



**Mberia v Mount Kenya University (Cause 1407 of 2016)
[2023] KEELRC 2960 (KLR) (20 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2960 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1407 OF 2016
JK GAKERI, J
NOVEMBER 20, 2023**

BETWEEN

EVANS MUGAMBI MBERIA CLAIMANT

AND

MOUNT KENYA UNIVERSITY RESPONDENT

RULING

1. Before the court for determination is the Respondent/Applicant's Notice of Motion dated 12th September, 2023 filed under Certificate of Urgency seeking Orders that;
 1. Spent.
 2. The Honourable court be pleased to review the consent orders issued on 24th April, 2023 and set aside/vacate the said orders on liability being entered in favour of the Claimant against the Respondent and parties to file written submissions of quantum.
 3. Costs be provided for.
2. The Notice of Motion is based on the grounds outlined on its face and supported by the Affidavit of Deogratius Omondi Ochieng sworn on 12th September, 2023 who deposes that when the matter came up for hearing on 31st January, 2023, counsels informed the court that they were negotiating and prayed for time to conclude the negotiations and a mention was slated for 16th March, 2023 when counsels sought a further 30 days to finalize the negotiations and a further mention was scheduled for 24th April, 2023 when the Respondent's counsel did not attend the mention but was notified of the mention slated for 24th May, 2023 and the parties were still exchanging response necessitating a further mention on 18th July, 2023 when the court did not sit and a mention was scheduled for 27th July, 2023 when Mr. Wafula holding brief for Mr. Omondi informed the court that the matter was coming up to confirm the filing of submissions on quantum but requested for more time to do so. Surprisingly, Counsel for the Respondent informed the court that the matter was coming up for taking directions



on the hearing of the main suit as the parties had not consented on liability as the negotiations had not yielded a consent.

3. That at the instance of the Claimant's counsel, the court had recorded consent on liability in favour of the Claimant and a judgement date set.
4. That no such agreement had been arrived at and the consent was not written.
5. The affiant depones that the consent herein was recorded on the basis of misrepresentation of the facts that the parties had agreed on liability.
6. That the Respondent stood to suffer massive loss if the *ex parte* consent order was not set aside as it was obtained without its consent and were thus condemned unheard and the Claimant stands to suffer no harm.

Response

7. In his Replying Affidavit in opposition to the application, counsel for the Claimant deposes that the parties had been negotiating a settlement since November 2022 and the Respondent had agreed to pay an all-inclusive figure of 5 months salary and no leave days were outstanding.
8. That on 24th April, 2023, counsel informed the Court that they had agreed on liability and the only outstanding issue was quantum and the Respondent's counsel was notified of the courts directions but on 27th July, 2023 counsel for the Respondent provided a different reason for the mention.
9. The affiant deposes that an agreement had been reached on the issue of liability.

Applicant's submissions

10. According to counsel, a consent agreement must be characterised by agreement, reciprocal concessions, compliance with formal requirements, validity and binding effect.
11. That the consent in question was oral and the Respondent had not consented to it and due to their absence, the consent ought to have been in writing for adoption as an order of the court and the Claimant's counsel misrepresented facts as the negotiations had not yielded a settlement.
12. Reliance was made on the sentiments of the court in *Gurpreet Singh v Chatur Bhuj Goel* [1988] AIR 400, *Wema Foundation Trust Co. Ltd v County Government of Nairobi City & another* [2022] eKLR and *Munyiri v Ndunguya* [1985] eKLR to reinforce the submission.
13. Counsel further submitted that the Claimant had not provided any correspondence on the alleged agreement on admission of liability and client's instructions had not been sought in this case.
14. Counsel urged the court to set aside the consent and set the matter down for hearing.

Claimant's submissions

15. Counsel isolated two issues for determination including costs.
16. As to whether the consent order recorded on 24th April, 2023 was proper, counsel submitted that it was as the parties attempted to settle the matter out of court and the only contentious issue was the quantum.
17. Counsel relied on the sentiments of the court in *Sarova Hotels Ltd India v Placid Properties Ltd Gross & Co. Advocates* (Misc App. 157 of 2017 (2022 KEHC 85 (KLR) on setting aside of a consent order.



