



**Odhiambo v Riley Falcon Security Services Limited (Appeal
E026 of 2023) [2023] KEELRC 2595 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2595 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E026 OF 2023
CN BAARI, J
OCTOBER 26, 2023**

BETWEEN

ROSEMARY ODHIAMBO APPELLANT

AND

RILEY FALCON SECURITY SERVICES LIMITED RESPONDENT

RULING

1. This ruling relates to a Notice of Motion application dated 10th July, 2023, brought pursuant to Order 9 Rule 9 of the *Civil Procedure Rules* 2010, Section 79G of the *Civil Procedure Act*, Section 1B, 3 and 3A of the *Civil Procedure Act*. The Applicant seeks order That:
 - i. That leave be granted to the Firm of Omondi Otieno & Associates to come on record for the Applicant/Appellant in place of P.D Onyango and Associates Advocates.
 - ii. That the Memorandum of Appeal herein, dated 15th May 2023, be deemed to have been filed within time.
 - iii. The costs of the application to abide by the outcome of the appeal.
2. The motion is supported by grounds on the face thereof and the affidavit of Rosemary Odhiambo, the Applicant herein. The crux of the motion is that the Firm of P. D Onyango and Company Advocates represented the Applicant herein, who was then the Claimant in Kisumu CMCELRC No. 188 of 2020, and it is necessary that the Court grants leave before another Advocate can come on record.
3. The Applicant states that she was the Claimant in Kisumu CMELRC No. 188 of 2020, for which judgment was delivered on the 7th of October, 2022. She further avers that her Counsel filed a Memorandum of Appeal dated 31st October, 2022, in Kisumu ELRCA No. E040 of 2022, Rosemary Odhiambo versus Riley Falcon Security Services Limited.



4. The Applicant further avers that when she sought to know from her counsel the progress of the appeal, she was told that the same had never been lodged. She avers that Counsel informed her that he had collected her compensation from the Respondent, and asked the Applicant to sign a discharge voucher for KShs.40,000/=, in full and final settlement of the decretal sum.
5. The Applicant states that after the above events, she sought to find out by herself whether there was actually an appeal that had been filed since she was not satisfied with the response of her advocate, and to her surprise, she found that the same had been lodged, yet she was never informed.
6. The Applicant states that her former counsel later filed a Notice of withdrawal dated 31st January 2023. It is her position that she reported to the Law Society of Kenya, and has formally lodged a complaint against her counsel which complaint is currently pending determination.
7. The Applicant states that she has sufficiently explained the delay in lodging this appeal and that Counsel mistakes must never be visited upon a litigant. She further states that her appeal is merited, and the same should be heard to its logical conclusion.
8. The Applicant avers that the Court has inherent jurisdiction to grant the orders sought, and it is in the interest of justice that the orders sought are granted. The Applicant submits that no prejudice will be occasioned to the Respondent as they shall have the opportunity to be heard.
9. The Respondent opposed the motion vide a replying affidavit sworn by one Nancy Machage, wherein, she states that seeking extension of time to file the appeal is made in bad faith and is devoid of merit. It is the Respondent's position that as soon as judgment in the subordinate Court was delivered, the Appellant filed an appeal in a haste to meet the timelines within which to file an appeal and that she indeed filed an appeal being Kisumu ELRCA No E040 of 2022.
10. The Respondent avers that parties herein, embarked on negotiations on the decretal sum, and eventually agreed to have the subordinate court suit settled at an all-inclusive sum of Kshs. 80,000/-
11. The Respondent avers that it complied with the consent and paid out Kshs 80,000/- in the name of the Appellant's former Advocates, and which cheque was received. It states that it was imperative that the appeal be withdrawn upon settlement of the decretal sum as agreed by parties, and that indeed, the appeal was withdrawn vide notice of withdrawal dated 31.1.2023.
12. The Respondent states that it also prepared a certificate of service and the same was sent to the Appellant's advocates, who *vide* letter dated 21.2.2023, acknowledged receipt and confirmed that the matter is settled.
13. The Respondent states that upon receiving the instant application and its annexures, they forwarded it to the Appellant's former advocates seeking their response because according to them, the matter was settled. The Respondent further states that they received a letter dated 21.5.2023 from the Appellant's former advocates, indicating that the Appellant accepted the negotiated payment and signed the discharge voucher with her advocates.
14. The Respondent further states that the Appellant agreed to the withdrawal of the appeal on the payment of the negotiated amount, and that is why the appeal was withdrawn after she received the payment and signed the discharge voucher.
15. It is the Respondent's position that the said letter dated 21.5.2023 further informed them that the Appellant was being briefed on all the negotiations with regard to this matter, and on the day of payment, she was accompanied by one Patrick Sakwa. The Respondent states that there was therefore no fraud or coercion or misinterpretation as everything was done in a transparent manner.



16. The Respondent states that from paragraph (e) of the Appellants affidavit in support of the application, it appears that she was aware of the withdrawal of the appeal with no orders as to costs vide the notice dated 31/1/2023, and filed on 2/2/2023, yet it has taken her 105 days to file this application, which period is thus unreasonable.
17. The Respondent avers that allowing this application would prejudice them, in that it will have to pay its advocates afresh in a matter which was already settled.
18. Parties urged the motion orally before Court on 25th September, 2023, wherein, they reiterated their pleadings.

Determination

19. I have considered the application, the grounds in support, the replying affidavit in opposition and the oral submissions by both counsels.
20. The first issue for determination herein, is whether the consent order through which Kisumu ELRCA No E040 of 2022, earlier filed should be set aside. A determination of this issue will then enable Court reach a finding on the prayers subject of this application.
21. The principles on setting aside of consent order was spelt out in the case of *Broke Bond Liebig (T) Ltd v Mallya* (1975) E.A. 266 where the then Court of Appeal for East Africa stated :-

“The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani v Kassan* (1952)19 EACA 131 where the following passage from Section on judgments and orders, 7th Edition vol. 1, P. 124 was approved:

“Prima Facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud of collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement”

22. In this matter, a consent was entered into which compromised the appeal earlier filed. The Appellant/Applicant herein, received Kshs. 40,000/- out of the Kshs. 80,000/- subject of the settlement, and executed a discharge voucher in this regard on 16th January, 2023.
23. Further, a consent executed by both the Appellant’s former counsel and the Respondent’s counsel, has been annexed to the Respondent’s replying affidavit together with correspondences indicating that the matter was settled.
24. In *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485, Harris J held that thus:

“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.



2. 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.”
25. Further, in *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR Hancox JA cited Setton on *Judgments and orders* (7th edition) vol 1 page 124, and reiterated that;

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”
26. In my view, the Appellant has not satisfied this Court that the consent and discharge under which the matter was settled, was obtained either by fraud, misrepresentation or collusion as to qualify its being set aside. In any event, the Appellant in her application did not seek the setting aside of the consent, and for as long as it is in place, allowing the filing of another appeal is not tenable.
27. It then follows that by virtue of the consent order which settled the matter between the parties herein, the memorandum of appeal dated 15th May, 2023, is untenable.
28. In the premise, there would be no basis upon which to grant prayer 1 of the motion as no suit exists for the Firm of Omondi & Associates Advocates to come on record in.
29. The motion is dismissed in its entirety with no orders on costs in the interest of bringing this matter to a close.
30. Costs shall be in the cause

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 26TH DAY OF OCTOBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Brian Otieno present for the Applicant/Appellant

Ms. Anuro present for the Respondent

Ms. Christine Omolo-C/A

