



**Kalele & 53 others v Universal Corporation Limited (Cause  
853 of 2018) [2023] KEELRC 61 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 61 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 853 OF 2018  
K OCHARO, J  
JANUARY 20, 2023**

**BETWEEN  
DAMARIS WANJIRU KALELE & 53 OTHERS ..... CLAIMANT  
AND  
UNIVERSAL CORPORATION LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. The character of the claimant's application herein requires that the procedural history of this suit be brought forth in detail and, understood. The history will hereby influence the outcome of the application.
2. Through a memorandum of claim dated June 4, 2018, the claimant impleaded the respondent for the following reliefs:
  - a. A declaration that the claimants became permanent by operation of the law upon the lapse of 3 months of each individual employee's employment and therefore are all entitled to all advantages, privileges and allowances of permanent employees.
  - b. Written contracts going forward.
  - c. General damages for a total sum of Kshs 18,073,056.00 [as computed and particularized in each of the individual's witness statements].
  - d. Service pay calculated as 15 days for each completed year of service until when the controlling stake of the Company was sold to Strides Shasum Limited.
  - e. Payment for accrued leave calculated as 21 days' pay for each year of service.
  - f. One day rest per a week for all the years served by each individual employee.



- g. Unpaid NSSF remittances for various employees.
- h. Unpaid maternity leave.
  - i. Costs of the suit and interest on [c – h] above at court rates.
  - j. Punitive and exemplary damages for arrogance, unfair labour practices.
- 3. The memorandum of claim was filed for and on behalf of the Claimants by the law firm of M/S Gitau Mathu and Associates.
- 4. Apparently, the notice to summons was not served within the requisite statutory period, prompting the Claimants to, through an application dated August 5, 2019, seek for extensions of the validity of summons for a further six months. The application was allowed on the September 19, 2019. The application was prosecuted by the 1<sup>st</sup> Claimant on her behalf and that of the others.
- 5. On the September 26, 2019, when the matter came up before court for further directions, Mr Kanyiri then appearing for the Respondent expressed surprise that the Claimant had taken out and served fresh summons on the Respondent, notwithstanding that the matter had been compromised and settled vide a consent of August 20, 2018, and all the Claimants paid the agreed sums via individual cheques.
- 6. Admitting that she had received a cheque of Kshs 135,000, the 1<sup>st</sup> Claimant asserted that she was unaware of the consent filed in court. Informed by the diametrically opposite positions taken by the parties, on the consent, the Court referred the matter to the County Labour Officer for conciliation.
- 7. Though a conciliation report was filed in court, the parties did not agree on the same, it did not aid in resolving the matter therefore.
- 8. On the December 17, 2020, when the matter came up for mention before Justice Mbaru, in absence of Counsel for the Respondent, Counsel Mr Omolo for the Claimants indicated to the court that the Respondent had not filed a defence to the claim, and therefore the matter was fit for listing for formal proof. The Court directed that a date for formal proof be picked in the registry. A formal proof date was subsequently given for the May 6, 2021.
- 9. On the above stated date, Mr Masese for the Respondent brought it to the attention of the Court that the matter was long settled, culminating to a consent dated August 20, 2018, marking the matter as settled. The Claimants had been paid. Counsel Odinga, who was holding brief for Mr Gilbert for the Claimants sought for an adjournment to enable Mr Gilbert to respond to the issue of the settlement that was raised by Counsel Masese. The Court adjourned the matter to enable him consult on the allegation of settlement and fixed the matter for mention for further directions for the May 18, 2021.
- 10. When the matter came up for the mention on the May 18, 2021, in the presence of Counsel for the Claimants but in absence of Counsel for the Respondent, the Court directed that the matter be placed before the Deputy Registrar for allocation of a date for formal proof.
- 11. Subsequently, the Claimant's Counsel got the matter slated for formal proof for the August 4, 2021. On this date the court directed:

“The matter to be mentioned on the August 12, 2021 to confirm agreement and adoption of the reconciliation report and if not agreed, parties to take a date for formal proof.”
- 12. Subsequently, the matter was placed before me on the October 7, 2021, when Counsel for the Respondent raised the issue of the existence of an agreement dated August 20, 2018, whose effect was



marking this matter as fully settled. Noting that the agreement, captioned “consent” was on record, and pursuant to the overriding objective of the court, I gave the following directions:

