



**Dock Workers Union v Kenya Ports Authority (Cause 755 of 2015)
[2023] KEELRC 64 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 64 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 755 OF 2015
AK NZEI, J
JANUARY 19, 2023**

BETWEEN

DOCK WORKERS UNION CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

1. The Claimant sued the Respondent herein in the year 2015, and vide an Amended Memorandum of Claim dated 29th March 2017 and filed in Court on even date, the Claimant prays for:-
 - a. a declaratory order that the ninety-six (96) Claimants/Grievants herein were unfairly, illegally, unlawfully wrongfully and/or unconstitutionally summarily dismissed from employment by the Respondent.
 - b. an order that the ninety-six Claimants/Grievants be unconditionally reinstated as employees of and in employment with the Respondent, or in the alternative, the Respondent be ordered to pay the ninety six Claimants twelve (12) months' salary as compensation for unfair termination of employment.
 - c. general, punitive and exemplary damages for illegally, unconstitutionally, unlawfully, maliciously and wrongfully subjecting the ninety six (96) Claimants/Grievants to unfair administrative actions, unfair and unjustified frustrations and trials, multiplicity of investigations, emotional, financial, societal and mental anguish and torture, public embarrassment and ridicule.
 - d. full compensation for all the salaries, allowances, emoluments and/or income lost by each of the respective Grievants from the time of dismissal till reinstatement.
 - e. costs of and incidental to the cause.



2. On 4th May 2017, the Respondent filed an Amended Statement of Response, with trial commencing on 29th June 2017 and some of the Grievants giving evidence. The matter was, on application by Counsel for the parties, referred for Court Annexed Mediation on 9th December 2020. The Court's record shows that a Mediation Settlement Agreement and a Mediator's Report both dated 19th October 2021, were filed in Court on 21st October 2021. The Mediation Settlement Agreement, shown to have been duly executed by both parties and their respective Advocates, states in part:-

“It is agreed that:

1. The plaintiffs be paid their pension benefits with Kenya Ports Authority Pension Scheme and or Kenya Ports Retirement Benefits Scheme, 2012 upon obtaining clearance from the defendant.
2. The processing of payment to the foresaid plaintiffs shall be in compliance with the Pension Regulations and Rules that are applicable in both Schemes.
3. Reinstatement will not be considered.
4. Each party to bear its own costs.”

3. The Mediation Settlement Agreement does not state that the Agreement therein contained is full and final.

4. Although the Mediation Settlement Agreement is clearly dated (by hand) 19th October 2021, the Mediator's Settlement Report states in part:-

- “7. 1 the parties executed the Mediation Settlement Agreement dated 22nd July 2021 in full and final Settlement of their claims herein.
7. 2 the original Mediation Settlement Agreement is attached to this Mediator's Report for immediate reference.”

5. On 26th July 2022, the Claimant filed an evenly dated Notice of Motion and sought the following orders:-

- a. that the Court be pleased to adopt as an order of the Court the Mediation Settlement Agreement dated 19th October 2021 with variation of clause 3 therein to include the following words; “but plaintiffs who apply for reinstatement and qualify will be afforded a fair hearing.”
- b. that costs of the application be provided for.

6. This is the application before me and is brought under Article 50 of *the Constitution* of Kenya 2010, Section 3 of the *Employment and Labour Relations Court Act* and Order 51 Rule 10 of the *Civil Procedure Rules*, and is supported by a supporting affidavit and a supplementary affidavit of Simeon K. Sang sworn on 26th July 2022 and 27th September 2022 respectively.

7. It is deponed in the said two affidavits, inter-alia:-

- a. that parties herein participated in various Mediation sessions and ultimately were able to agree on terms that would resolve the dispute with finality, and to that end, the Mediator forwarded to the parties a Mediation Settlement Agreement for execution vide a letter dated 22nd July 2021. (A copy of the letter dated 22nd July 2021, addressed to the Mediation Deputy Registrar and copied to Counsel for both parties, was annexed to the supporting affidavit).



