



Esakwa & 14 others v Mwendwa ((sued through its President Nick Mwendwa, Vice President Petra Doris and C.E.O Barry Otieno)) (Cause 1370 of 2016) [2022] KEELRC 4079 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 4079 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1370 OF 2016
JK GAKERI, J
SEPTEMBER 29, 2022**

BETWEEN

**MICHAEL ESAKWA 1ST CLAIMANT
JOSEPH O. AGOLA 2ND CLAIMANT
IGANZA PAMELA 3RD CLAIMANT
SAMSON CHEROP 4TH CLAIMANT
RAPHAEL O. MAWARO 5TH CLAIMANT
ROSE GACHERI 6TH CLAIMANT
EVANS RONO 7TH CLAIMANT
DAVID J. AGINGA 8TH CLAIMANT
LEONARD K. ONKOBA 9TH CLAIMANT
SOPHIA KWAMBOKA 10TH CLAIMANT
JUSTUS N. MUTUNGA 11TH CLAIMANT
MORRIS MAWIRA NYAGA 12TH CLAIMANT
EDWARD LUMBUGU 13TH CLAIMANT
DOMINIC MOUTI MICHIEKA 14TH CLAIMANT
LORDVICK ADUDA 15TH CLAIMANT**

AND

**FOOTBALL KENYA FEDERATION RESPONDENT
(SUED THROUGH ITS PRESIDENT NICK MWENDWA, VICE PRESIDENT
PETRA DORIS AND C.E.O BARRY OTIENO)**



RULING

1. Before the court for determination is a notice of motion application by the claimants/applicants dated December 14, 2021 seeking orders that:
 - i. Spent.
 - ii. The court be pleased to set aside, vacate, vary and/or review the consents filed on November 29, 2019 in respect of the 2nd, 5th, 7th, and 13th claimants.
 - iii. The court be pleased to allow the firm of M/S Obura Mbeche & Co Advocates to come on record for the 2nd, 5th, 7th and 13th claimants.
 - iv. The costs be provided for.
2. The application filed under certificate of urgency is expressed under section 12 of the *Employment and Labour Relations Court Act*, 2011, rules 17 and 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and other enabling provisions of law and is supported by the affidavit of Joseph O Agola who depones that he instructed the firm of M/S Obura Mbeche and Company Advocates to file this suit claiming Kshs 2,500,000/= as well as Kshs 2,000,000/= as general damages for breach of his constitutional rights. That the respondent entered appearance and filed a statement of response on August 15, 2016 through M/S Sila Munyao & Co Advocates. The affiant states that he was shocked to find out that a consent had been filed by the firm of M/S WM Njagi and Associates Advocates under which he was to receive Kshs 1,000,000/= which he is yet to receive and has always been willing to prosecute the claim.
3. That consents were also recorded in respect of the 5th, 7th and 13th claimants and the 15th claimant who was no longer privy to the suit and appears to have colluded with M/S WM Njagi & Associates Advocates in an attempt to defraud the 2nd, 5th, 7th and 13th claimants.
4. That on becoming aware of the foregoing, the affiant sought the assistance of M/S Obura Mbeche & Co Advocates who wrote to M/S WM Njagi & Associates who confirmed that only the 15th claimant had consented. That at the time, M/S Obura Mbeche Advocates could not peruse the court file owing to the COVID-19 pandemic.
5. That when the affiant's advocates perused the file, 5 consents dated November 29, 2019 were on record. That the consents were entered into through misrepresentation and/or fraud between the 15th claimant and M/S MW Njagi Advocates.
6. The affiant states that at no point did he instruct WM Njagi Advocates to represent him and had no authority to negotiate or consent on his behalf.
7. That the affiant withdrew his instructions to consent and the same was recorded contrary to his wishes.
8. The affiant further avers that under the Law Society of Kenya Code of Ethics and Conducts of Advocates, 2016, an advocate should not waive or abandon the client's rights without the client's informed consent.
9. That if the firm of WM Njagi Advocates had instructions to act on his behalf, the same was granted through misrepresentation of the 15th Claimant and he had not been consulted or agreed to the change.
10. It is the affiant's case that he was never consulted on any proposed settlement or consent.