- a. That the Respondent does file and serve document[s] in prove of payments that were made to the Claimant within 7 days from today.
  - b. That the managing partner in the Law firm of Gitau Mathu and Advocates to swear and file an affidavit stating whether or not the settlement sums if any were received and if so whether they were forwarded to the Claimants.
  - c. The affidavit also to confirm whether or not there was a consent recorded by the parties dated August 17, 2018.
  - d. This matter shall be mentioned on the October 21, 2021, for further directions.
13. On the above stated date, Counsel for the Claimants sought for one week to consult his clients on the documents that his predecessor on record filed pursuant to the above directions of the Court, and seek further instructions. The Court adjourned the matter to November 9, 2021. Subsequently, the 1<sup>st</sup> Claimant filed an affidavit stating that there was no consent recorded as was being alleged by the Respondent.
14. The consent was on record, the Court had not dealt with the parallel positions that had been taken by the parties on it, and the import thereof in any substantive manner at any time. Being of the view that the circumstances of the matter required the court to first deal with them, this court exercised its inherent power, and directed:
- a. The issue of the consent dated August 17, 2018 be addressed conclusively first before any further step could be taken in the matter.
  - b. The Claimant do file an application challenging the validity of the consent within 14 days.
  - c. The Respondent to file a response to the application within 14 days of service of the application.
  - d. Within 14 days of service of the replying affidavit, the Claimants to file and serve written submissions on the application.
  - e. The Respondent to file and serve response submissions within 14 days of service.

### **The Application**

15. Pursuant to the above stated direction by the Court, the Claimants filed a Notice of Motion application dated November 22, 2021, seeking:
- a. That the consent dated 17<sup>th</sup> August be set aside.
  - b. That costs of the Application herein be in the cause.
- The Application is anchored on the grounds obtaining on the face of the Application and the supporting affidavit sworn by the 1<sup>st</sup> Claimant, Damaris Kaleli.
16. The Respondent opposed the Application through an affidavit sworn on the March 23, 2022.
17. The Claimants contended that Counsel Rose Gitau, their first Counsel on record, did not have instructions from them to enter into the alleged consent or any consent at all.



18. It was further asserted that the above stated Advocate or any other Advocates had never represented the Claimants in this matter. They all through acted in person from the start of the proceedings.
19. The Claimants contended that in any case, the consent dated August 17, 2020, has not been adopted by the Court. Consequently, it cannot stand as an order of the Court.
20. The Claimants alleged that the consent was sneaked into court, no court fees was paid for it, and without fee payment, there is no consent validly filed.
21. The Claimants stated that the Court has already pronounced itself on the issues of the consent when directions were given that the matter proceeds for formal prove.
22. The Claimants further contended that they instructed their Counsel, Rose Gatau, to have a consent to the effect that the agreed sums be paid in two instalments of 70% and 30%, they be offered contracts of employment and then a further computation be made.
23. It was further argued, that after the Claimants were paid the 70% of the agreed sums, the Respondent terminated their employment. Consequently, the substratum of their intended consent was extinguished.
24. That the consent was miraculously placed on record after mid of 2021. That if indeed the consent was on record, the Court would not have had any reason to refer the matter to the Labour officer as it did, for conciliation. Further, that if the consent was in existence, its existence could have been raised when the Court was referring the matter to the Labour officer.
25. The consent was a product of collusion by their former Counsel on the one part and the Respondent and their Counsel on the other to defeat the Claimant's interest. The consent was therefore procured by fraud and misrepresentation. Consequently, it should be struck out.

### **The Respondent's Response**

26. The Respondent's challenge on the Claimant's application was predicated on the averments in the affidavit by Dickson Chaheza, its Human Resource manager, and that of Daniel Mwangi Nyambura, the Managing partner of the Law firm of Gitau Matu and Company Advocates, that were filed pursuant to this court's directions hereinabove mentioned.
27. It was stated that on diverse dates in the year 2017 and 2018, the Law firm aforesated received instructions from the Claimants and 8 others to institute suit against the Respondent.
28. That with express authority from all the Claimants, Counsel commenced negotiations with the Respondent. In the course of the negotiations, Counsel made a settlement offer in form of tabulated monetary entitlement for each of the Claimants. The Respondent made a counter offer. The counter offer was floated to the Claimants who accepted the same and authorized Counsel to record a consent Judgment.
29. For purposes of transparency, the Respondent issued multiple cheques for all the Claimants in their distinct names. The Claimants collected their respective cheques, and executed a document marking the claim against the Respondent settled.
30. Consequent thereto, the consent dated August 17, 2018, was executed. It was left to the Respondent, to file it, and have the matter fixed for mention for adoption of the same.
31. The Respondent argued that the Claimants have not cited any grounds of fraud to vitiate the consent. There is no evidence that the Advocate then on record did not have instructions to enter into any



consent in favour of the Claimants. The Claimants have benefitted from the consent as they have been paid.

