This was the position taken by the court in the case of *Protus Hamisi Wambada & another v Eldoret Hospital* [2020] eKLR.
40. In light of the foregoing, the Claimant's assertions that Ms. Atieno lacked full instructions to compromise the matter as she did, does not hold water.
41. Be that as it may, and bearing in mind the circumstances that have come to light in this case, it is apparent that there was no meeting of the minds between the parties at the time the consent judgment was recorded by the court.
42. Indeed, the parties are not even on the same page as to whether there is a dispute to be settled through arbitration. As it has been held in a long line of authorities, a consent order is normally treated as a binding contract between the parties and courts will interfere only if circumstances which would have vitiated or rescinded a contract influenced the consent order. Further, and was highlighted in the case of *Brooke Bond Liebig vs Mallya* (supra) one of the grounds for setting aside a consent judgment is where there was no consensus between the parties.
43. It thus follows that for the consent judgment to pass muster, it was essential that parties herein have a meeting of the minds. This was not the case herein hence the consent did not meet the threshold of a contract.
44. It is for the above reason that I will proceed to set aside the consent judgment recorded by the court on 5th December 2023, in its entirety.

Orders

45. Accordingly, the Claimant's Application dated 5th March 2024, is hereby allowed with an order setting aside the consent orders recorded on 5th December 2023 in entirety.
46. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER 2024.

STELLA RUTTO



JUDGE

In the presence of:

Ms. Obiri for the Claimant/Applicant

Ms. Koskey for the Respondent

Millicent Kibet Court Assistant

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 had 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.

