



**Were v Board of Directors, National Transport Safety Authority & another; Njao (Interested Party) (Petition 2 of 2023) [2023] KEELRC 347 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 347 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION 2 OF 2023  
B ONGAYA, J  
FEBRUARY 10, 2023  
(FORMERLY HIGH COURT PETITION E557 OF 2022 AT MILIMANI)**

**BETWEEN**

**EDWIN ODUOR WERE ..... PETITIONER**

**AND**

**BOARD OF DIRECTORS, NATIONAL TRANSPORT SAFETY  
AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF ROADS AND  
TRANSPORT ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**GEORGE NJAO ..... INTERESTED PARTY**

**JUDGMENT**

1. The matter came up before the Court on January 5, 2023 when the Court ordered:
  - i. The application (dated 3012.2022) is certified urgent for consideration during the current court recess.
  - ii. As it is alleged that the interested party's contract of service has since lapsed, pending the inter-partes hearing or further orders by the Court, the respondent is at liberty to recruit a qualified person to fill the accruing vacancy in strict compliance with chapter 6 of the *Constitution of Kenya, 2010* on Integrity and Leadership as well, taking into account the values and principles in Articles 10 and 232 of the *Constitution* as they apply on recruitment, selection, and appointments in public and state officers.



- iii. The application and all material on record be served forthwith by close of Friday January 6, 2023 for inter-partes hearing or further orders on January 19, 2023 at 9.00 am or soon thereafter as will be called out per video link and cause list to be provided.
  - iv. Pending the inter-partes hearing, parties are encouraged to compromise the application with a view of recording a consent at the inter-partes hearing as will be just and appropriate.
  - v. Costs in the cause.
2. The parties' advocates attended Court on January 19, 2023 and learned counsel for the petitioner Mr Okoth addressed the Court thus, "We attempted negotiations and my client withdrew instructions to file a consent. We pray for 3 days to file our response and submissions to the preliminary objection raised by the respondent. In the meantime, we will still attempt settlement out of Court." Mr Agwara Advocate for the 1<sup>st</sup> Respondent and the interested party informed the Court that the consent had been filed by parties on January 16, 2023, parties had been served and, the petitioner had written to the Court to mark the matter settled. Mr Agwara further stated that unless the petitioner applied formally, the consent be adopted by the Court. Mr Okoth took the view that the consent had not been adopted by the Court and so it was not yet binding on the Court. The Court then ordered:
- i. That there is a signed consent by the parties which the petitioner is now applying to withdraw.
  - ii. That the petitioner is given 4 days to file submissions on the consent and upon service the respondents and interested parties will file their submissions.
  - iii. That mention on February 7, 2023 to confirm compliance and give a date for ruling.
3. The submissions were filed for the 1<sup>st</sup> respondent and interested party, as well as, for the petitioner. Counsel for the 2<sup>nd</sup> respondent submitted that he would not file submissions and the decision of the Court to apply in the matter.
4. It is common ground that Advocates for the petitioner Okoth & Company Advocates and Prof Albert Mumma & Company Advocates for the 1<sup>st</sup> respondent & the interested party signed a consent dated January 16, 2023 and filed it in Court and stating: By consent it is hereby ordered that:
- a. This case as contained in the petition dated December 30, 2022 together with the Notice of Motion Application dated December 30, 2022 be and are hereby marked as settled.
  - b. The interim orders issued by this Honourable Court in the matter, on January 5, 2023 be and are hereby discharged.
  - c. Parties to bear their own costs.
5. It is submitted for the petitioner that the consent was signed and concluded on the presumption that the information presented to the petitioner was true and correct. In particular, it is submitted that the interested party had presented to the petitioner's advocate that the interested party had already had his term extended and therefore in principle the petition had been overtaken by events; but which position the petitioner says was not true. It is submitted for the petitioner that the consent had not been adopted by the Court and therefore, it cannot be set aside as though it was a court order. Further, instructions for the consent to be adopted were withdrawn prior to recording of the consent and on account that the interested party misled the petitioner that the interested party's tenure had already been extended as the Director General of the National Transport Safety Authority. Thus the suitability of settlement of the matter between the parties became unsuitable in terms of holding in *Kasimir Wesonga Ongoma and Another – Versus- Ismael Otoicho Wanga* (1987) KLR 159 thus, "... the purpose of a consent judgment