- b. that the terms of Settlement agreed upon by the parties, and on which the dispute was to be resolved, are captured in the Mediation Settlement Agreement that was forwarded to the parties vide the letter dated 22nd July 2021 as follows:-
 - i. the plaintiffs be paid their pension benefits with Kenya Ports Authority Pension Scheme and or Kenya Ports Authority Retirement Benefits Scheme, 2012 upon obtaining clearance from the defendant.
 - ii. the processing of payments to the aforesaid plaintiffs shall be in compliance with the Pension Regulations and Rules that are applicable in both schemes.
 - iii. reinstatement will not be considered, but plaintiffs who apply for reinstatement and qualify will be afforded a fair hearing (a copy of the Mediation Settlement Agreement forwarded under cover of the letter dated 22nd July 2021 was annexed to the supporting affidavit).
 - iv. each party will bear its own costs.
 - c. that the deponent (Simon K. Sang) executed the Mediation Settlement Agreement so forwarded on 22nd July 2021.
 - d. that on 19th October 2021, the deponent, who is the Claimant's General Secretary, was telephoned by the Mediator's Secretary and requested to go to the Mediator's Office and execute another Mediation Settlement Agreement as the Mediator had misplaced the duly executed Mediation Settlement Agreement of 22nd July 2021; and that on the same date (19th October 2021), he went and signed another Mediation Settlement Agreement, believing the same to be an exact replica of the one he had executed on 22nd July 2021.
 - e. that shockingly, he (Simon K. Sang) later learnt that the Mediation Settlement Agreement that he signed on 19th October 2021 was not an exact replica of the one he had earlier signed on 22nd July 2021 as clause 3 of the Agreement signed on 19th October 2021 left out the following words/sentence: "but the plaintiffs who apply for reinstatement and qualify will be afforded a fair hearing."
 - f. that the Claimant/Applicant should not be compelled to settle the matter herein outside the terms agreed upon by the parties and that inclusion of the left out words/ sentence will not prejudice the Respondent as the words are part of what the parties herein had agreed.
8. The application is opposed by the Respondent vide a Replying Affidavit of Irene Mbogoh, the Respondent's Principal Human Resource Officer, sworn on 23rd August 2022. It is deponed in the said replying affidavit, inter-alia :-
- a. that Mediation commenced on 16/2/2021 and terminated on 19/10/2021, after which a Mediation Settlement Agreement was executed by all parties; and that in addition, the Mediator prepared and filed in Court a Mediation Settlement Report dated 19/10/2021. (Copies of the Mediation Settlement Agreement and Mediation Settlement Report, both dated 19/10/2021, were annexed to the replying affidavit).
 - b. that the Claimant and the Respondent had on 1/3/2021 signed a statement of understanding pursuant to Rule 8 of the Judiciary of Kenya Practice Directions on Court Annexed Mediation 2018; and that the statement of understanding provided that if Settlement was reached, the same would be reduced in writing and once signed, it would be binding on the parties thereto. (A duly signed copy of the statement of understanding was annexed to the replying affidavit).



- c. that by a letter dated 22/7/2021, the Mediator forwarded to the parties' respective Counsel on record a draft Mediation Settlement Agreement; but no party executed the draft and that no binding and/or contractual relation could arise from the same.
 - d. that it was the understanding of the parties, guided by their respective Counsel on record, that they would include necessary amendments to the said draft Mediation Settlement Agreement and that consequently, Advocates on record engaged in discussion with a view to amending the said Agreement.
 - e. that vide a letter dated 15/9/2021, the Mediator reminded parties to share the duly executed Mediation Settlement Agreement, and that there was no way possible that the Claimant could have executed the Mediation Settlement Agreement without the concurrence of its Advocates on record; who ought to have forwarded the executed Agreement to the Respondent's Advocates on record for signature, which was never the case. (A copy of the Mediator's letter dated 15/9/2021 was annexed to the replying affidavit).
 - f. that it is not plausible that the Mediator by-passed the Advocates on record and called the Claimant directly to execute another Mediation Settlement Agreement, and that the Advocates on record were never informed of misplacement of the Mediation Settlement Agreement.
 - g. that this Court neither has the inherent power nor the jurisdiction to re-write the terms of the Mediation Settlement Agreement executed by the parties on 19/10/2021. That the Agreement constitutes a binding contractual relationship between the parties and the Claimant has not demonstrated by evidence any sufficient grounds to set aside or alter terms of the Mediation Settlement Agreement.
 - h. that the Respondent will suffer prejudice should the proposed words alter the duly executed Mediation Settlement Agreement dated 19/10/2021.
 - i. that in order to uphold Article 159 of *the Constitution* of Kenya 2010 and Section 59B (1) (a) (b) & (c) of the *Civil Procedure Act*, this Court should dismiss the Claimant's application dated 26/7/2021 as it lacks merit.
9. Both parties filed written submissions pursuant to the Court's directions in that regard, which I have considered.
 10. It is to be noted that although the Claimant/Applicant deponed to having signed a Mediation Settlement Agreement on 22/7/2021 whose clause 3 included the words "but plaintiffs who apply for reinstatement and qualify will be afforded a fair hearing", no signed copy of the said Agreement was exhibited and/or annexed to the application under consideration, and nothing was presented in Court to show that such signed copy of the Agreement was forwarded to the Respondent and/or its Advocates for execution. Only an unsigned draft bearing the words sought to be included was exhibited by the Claimant/Applicant, and both parties are in agreement that this is the draft that the Mediator send to the parties' respective Advocates under cover of her letter dated 22/7/2021.
 11. The said draft Mediation Settlement Agreement send by the Mediator to the parties' respective advocates on 22/7/2021 does not appear to have been executed by the parties, hence the Mediator's letter to the parties' respective Advocates dated 15/9/2021, which the Claimant/Applicant did not deny having received. On the other hand, and as already stated in paragraph 4 of this Ruling, the Mediator's Mediation Settlement Agreement Report refers to an Agreement executed by the parties on 22/7/2021; but the Mediator filed in Court a Mediation Settlement Agreement dated 19/10/2021, duly executed by both parties and their respective Advocates on record. The Claimant/Applicant