32. The deponent of the supporting affidavit has not demonstrated that she had the authority of the other Claimants to swear the affidavit.

### **The Claimant's Submissions**

33. The Claimant identifies two prime issues for determination on the application, thus:

- i. Whether there is a valid consent adopted as an order of the Court.
- ii. If the answer in [i] is in the affirmative, whether the applicant has satisfied the Court that there are circumstances justifying the setting aside of the said consent.

34. On the 1<sup>st</sup> issue, the Claimants submitted that no valid consent exists. The holding in the Supreme Court decision in [Geoffrey M Asanyo v Attorney General](#) [2020] eKLR, Petition No 7 of 2019, thus:

“ 40. Adoption of a consent by a court is a process, in the course of which a court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an order of the court only once it has been formally adopted by the court. It is only from that stage, that the court becomes *functus officio* .....”

was relied on to fortify this submission.

35. The consent having not been formally adopted, it is not an order of the Court and therefore has no binding effect of any nature.

36. The Claimants submitted that they were never aware of any consent, as they had not instructed their then Advocate to enter into any. They only learnt of the consent long after they had sought to act, and started acting in person.

37. While there were negotiations between themselves and the Respondent, the same never culminated into a consent as the latter failed to honour its part of the bargain, by failing to, offer written contracts of employment on paying 70% of the amount that was owed to them and, pay the 30% balance.

38. The consent dated August 17, 2019 has no terms of payment, amounts and is ambiguous.

39. It was further contended that even if the payments constituted a valid consent, the same would still be set aside as certain conditions remained unfulfilled. To buttress this argument the case of [Flora N Wasike v Destimo Wamboka](#) [1988] eKLR where the Court 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 the decision of this court in JM Mwakio v. Kenya Commercial Bank Limited Civil appeals 28 of 1982 and 69 of 1983. In Purcell v FC Trigell Limited [1970] Z All ER 671. Winn LJ Said at 676; .....”

40. According to the Claimants, a proper consent in the sense of the law is one which is made in the presence and with the consent of the parties and/or their Counsel. A consent is binding on all parties, and it attracts contractual obligations to the parties thereto. The Claimants having denied knowledge



of the existence of the consent, as it did not flow from their instructions, and, having cast aspersions on the same, it is clear that there was no meeting of the minds leading to the consent.

41. The subject consent was not at any time placed before the Court for consideration and determination, whether the parties, had fully understood it, or even intended to enter into the same. There has never been a formal application for its adoption. The consent dated August 17, 2018 is neither binding nor is it enforceable. It should be set aside.
42. On the 2<sup>nd</sup> proposed issue, the Claimants submitted that the Respondent colluded to have the consent placed on record. There is no proof by way of court filing fees receipt, that it was ever filed. The consent was fraudulently backdated and sneaked into the Court file. A document can only be considered filed if court fees has been paid for the same. To bolster this point, reliance was placed on the case of *Savana Saw Mills Limited v George Mwale Mudamo* [2005] eKLR.
43. The consent pre-dates the Court order of September 27, 2019, by one year. If indeed it was on record when the Court referred the matter for conciliation by Labour officer, the court would have made an acknowledgement of its existence. Further, the Labour officer's report does not mention it.
44. The Claimants asserted that whereas an Advocate has general authority to act on behalf of his or her client, the authority has to be exercised bona fide and not contrary to the express negative directions or without express directions provided to him by the client.
45. In response to the Respondent's submissions that, the instant application is incompetent and an abuse of the Court process as it has been brought under wrong provisions, the Claimants submitted that the position by the Respondent is misplaced, and placed reliance on the case of *Nation Media Group & another v Awale Transporters Limited* [2022] eKLR, where the court held:

“Similarly, an application cannot be dismissed for want of form because of the principles on administration of justice set out under article 159 of the *Constitution* and the policy set out under Order 51 rule 10 of the Civil Procedure Rules. .... Consequently, based on the above provisions, the objection that the application be disallowed for having cited wrong provisions of the law or for want of form or that the same has been expressed as an application for review when it ought not to be so is disallowed. ....”

