



**Dock Workers Union v Kenya Ports Authority (Cause
755 of 2015) [2023] KEELRC 553 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 553 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 755 OF 2015
AK NZEI, J
MARCH 2, 2023**

BETWEEN

DOCK WORKERS UNION CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

1. This Court delivered a Ruling on 19th January 2023 and allowed an application filed herein by the Claimant 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 variations 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.
2. Before the ink on the said Ruling could dry up, the Respondent/Applicant, Kenya Ports Authority, moved back to this Court on 2nd February 2023 and filed the following applications under Certificate of Urgency:-
 - a. a Chamber Summons dated 2nd February 2023 seeking Orders:-
 - i. that leave be granted for the filing, hearing and determination of the Notice of Motion Application on the grounds set out therein, filed herewith seeking to review and set aside order number (b) contained in the Ruling of this Honourable Court delivered on 19th January 2023 in respect to the application dated 26th July 2022, which order



reads as follows; 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.

- ii. that costs of the Summons be in the cause
 - b. a Notice of Motion dated 2nd February 2023 seeking Orders:-
 - i. that pending hearing of the application, the Honourable Court be pleased to stay the execution and implementation of the ruling and orders granted on 19/01/2023 in the application dated 26/7/2022.
 - ii. that the Honourable Court be pleased to review and to set aside order number 2 contained in the ruling of the Honourable Court delivered on 19/01/2023 in respect of the application dated 26/7/2022 which order reads as follows:- 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 parties and their respective Advocates on 19/10/2021.
 - iii. that costs of the application be provided for.
3. The two applications were presented to me in chambers on 2nd February 2023 under certificate of urgency, and I directed that the two applications be served forthwith, and fixed the same for directions on 9th February 2023.
4. I must point out that under Rule 39(1) of the Civil Procedure (Court Annexed Mediation) Rules 2022, an application for setting aside an order or decree arising from a mediation settlement “shall not be filed except with the leave of the Court.” In the present case, the Respondent filed both the substantive application and the application for leave together, and presented them to the Court under Certificate of Urgency, possibly in an attempt to beat the thirty days’ time limitation period provided in Rule 39(5) of the aforementioned Rules.
5. Both applications are before me, and substantive justice would demand that the substantive Notice of Motion dated 2nd February 2023 be deemed as having been filed with the Court’s leave; to give way for interrogation by the Court of the substantive issues raised in the Motion. The Notice of Motion dated 2nd February 2023 is hereby deemed to have been filed with leave of the Court, in view of the Chamber Summons evenly dated; and with that, the Chamber Summons application has served its purpose and is fully spend.
6. When the matter came up for directions before me on 9th February 2023, and Counsel for both parties appeared before me, I ordered the Claimant to file and serve response to the Notice of Motion (dated 2nd February 2023) within five days of the said date, upon which the Respondent/Applicant would file a further affidavit and skeletal submissions within three days of service, with the Claimant/Respondent filing their skeletal submissions within three days of being served by the Respondent/Applicant. I fixed the matter for mention on 21st February 2023 for highlighting of submissions (by any party wishing to do so) and fixing of a Ruling date.
7. The Claimant/Respondent did not file response to the said application, either as ordered on 9th February 2023 or at all. On 21st February 2023, I ordered Counsel for the Claimant/Respondent to file and serve response to, and written submissions on the Notice of Motion dated 2nd February 2023 by close of the Court’s business on 22nd February 2023; and fixed the matter for Ruling on 2nd March 2023.