18. Counsel urged the court to dismiss the application with costs.

Determination

19. The singular issue for determination is whether the Notice of Motion by the Respondent/Applicant is merited.
20. It is common ground that the Claimant instituted the instant suit on 18th July, 2016 and the matter is yet to be heard.
21. In order to appreciate the context of the instant application, it is important to highlight the historical background of this suit.
22. By 13th July, 2018, the Respondent had not filed a response to claim even after having been accorded 14 days to do so on 9th April, 2018.
23. By 13th June, 2018, the court directed that the suit proceeds as undefended and a date for formal proof was to be taken at the Registry.
24. On 4th June, 2019, the court directed the parties to take a hearing date at the Registry.
25. On the hearing slated on 9th March, 2020, the Respondent's counsel was reported to have been indisposed. The same reason was used on 4th June, 2019, more than 9 months earlier. The court demanded evidence of admission of counsel.
26. Although the report did not state that counsel was admitted in hospital, the court adjourned the hearing and gave the Respondent leave to file and serve a witness statement and other documents by close of business on 12th March, 2020.
27. On 19th June, 2020, the court directed that the hearing date be fixed in September but nothing happened until 30th September, 2021 when a notice to show cause was issued by the court suo motu. On that day, the Claimant was represented by two counsels. The court gave the counsels upto 21st October, 2021 to sought out the issue of representation, which they did.
28. On 21st October, 2021, the Respondent's counsel was absent but was present on 3rd February, 2022 when the court vacated the notice to show cause and set the matter for hearing on 2nd June, 2022 when neither of the counsels was ready to proceed and each had to pay a court adjournment fee of Kshs.1,000/= before 13th October, 2022, the new hearing date when again counsels were not ready to proceed.
29. On 31st January, 2023, the hearing date, counsels reported that they were in the final stages of a settlement and prayed for 2 weeks to record a settlement, which was still in the offing on 16th March, 2023.
30. On 24th April, 2023, counsel holding brief for Mr. Thurairaja, for the Claimant informed the court that the parties had agreed that the termination of employment was unfair but the Claimant was insisting on compensation for the unexpired term of the contract and the Respondent was only ready to pay 3 months salary as compensation.
31. Counsel prayed that the parties be accorded 14 days to file submissions on compensation and that costs follow the event.



32. Since the Respondent's counsel missed attendance on a date fixed by consent, the court directed that the issue of compensation be canvassed by way of written submissions, 14 days a piece and a mention was slated for 24th May, 2023.
33. Instructively, the Claimant's counsel briefed the Respondent's counsel on what had transpired in court on 24th April, 2023 and was directed to serve the notice of motion.
34. On 24th May, 2023, counsels prayed for 14 days to consult on the settlement but on 27th July, 2023, the Respondent's counsel informed the court that the mention was intended to fix a hearing date, which was patently untrue.
35. The court directed the parties to comply with the directions made on 24th April, 2023 and a ruling date was set.
36. To forestall the ruling, the Respondent filed the instant application under Certificate of Urgency.
37. The foregoing sorry history of this case reveals that neither of the parties has been enthusiastic about concluding this case, a straight forward issue of whether termination of the Claimant's employment by the Respondent was unfair.
38. The court is persuaded that had counsels applied their negotiation skills and experience more tenaciously and in the spirit of give and take, a settlement would have been arrived at.
39. It is not in dispute that counsels for the parties were negotiating an out of court settlement as rehashed by the parties herein at the instance of the Claimant.
40. Copies of emails reveal that the Respondent's counsel had communicated an offer of 3 months salary which the Claimant rejected and made a counter offer of the equivalent of 8 months salary and unpaid leave days.
41. In response, the Respondent made a counter-offer of an equivalent of 5 months salary, contending that leave days had been paid.
42. There is no evidence on record that the Claimant accepted this offer in writing.
43. Although the parties were negotiating, no consensus appear to have been reached by 24th April, 2023 when the counsel holding brief for Mr. Thurania informed the court that the parties had agreed that termination of the Claimant's employment was unfair.
44. The foregoing is fortified by the Claimant's acknowledgment in his submissions that "the parties had attempted to settle the matter out of court and the same had made great progress. The only issue of contention during the negotiations was the issue of quantum."
45. The applicant maintained that the alleged consent was obtained through misrepresentation of facts by the Claimant's counsel in the absence of the Respondent.
46. It is trite that a consent judgement must have been agreed upon by the parties freely and can only be varied or rescinded on the same grounds on which a contract may be set aside such as fraud, misrepresentation or other vitiating element of a contract.
47. In the absence of documentary evidence to show that the parties had indeed agreed on the question of liability, the Claimant's counsel's statement to the court on 24th April, 2023 on the issue would appear to have been a misrepresentation of the status of the negotiations and precipitated the instant application.



48. The court is guided by the sentiments of Achode J. (as she then was) in [PMM V JNW](#) [2020] eKLR as follows;

“This court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectations is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice. (See *Wachira Karani v Bildad Wachira* [2016] eKLR).

49. Similarly, there is sufficient judicial authority for the proposition that the power of the court to set aside consent, judgement, orders or proceedings is discretionary and the over-arching principle is to do substantial justice to the parties before it as held in *Patel v E.A Cargo Handling Services* [1974] EA 75 as follows;

“There is no limit or restriction on the judge’s discretion except that if he does vary the judgement, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter wide discretion given to it by the rules . . .”

50. (See also [Patrick Omondi Opiyo t/a Dallas Pub V Shaban Keah & another](#) (2018) eKLR.

51. Based on the foregoing, the court is satisfied that the Applicant’s Notice of Motion dated 12th September, 2023 has merit and it is hereby allowed.

52. The orders of this court made on 24th April, 2023 are hereby set aside.

53. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF NOVEMBER 2023

DR. JACOB GAKERI

JUDGE

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 15th March 2020 and subsequent directions of 21st April 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 Civil 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.

DR. JACOB GAKERI

JUDGE