does not deny having freely signed this Agreement (dated 19/10/2021) whose clause 3 simply states “Reinstatement will not be considered.”

12. How did the original version of Clause 3 in the draft Agreement forwarded by the Mediator under cover of a letter dated 22/7/2021 mutate to its brief version of “reinstatement will not be considered” as contained in the duly executed Mediation Settlement Agreement dated 19/10/2021? It was deponed on behalf of the Respondent that further discussions/negotiations between the parties’ Advocates led to that. The Claimant/Applicant did not deny and/or dispute the occurrence of such further discussions/negotiations that may have led to that change/mutation of terms after the Mediator send out a draft Agreement on 22/7/2021.
13. Can this Court re-write, vary, set aside and/or make additions to the terms of a duly and freely executed Mediation Settlement Agreement? As already stated in paragraph 8(b) of this Ruling, both parties executed a written statement of understanding on 1st March 2021 to the effect that if Settlement was reached, the same would be reduced into writing and that once signed, the same would be binding on all parties to the Agreement. This simply meant that once the Agreement reached by the parties was signed, parties thereto would be contractually bound by the terms thereof.
14. The Blacks Law Dictionary defines a contract as:-

“an Agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law,”
15. Simply put, a contract is an Agreement between two or more parties that is legally binding on all of them. Most contracts are preceded by negotiations and/or discussions between the parties and/or their Advocates, and draft Agreements may be shared amongst the parties, leading to further discussions and negotiations before the contract is finally signed. Once signed, the contract and the terms therein cannot be amended, re-written, varied, altered or set aside except by consent of the parties to the agreement vide a subsequent agreement; or on ground or factors that would ordinarily vitiate a contract. These include fraud, misrepresentation, coercion and undue influence, none of which has been established in the present case.
16. The Claimant/Applicant’s General Secretary deponed that he freely signed the Mediation Settlement Agreement on 19/10/2021, believing the same to be an exact replica of the (draft) agreement forwarded by the Mediator on 22/7/2021. He did not dispute the Respondent’s assertion that further discussions followed after the draft agreement was forwarded to the parties’ respective Advocates by the Mediator on 22/7/2021.
17. I have noted that the Mediation Settlement Agreement dated 19/10/2021 is duly executed by both parties and their respective Advocates. It is binding on both parties.
18. For record purposes, I must state that I have noted the contents of the Mediator’s Mediation Attendance Sheet dated 22.7.2021 wherein the parties are shown to have agreed on terms of Settlement as set out in Clause 3 of the unsigned draft agreement forwarded to the parties’ respective Advocates by the Mediator on 22/7/2021. A copy of the Mediation Session Attendance Sheet dated 22/7/2021 was annexed to the Claimant/Applicant’s supporting affidavit sworn by Simon K. Sang on 26/7/2021, and its validity was not disputed by the Respondent. The Court was not addressed on whether there was a subsequent formal Mediation Session after 22/7/2021 at which clause 3 of the Agreement reached by the parties on 22/7/2022 was apparently changed from “Reinstatement will not be considered, Plaintiffs who apply for re-instatement and qualify will be afforded a fair hearing” to “Reinstatement will not be considered.” The Court was not told how the alleged subsequent discussions leading to the change of Clause 3 were conducted and where. I will leave these issues to lie as there is a binding