- No response has been filed to date, and the Notice of Motion stands unopposed. I have, however, noted that on 22nd February 2022, written submissions were filed on behalf of the Claimant/Respondent.
8. Rule 17(9) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides that a party may respond to an application filed in this Court by filing grounds of opposition verified by an affidavit. Submissions, written or oral, are not pleadings, and cannot be a substitute for a response to an application. Submissions are legal arguments aimed at persuading a Court of law to rule in one way or the other based on the law, pleadings filed and evidence adduced in a case before the Court.
 9. The unopposed Notice of Motion is expressed to be brought under Section 80 of the Civil Procedure Act, Section 12 of the Employment and Labour Relations Court Act, Order 45 Rule 1 of the Civil Procedure Rules and Civil Procedure (Court Annexed Mediation) Rules 2022; and is supported by a supporting affidavit of Paul Munyao Advocate sworn on 2nd February 2023. The Respondent/Applicant deposes that:
 - a. Rule 32(1) and 35(1) of the Court Annexed Mediation Rules 2022 contemplate two types of agreements that may emanate from mediation proceedings; either a Settlement Agreement in Form 12 or a Partial Settlement Agreement in Form 14. That from the Court's record, and from the conduct of parties during mediation proceedings; the mediation settlement dated 19/10/2021 is a Settlement Agreement and not a Partial Agreement.
 - b. that at the time mediation herein terminated, the practice directions as amended in Practice Directions on Court Annexed mediation (Amendment) 2018, which were then operational, prescribed that Mediation Settlement Agreement be in the prescribed Form 8, and that the Mediation Settlement Agreement dated 19/10/2021 was drawn in that prescribed Form 8.
 - c. that by mutual consent, the parties referred the entire dispute, as set out in their pleadings, for mediation, with an intention of settling the entire dispute, and that the Mediation Settlement Agreement dated 19/10/2021 represents a conclusive resolution of the dispute.
 - d. that parties to the dispute did not, at any stage, indicate or submit that the mediation process and the outcome thereof would be a partial settlement of the dispute.
 - e. that the Mediation Settlement Agreement dated 19/10/2021 is a conclusive determination, but not a partial determination.
 - f. that order no. 2 in the Court's Ruling dated 19th January 2023 is not one of the orders contained in the terms of the Mediation Settlement Agreement, and was not sought in the Claimant's application dated 26/7/2022.
 - g. that failure by the Mediator to include the words "full and final" does not render the Mediation Settlement Agreement inconclusive.
 - h. that there is an error and/or mistake apparent on the face of the record.
 10. As already stated, the Claimant/Respondent did not respond to, and/or oppose the application before the Court, and the foregoing averments made on behalf of the Respondent/Applicant stand unchallenged.
 11. The twin issues for determination in this matter, in my view, is whether this Court has jurisdiction to review and to set aside its own orders, and if so, whether the review order sought by the Respondent/Applicant is deserved.
 12. Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:-



- 33.(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling:-
- (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or (d) for any other sufficient reason.
- (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.
- (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.
- (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
- (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
13. it is my finding that this Court can, indeed, review and set aside its own orders.
14. By dint of Rule 36(3) of the Civil Procedure (Court Annexed Mediation) Rules 2022, no appeal shall lie against a decree or order of the Court arising from a settlement agreement. No appeal, therefore, is allowed against this Court's orders dated 19th January 2023, and the only way in which a party aggrieved by the said orders can move the Court is by applying for setting aside of the same on grounds set out in Rule 39(3) of the said Rules. None of those grounds has been alleged by either of the parties herein.
15. In the present case, the Respondent/Applicant has moved the Court to review and to set aside order no. (b) in the Ruling delivered on 19th January 2023, mainly on grounds that the order was not one of the orders contained in the terms of the Mediation Settlement Agreement, and had not been sought in the Claimant's motion application dated 26th July 2022. This removes the application herein from the threshold set by Rule 39(3) of the Civil Procedure (Court Annexed Mediation) Rules, 2022.
16. Whereas order no.(b) in this Court's Ruling dated 19th January 2023 was not part of the Mediation Settlement Agreement dated 19th October 2021, it was part of the reliefs sought by the Claimant in the Notice of Motion application dated 26th July 2022 whereby the following order had been sought:-
- “ that the Court be pleased to adopt as an order of the Court the Mediation Settlement Agreement dated 19/10/2021 with variation of Clause 3 therein to indicate the following words, “but plaintiffs who apply for reinstatement and quality will be afforded a hearing.”
17. In its Ruling delivered on 19th January 2023, this Court adopted the Mediation Settlement Agreement dated 19th October 2021 as an order of the Court without any variation or inclusion of words not captured in the Agreement as executed. Further, the Court put the parties herein at liberty to move the Court for determination of any pleaded claim or relief sought (in the suit herein) and not settled or resolved vide the duly executed Mediation Settlement Agreement executed by the parties and their



Advocates on 19th October 2021. It is this latter part of this Court's said Ruling (Order no. (b) in the Ruling) that provoked the filing of the present application.

18. It is clear from the foregoing that Order no.(b) in this Court's Ruling delivered on 19th January 2023 was not alien to the application pursuant to which it was delivered. The Ruling itself is quite detailed and is part of the Court's record herein. Enough said on that.
19. The Respondent/Applicant has contended that the said Order (no.(b) in this Court's Ruling delivered on 19th January 2019) was not part of the Mediation Settlement Agreement dated 19th October 2021. That position has not been disputed by the Claimant/Respondent, and I agree with the Respondent/Applicant.
20. Having demonstrated at paragraph 12 of this Ruling that this Court has jurisdiction to review and to set aside its orders, the Respondent/Applicant's Notice of Motion dated 2nd February 2023 is hereby allowed in the following terms:-
 - a. Order no.(b) in this Court's Ruling delivered on 19th January 2023 is hereby reviewed, and is set aside.
 - b. Each party will bear its own costs of the application.
21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND MARCH 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.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Claimant/Respondent

..... for Respondent/Applicant