11. That between November 19, 2019 to December 5, 2019, the affiant was hospitalized and could not have given instructions to the law firm of WM Njagi Advocates.
12. The application herein came up before Justice Nderi Nduma on December 16, 2021 who certified the same urgent and directed the applicant to serve the respondent and the application be responded to within 14 days. There is no record of service on file.
13. On October 12, 2021 when the suit came up for hearing, the claimant's counsel was not ready and the respondent was absent. The court directed service of notice of the hearing scheduled for November 18, 2021 when the counsel holding brief informed the court that 5 claimants had settled their matters with the respondent and sought time to amend the statement of claim and refile the witness statement and leave was granted. The application herein followed on December, 16th 2021.
14. On the hearing date on January 18, 2022, none of the parties were present at 9.30 am when the matter was called out and neither was present at 10.40 am. The hearing was adjourned to February 15, 2022.
15. On February 15, 2022, Mr Otieno holding brief for Mr Bonyo informed the court that the respondent had not filed a replying affidavit and the application was unopposed and ruling was slated April 12, 2022.
16. In order to prepare for the ruling, on March 14, 2022, the court requested the Deputy Registrar to have the proceedings typed for clarity. Consequently, the file was unavailable for preparation of the ruling until August 2, 2022. The ruling was prepared on August 4, 2022.
17. Puzzlingly, the last time the respondent's counsel was in court was on December 18, 2019.
18. The respondent neither filed a replying affidavit nor submissions.

Submissions

19. The applicant submits that the court is called upon to determine the question whether.
 - a. an advocate who has not been instructed has authority to enter into a consent on behalf of the claimant.
 - b. an advocate enters into a consent without authority, acts in good faith and/or in the interests of the claimant.
 - c. all parties to an action are required to render consent.
 - d. if an advocate disowns a consent executed and filed by himself a court can proceed to uphold the same.
 - e. a consent entered into by fraud and/or misrepresentation is valid.
 - f. the court has power to make orders on a finding that a consent is valid.
20. Counsel for the claimant submits that it is settled law that a consent has a contractual effect and can only be set aside on grounds on which a contract may be set aside. The decision in *Intercountries Importers & Exporters Ltd V Teleposta Scheme Registered Trustees & 5 others* (2019) eKLR is relied upon to buttress the submission.
21. It is alleged that the consents on record were entered into through fraud and/or misrepresentation between the law firm of WM Njagi and the 15th claimant.



22. It is further submitted that the firm of MS WM Njagi had not been instructed by the claimants to and had no authority to enter into consents on their behalf and the alleged consents are a nullity.
23. That the claimants withdrew their consent and the firm acted without ostensible authority of the claimants and in breach of rule 122 of the Law Society of Kenya Code of Ethics and Conducts of Advocates, 2016.
24. Reliance is made on the decisions in *Samuel Mbugua Ikumbu V Barclays Bank of Kenya Ltd* (2015) eKLR, *Kenya Commercial Bank V Specialized Engineering Co Ltd* (1980) eKLR and *Republic V District Land Registrar Nandi & another ex parte Tegerei & another* Misc. Application No 240 of 2002 to urge that an advocate has general authority to compromise on behalf of the client if he acts *bonafide* and not contrary to express negative direction.
25. It is further submitted that consent of all the parties must be obtained in consent judgements.
26. Counsel submits that while the 15th claimant consented, the rest of the claimants did not and were not privy to the consent and only became aware of the same when they perused the court order in December, 2021 and did not receive the amount allegedly consented to. It is submitted that the claimants have raised cogent evidence for the court to set aside the consents on record.
27. In conclusion, the claimants' counsel submitted that;
 - i. an advocate has no authority to act on behalf of the claimant without instructions.
 - ii. an advocate has a fiduciary duty to the client to act in a manner consistent with the authority given.
 - iii. the consent entered into on the basis of fraud and/or misrepresentation should be set aside.
28. The respondent did not file submissions.