Agreement, duly executed by the parties and their respective Advocates on 19/10/2021. It is a well established principle that a Court of law cannot re-write a contract between the parties. Parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved (*National Bank of Kenya Limited -vs- Pipe Plastic Samkolit (K) Ltd & Another* [2002] E.A 505).

19. It was held as follows *in Re-estate Of Oyosi Oyuayo (deceased)* [2021] eKLR; and I agree:-

“26. Once the Mediation Agreement is signed it becomes final and binding as to the disputes that have been amicably resolved. Under the Court annexed Mediation, the Mediation Report is filed and is subsequently adopted as an order of the Court. however, if the parties are unable to agree on the issues that had been referred to Mediation, the Mediator files a non-compliance Report and the matter is then referred back to Court for determination.”

20. In the present case, parties herein agreed that reinstatement of the Grievants would not be considered; and further agreed on payment of the Grievants’ pension benefits and costs. Parties did not, however, resolve and/or agree on the issue of the grievant’s pleaded unfair dismissal/termination regarding which compensation is sought in the statement of claim as an alternative prayer to reinstatement. The issue of reinstatement, which parties agreed would not be considered, is one that is strictly guided by the statute; and where the same is to be determined by the Court, the Court cannot order reinstatement unless the order of reinstatement is made within three years of the dismissal in issue. Section 12(2) (vii) of the *Employment and Labour Relations Court Act* states as much.

21. The Claimant pleaded in its Amended Memorandum of Claim dated 29th March 2017 that the Grievants were dismissed from the Respondent’s employment on diverse dates, being 28th, 29th and 30th September 2015. That is over seven years ago. The obvious legal import of this position is clear, and parties may, possibly, have taken note of this fact when they agreed on the terms of the Mediation Settlement Agreement dated 19/10/2021, which this Court has neither power nor jurisdiction to re-write, to amend or to alter.

22. It was stated as follows in the case of *LKM -VS- LWK* [2022] eKLR:-

“15. As to whether the grounds set out by the Applicant meet the threshold for the setting aside of the said Mediation Settlement Agreement, I noted in the foregoing that the parties were each represented, and each together with the lawyer signed the Agreement. It is not easy, under such circumstances, to allow a party to renege from such an Agreement. The Applicant complained that the process was hurried, and took only two sessions. A Mediation may take one session. It may take several sessions. It depends on the complexity of the dispute, the willingness of the parties to settle and the ability and experience of the Mediator...”

23. As already stated in this Ruling, the Mediation Settlement Agreement dated 19/10/2021 was signed by the parties herein and their respective Advocates. None of the parties can run away from the terms of the agreement. As already stated in this Ruling, the Mediation Settlement Agreement executed by the parties and their Advocates on 19/10/2021 does not state that the same is in full and final Settlement of their claims in the suit herein. That kind of a statement is made in the Mediator’s Report, (signed by the Mediator only), on 19/10/2021. The Mediator’s Report refers to a Mediation Settlement Agreement executed on 22/7/2021. There is no Mediation Settlement Agreement executed on 22/7/2021 on record, and both parties herein have deponed as much. This, in my view, leaves the parties at liberty



to pursue determination of any claim that was not part of the matters addressed and agreed upon as set out in the Mediation Settlement Agreement executed by the parties and their respective Advocates on 19th October 2021.

24. In view of all the foregoing, and in the interest of justice, I allow the Claimant/Applicant's Notice of Motion dated 26th July 2022 in the following terms.
- a. the Mediation Settlement Agreement dated 19th October 2021 is hereby adopted as an order of this Court without any variation or inclusion of words not captured in the Agreement as executed.
 - b. parties may move the Court for determination of any pleaded claim or relief sought and not settled or resolved vide the duly executed Mediation Settlement Agreement executed by the parties and their respective Advocates on 19th October 2021.
 - c. each party will bear its own costs of the application.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JANUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

Appearance:

N/A for Claimant/Applicant

Mr. Kariuki Respondent