### **The Respondent' Submission**

46. The Respondent submitted that from the Claimants' former Counsel's affidavit on record it is clear that the consent was perfected and money paid out to the Claimants. The Claimants signed discharge instruments upon the payments, acknowledging full settlement of their entitlement under the claim.
47. The allegation of fraud and collusion was not proved as the same is not founded on evidence.
48. On the Claimants' submission that the consent is of no effect as it was never adopted as an order of the Court, the Respondent argued that the fact does not in any manner diminish its meaning as an agreement entered freely by the parties. Reliance was placed on the case of *Stephen Ndegwa & another v KCB* [2021] eKLR.
49. It was stated that the Claimants failed totally to differentiate between a consent order and a consent before filing in court. A consent entered into is an agreement that is binding on the parties and is only assailable on the same principles as for a consent Judgment.
50. If indeed their former Advocate entered into a consent without their instructions, then the Claimants could have declined the money and file a notice to act in person or report the matter to the



Advocates Complaints Commission. The Claimants engaged themselves in a process aimed at enriching themselves unfairly.

51. The Claimants have not been candid to this Court.

### **Analysis and determination**

52. From the material placed before this Court by the parties, the following issues emerge for determination:

- i. Whether there were any out of court negotiations on the Claimants' claim herein.
- ii. Whether, if the answer to [i] above is in the affirmative, there was an agreement, a product of the negotiations.
- iii. What is the nature of the document dated August 17, 2019?
- iv. Can the document be vitiated on the reason set out by the Claimants, or any other reason?

53. Before I delve into considering each of the above stated issues, it behoves on me to consider a matter which though raised in the affidavit[s] in support of the application herein, it has not been submitted on. To this court, the matter is jurisdictional. The Claimants asserted that as regards the alleged consent, this Court is *functus officio*. The 1<sup>st</sup> Claimant stated in the supporting affidavit, thus:

- “ 8. That this Court had already pronounced itself on the issues of the purported consent and is therefore *functus officio*, after the predecessor Judges including Justice Mbaru, Justice Wasilwa and Justice Baari had already pronounced themselves on the consent and ordered that the matter proceeds for formal proof.

This is a position and reasoning that this Court does not agree with.

54. *Black's Law Dictionary*, Tenth Edition defines *functus officio* as:

- “Without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

To my mind, the doctrine of *functus officio* can only be raised where a court has rendered itself on the issues submitted on. The doctrine contemplates a situation where the court has considered an issue[s] on its merit[s]. This Court finds no difficulty in concluding that the doctrine as raised by the Claimants is not applicable to this matter. There is no time in the course of the proceedings herein, whereat the issue of the consent was deliberated on by the parties and the Court rendered itself thereon.

55. I have no doubt that in the course of the proceedings, directions were given for formal proof proceedings. However, it is important to state that the direction[s] were given not as a result of a determination on the consent as alleged by the Claimants. In my view the directions were procedural directions which cannot bar this Court from examining the consent and its implication on the Claimants' matter herein, if any.

56. In any event, the order by this Court to the effect stopping any other further proceedings until the issue of the consent is considered and a decision rendered thereon has not been assailed in any known legal forum.



**Whether there were any out of court negotiations on the Claimants' claim herein.**

57. Pursuant to the Court's order herein, the Managing partner of the Law firm of Gitau Mathu and Company Advocates filed an affidavit deposing on specific aspects inter alia that there were out of court negotiations on the Claimants' claim.
58. The Claimants, through the affidavit sworn on the November 7, 2021 and the supporting affidavit herein, both by the 1<sup>st</sup> Claimant suggest that indeed there were out of court negotiations.

**Whether if the answer to [i] above is in the affirmative, there was an agreement a product of the negotiations.**

59. The Respondent contended that the negotiations were successful. The Claimants were paid agreed sums following the negotiations. Upon receipt of the settlement cheques, they signed acknowledgment and discharge instruments.
60. The Claimants on the other hand contended that though there was an agreement out of the negotiations, the agreement was in terms beyond the amounts that they received. What was paid to them was only 70% of the figures that were agreed on. 30% was to be paid later, and the Respondent was to issue written contracts placing them under permanent and pensionable employment.
61. To support this position, the Claimants referred this Court to email correspondences between their former Counsel and Counsel for the Respondent. The 1<sup>st</sup> email is that of January 19, 2018 from Counsel for the Respondent to the former Counsel for the Claimants, which read in part:

“I hope this email finds you well. Following our last communication, please note that our client is offering a counter proposal of 60% payment in 2 instalments in full and final settlement [emphasis mine] of the outstanding dispute. Kindly confirm whether your client is agreeable to the said counter offer to enable us expedite on an amicable settlement. As for the casual contracts, I will send you a sample contract for your perusal and comments .....