is for the parties to inform the court that they have composed all their differences in a manner suitable to themselves without asking the court to make any further decision. The principle is that the parties know best how to conduct their own affairs and that by entering into a consent judgment they have entered into a contractual agreement to compose their differences to their satisfaction.” The petitioner’s counsel also cited *Specialized Engineering Co Ltd –Versus- Kenya Commercial Bank Ltd* (1988) KLR 150; [1986 – 1989] EA 554 where Court held thus, “it is desirable in general to lean towards a trial on the merits where there is doubt that all the issues have been resolved by consent order.” It was submitted that even where a consent has been adopted as a court order and it is doubtful that it resolves all the dispute, the court should lean towards having the dispute determined and or resolved on merits through a hearing.

6. On withdrawal of instructions to adopting of consent as court order, the petitioner cited *Kenya Commercial Bank Limited –Versus- Benjob Amalgamated Limited and Another*, Civil Appeal No 276 of 1997 where the Court of Appeal held, “A solicitor has a general authority to compromise on behalf of a client, if bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as an agent for the principal solicitor has the same power. No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice.” It is submitted that the petitioner withdrew the instructions to have the consent adopted and therefore there exist express negative direction for the advocate not to proceed and have the consent adopted as a court order. The consent should not be adopted unless parties are given a chance to iron out the issues in view of the petitioner’s negative instructions that the consent not be adopted. It was submitted that the consent had not been adopted and as such, it does not invite the need to make an application for setting aside. Further, enforcement of the consent that has not been adopted as a court order would be by way of an appropriate court action for breach of contract. Further, for the consent to be recorded, there must be a common will of the parties and since the petitioner is no longer willing to consent, the consent as filed is a nullity. Counsel for the petitioner relies on *Kafuma –Versus- Kimbowa Builders and Contractors* (1974) EA 91 thus, “if an advocate has no authority to enter into a consent judgment, the same is a nullity and would be set aside. The present case is peculiar, the instructions to consent were withdrawn prior to having the consent adopted as a court order, the petitioner’s advocate, therefore, lacked and lacks the capacity to agree to have the consent adopted as a court order. The consent being not adopted it is a contract and may be vitiated on account of mistake, fraud or misapprehension of facts.
7. For the 1<sup>st</sup> respondent and interested party, it was submitted that there is on record a duly signed and filed consent dated January 16, 2023. Further there is a letter on record Ref No OK/PET/22/2023 dated January 16, 2023 by the petitioner’s counsel addressed to the Court’s Deputy Registrar confirming that the matter had been settled by the consent dated and filed on January 16, 2023 and further, “We request that you kindly place the matter for mention before the trial court for the purpose of adopting the said consent and marking the file closed.” The consent was concluded of free and voluntary negotiations and therefore the duty of the Court is to adopt the consent unless there was an application to set aside the consent. Counsel submitted that the court’s practice was that where parties have voluntarily discussed a matter and agreed on clear terms which they have reduced in writing and filed in court as a consent, the court is bound by the terms of that consent and would ordinarily adopt the same as binding between the parties unless an application is filed to set aside the same on the basis that it was procured fraudulently - recording of consents is based on Article 159 (2) (c) of the *Constitution* which encourages parties to engage in alternative dispute resolution mechanism including court annexed mediation and, as the Court order of January 5, 2023 had encouraged parties to compromise as appropriate. Further, the terms of the consent were in clear terms and required no intervention of third parties or further action and must be binding. Counsel cited Order 49 Rule 3



of the *Civil Procedure Rules, 2010* that any order may, by consent of the parties evidenced in writing, be entered by the registrar or, in a subordinate, by an executive officer so authorised in writing by the Chief Justice. Thus, it was submitted that a consent need only be evidenced in writing and contain the provisions and terms of which are settled and agreed upon between the parties. It was submitted that the consent as filed expressed the free will of the parties involved and nothing stops the court from adopting the consent to formalise the freely negotiated terms of the parties. Further, in adopting the consent, the court only considers the validity of the consent and after they signed it, it became a binding contract. Counsel further submitted that counsel for the petitioner had written to the Deputy Registrar confirming the consent as filed and the principle of promissory estoppel barred the petitioner from turning away from the same.