62. The 2<sup>nd</sup> email correspondence was from the Claimants' Counsel that read in part:

“..... We write to advise that your clients' proposal of 60% is inadequate to ours. Our clients maintain their offer of 80% as full and final settlement. [Emphasis mine].

Kindly note that expeditious conclusion of the negotiations is of outmost importance to our client as it has been now 7 months since we were first instructed. We have been instructed to conclude the negotiations within 2 weeks .....

63. On the February 7, 2018 Counsel for the Respondent wrote:

“Our client has discussed and agreed that they are willing to pay 70% in full and final settlement [emphasis mine] of this dispute and the said 70% shall be paid in three equal instalments. Kindly confirm whether your clients are agreeable to the said offer to enable us put this dispute behind us .....

In response, Counsel for the Claimant through an email of the even date expressed the Claimants' position, thus:

“..... We have had a lengthy discussion with our clients in respect of your offer.



They are now amenable to your offer on condition that the same be paid in two equal instalments staggered within 2 consecutive months .....

64. From these correspondences it cannot be difficult for one to conclude that the Claimants' claim, was to be by agreement, settled at 70% of the amounts that were being advanced by them, in full and final settlement. It is imperative to note that in the correspondences both by the Claimants' Counsel and the Respondent's Counsel, the words "in full and final settlement of the dispute" are consistently used. The intention of the parties signified the claim was not being negotiated in peace meal. The negotiations were geared towards fully closing the dispute.
65. Contrary to what the Claimants purport, there is nothing in the correspondences indicating that their claim was to be settled at 100% and that having received 70% thereof, there was an outstanding balance of 30%. There is no indication that the issue of permanent and pensionable contracts was inter alia a final term of the negotiations.
66. The tabulation documents tendered by the Claimants are so detailed. They leave no doubt that the cheque amounts that were issued to the Claimants were actually 70% of the total sum that each of them was claiming.
67. In negotiation, parties have stakes. It is not automatic therefore that the parties to the negotiations get 100% of what they fronted in the process, at the end of it all.
68. By reason of the premises foregoing, I am not persuaded by the Claimants that the claims were not fully settled upon payment of the 70%. Consequently, I agree with the Respondent's position that the negotiation culminated to an agreement that the Claimants' claims were to be fully and finally settled at 70% of the amounts they were pushing for, and that it is upon basis of this, that settlement cheques were issued to the Claimants individually.
69. Upon receipt of the cheque of Kshs 135,107, the 1<sup>st</sup> Claimant like the others executed a document titled "Payment Acknowledgment" which read in part:

"I Damaris Wanjiru Kaleli of ID No 22xxxxxx acknowledge receipt of cheque No 2090 for Kshs 135,107 in full settlement of prayer number c, d, e, f and h of the memorandum of claim covering the period January 1, 2010 to April 30, 2018."

Considering this document against the reliefs sought in memorandum of claim, it is not possible for one to assert that there was 30% of the Claimant's entitlement that remained unpaid. In any event, the Claimants have not demonstrated how the 30% was arrived at and what it amounted to.

70. When the matter came up for mention on the September 26, 2019, and the issue of the settlement raised for the very first time, the 1<sup>st</sup> Claimant admitted having received Kshs 135,000. She deliberately did not mention under what circumstances and or that the same was only 70% of what she was expecting. I find considerable difficulty in understanding how reasonably possible it was for her, on her behalf and that of the other Claimants, to keep quiet on this crucial issue. In my view her conduct is clearly testament, that the payment was out of a negotiated process with final figures for full and final settlement of their claims.
71. When parties get into a negotiation, there is an implied promise to each other that should the negotiations be successful, each of them shall be bound by the outcome thereof, to an extent therefore that the doctrine of promissory estoppel shall operate against any of them from attempting to bolt out of the outcome.



72. In the circumstances of this case. I conclude that the Claimant cannot be allowed to run away from the outcome of the negotiations.
73. After the negotiations, the Claimants' entitlements were computed, and paid out to them by the Respondent. They did not object to the payment in any manner. They did not assert in any manner, including through an amended statement of claim that what they received was less than what they were entitled to under the outcome of the negotiations. By their conduct they made the Respondent to believe that the matter was finally and fully settled. They are estopped from asserting that the matter was not settled as such.
74. Article 159 of the Constitution enjoins this court to encourage and promote alternative justice systems. To permit a party or parties, to unjustifiably and without reasonable reason run away from an outcome of an out of court settlement, shall be equal to suffocating the operation of this constitutional provision from thriving.

#### **What is the nature of the document dated August 17, 2019?**

75. The document which clearly came after the negotiations and the payments to the Claimant read:

“Consent

By consent of both parties, the entire Claimants' claim inclusive of all outstanding claims, on leave days, maternity benefits and house allowance entitlements for the years 2010 to May, 2018 and agreed costs of this suit have been paid in full final settlement of the suit.”

In my view the document is in the nature of a settlement agreement.

76. Considering the document, I have no doubt in my mind that the parties had agreed consequent to the payments hereinabove mentioned to have this matter deemed fully settled. The Claimants' right to pursue their claims any further was extinguished.

#### **Whether the document can be vitiated on the reasons set out by the Claimants or any other reason.**

77. By reason of the premises herein before, this Court hesitates not to state that reasonably and in common practice, the document would be found to be not reasonable and legally anchored. However, the Claimants think not. It is therefore imperative to interrogate whether or not the agreement is such, and legally anchored.
78. It is trite law that courts of law give effect to the intention of the parties as expressed in their agreement, it is this Court's responsibility therefore to. In this position I find support in the sentiments of Sir Charles Newbold P in Damondar Jibabhai & Co Limited and another v Eustale Sisal Estates Limited [1967] EA 153 that:

“The function of courts is to give effect to the intention of the parties as expressed on their agreement. In the English Court of Appeal case above – Globe Motors Inc & others v TRN Lucas Electric Steering Limited and others [*supra*]. Justice Beatson stated as follows:

“Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake and can do so in a document, by word of mouth, or by conduct.”



79. Having stated as I have herein above, and that the document is a settlement agreement, the same can only be vitiated only upon those legally known factors – misrepresentation, fraud, mistake, coercion and frustration, or if certain conditions remain to be fulfilled. See *Flora N Wasike v Destimo Wamboko* [1988] eKLR.
80. The Claimants assailed the settlement agreement/consent inter alia on the ground that there were conditions that remained unfulfilled. Having found as I have hereinabove, that the agreement between the parties, which I must give effect, was to the effect that the matter was fully settled, I find no merit in this ground.
81. Counsel would ordinarily have ostensible authority to compromise suit so far as the opponent is concerned. This as was stated by the Court in *Waugh v HB Clifford & Sons* [1982] Ch 374, cited with approval in the *Flora N Wasike* case [*supra*]. I have keenly considered the circumstances of this matter including the Claimants’ admission that their former Counsel had instructions to enter into negotiations with the Respondent on their claims, and the correspondences on the negotiations that they themselves placed before this Court, and detect no reason that can arouse a thinking that Counsel did not have authority to execute the settlement agreement.
82. An allegation of fraud against an Advocate or any other person is a heavy indictment against such an Advocate or person. The person making the allegation must place before court cogent evidence to prove the allegation. Bald allegations of fraud cannot suffice. I have keenly considered the material the basis for the Claimants’ assertion, and find them to be mere assertions without sufficient evidence to warrant this Court find in favour of the position taken by them.
83. In the upshot, I see no valid reason which can justify a holding that the settlement agreement is invalid and ought to be set aside.

**What just and fair order[s] can this Court give in the circumstance of this matter?**

84. The only just and fair order that this Court can give is that which gives effect to the intention of the parties. My position is inspired by the Court of Appeal holding in *Coastal Bottlers Limited v Kimathi Minthika* [2018] eKLR thus:
- “23. Giving effect to the parties’ intention meant that the ELRC could not entertain the suit filed by the Respondent. This is because the Respondent had waived his rights to make and further claim in his relationship with the applicant”.
85. Having entered into the settlement agreement in the manner and in the terms they did, this Court cannot allow the Claimants to pursue their claims any further under the instant suit.
86. Consequently, I invoke the, inherent powers and overriding objective of this court, adopt The settlement agreement/consent as an order of this court, and mark the suit herein as dully settled. The respondent to pay court fees for the consent within 7 days of today.
87. Each party to bear its own costs of the application.
88. Orders accordingly.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY, 2023.**

**OCHARO KEBIRA**



## **JUDGE**

Delivered in presence of:

Mr Amolo holding brief for George Gilbert for the Claimant.

No appearance for the Respondent.

## **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 March 15, 2020 and subsequent directions of April 21, 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA**

**JUDGE**