8. The Court has considered the submissions and returns as follows:
  - a. The material on record and by submissions for the petitioner, there is no doubt that the parties negotiated a compromise and agreed to conclude the consent which has been filed in court.
  - b. While alleging in the submissions that the petitioner was misled by the interested party that his contract of service had already been extended, there is no material on record to verify that position and indeed, there is no evidence on record about the content of the negotiations leading to the signing of the consent. Of particular interest are the terms of the consent in issue and which do not show that it was a precondition that the matter was being settled subject to the interested party's contract having been already extended. The Court considers that in adopting the consent, the terms of the consent bind the parties and, it was not open for the petitioner to introduce extraneous matters outside the terms of the consent as being a bar to adoption of the consent as a valid court order. In any event, there is no established (by way of evidence) existence of instructions to petitioner's counsel not to sign the consent and such instructions being issued prior to such signing.
  - c. The Court has considered the submissions for the petitioner that the petitioner was withdrawing the instructions to counsel to consent to adoption of the filed consent. The Court considers that pertinent consideration before adopting a filed consent is whether it is valid. In the instant case there is no dispute that the consent was validly signed and it is duly filed. It appears that the submission for the petitioner is that after the consent was validly signed, the petitioner must consent to its being adopted as an order and by way of instructing counsel to do so concede to such adoption - and which counsel submits that the petitioner has withdrawn the instructions to so consent. The Court considers that it is a good practice of consistency and coherency for litigants to equally consent before court to adopting of a filed consent, but, failure to do so, in the court's view, would not take away the court's authority to adopt a valid consent, as a court order by parties' consent. Consenting as manifested in terms of the signed written consent is clearly different to consenting to adoption of the written consent as an order of the Court. Thus, once parties have signed and filed a consent in court, it is sufficient that they indeed validly signed and therefore the duty of the court is to adopt the same as a court order.
  - d. The Court has considered that the 2<sup>nd</sup> respondent was not a party to the consent and counsel for the 2<sup>nd</sup> respondent made no submissions. No prejudice to the 2<sup>nd</sup> respondent has been established as to defeat the adopting of the consent as duly filed.
  - e. The Court returns that the consent had not been adopted and as submitted for the petitioner, this was not a proceeding in the nature of setting aside or review of an order - requiring a formal application as was urged by Counsel for the 1<sup>st</sup> respondent and the interested party. Further, there was no application for expunging the consent as had been filed. However, as submitted by



Mr Agwara, if it was desired that the consent is struck out or expunged on account of material facts relied upon to vitiate it such as fraud or mistake or misrepresentation, then it would be necessary that a formal application is made and supported with an affidavit to establish such material facts.

- f. In view of the foregoing findings by the Court, the proper culmination is that there is a valid consent on record signed by the respective advocates for parties thereto and with full authority of their respective clients. It appears that the petitioner wishes to renegotiate the consent or to pull out belatedly in the circumstances that such renegotiation or pulling out was outside the clear terms of the valid consent on record. The Court considers that there is no established good reason not to adopt the consent as duly signed and filed as a binding understanding on the fate of the petition herein.
9. The Court has considered the circumstances of these unique proceedings leading to this ruling and each party to bear own costs.
  10. In conclusion, the proceedings for adoption of the consent are hereby determined with orders:
    - i. The consent dated and filed herein on January 16, 2023 is hereby adopted as an order of the court and, the order to issue accordingly.
    - ii. Each party to bear own costs of the proceedings prompting this ruling.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 10<sup>TH</sup> FEBRUARY, 2023**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