Determination

29. The issues for determination are:
 - i. Whether the 2nd claimant has established that the consent filed on November 29, 2021 was vitiated by fraud and/or misrepresentation.
 - ii. Whether the 2nd claimant consented to the consent filed in court on November 29, 2019.
 - iii. Whether the claimant is entitled to the reliefs sought.
30. As regards the first issue, it is trite that a consent, order or judgement has a contractual effect and can only be set aside if it is established that the same is vitiated by fraud, mistake, non-disclosure of material facts or other vitiating element.
31. This position finds support in *Flora Wasike V Destimo Wamboko* (1988) 1 KAR 625, where the court stated as follows;

“It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out . . .”



32. Similar sentiments were expressed in *Purcell V FC Trigell Ltd*(1970) 2 ALLER 671 at 676, *Brooke Bond Leibig Ltd V Mallya* (1975) EA 266 as well as *Windsor Commercial Land Co. Ltd & others V Century National Merchant Bank Tousi Ltd* SCCA 114/2005.
33. The 2nd claimant alleges that he did not instruct the firm of M/S WM Njagi & Associates to represent him. That the 15th claimant did so through misrepresentation of facts and the 2nd claimant was not consulted. That the acts of the law firm amounted to misrepresentation and/or fraud.
34. From the documents on record, the law firm of M/S WM Njagi & Associates & Advocates filed a notice of change of advocate on July 2, 2019 dated on July 1, 2019 and the same was served upon the 5th claimant's counsel on September 27, 2019. However, the firm of M/S Obura Mbeche & Co Advocates filed a Notice of Change of Advocates on December 16, 2019. There is no evidence that the notice was served upon the law firm of M/S WM Njagi & Co Associates previously on record.
35. It is not in contest that the law firm of M/S WM Njagi & Co Associates filed 5 consents in the names of;
 - i. Evans Rono (7th claimant)
 - ii. Edward Lumbugu (13th claimant)
 - iii. Raphael O Mwaro (5th claimant)
 - iv. Lordvick Aduda (15th claimant)
 - v. Joseph O Agola (2nd claimant)
36. On December 18, 2019, Mr. Udoto holding brief for Mr Ochieng for the respondent, informed the court that 5 claimants had reached a consent with the respondent.
37. Mr Burugu was holding brief for Mr Obura for the claimants.
38. The court directed that the parties resolve the issue of the consents for their adoption on the hearing date.
39. On July 20, 2020, Mr Mbeche told the court that some of the claimants had filed consent and he had no instructions from the claimants. On October 28, 2020, Mr Weru holding brief for Mr Bonyo told the court that the law firm had not engaged the claimants who had settled their claim.
40. On December 14, 2020, none of the parties appeared before the Deputy Registrar. On July 26, 2021, Mr Bonyo for the claimants appeared in court.
41. On October 12, 2021, Mr Otieno holding brief for Mr Bonyo for the claimants sought an adjournment on the premise that Mr Bonyo was attending to a sick infant.
42. On November 18, 2021, Mr Otieno holding brief for Mr Bonyo sought leave to amend the claim as 5 claimants had entered into a settlement and 14 days were given.
43. On January 18, 2022, the hearing date, none of the parties was in court.
44. Puzzlingly, the law firm of Obura Mbeche & Co Advocates appeared in court May 15, 2019, September 30, 2019, November 6, 2019 and December 18, 2019.
45. At no time did the law firm of M/S WM Njagi & Co Associates appear in court on behalf of the claimants.
46. The law firm of Obura Mbeche & Co Advocates was aware of the consents by some of its clients who were not eager to disclose the information to them.



47. Strangely, the consents were filed on November 29, 2019 and Mr Udoto stated as much in court on December 18, 2019.
48. The consents remained unchallenged until December 14, 2021, more than 2 years after they were filed by M/S WM Njagi & Co Advocates, a duration the court finds inordinate since both law firms were aware of their existence.
49. The claimants herein are less than candid on the issue of the consents.
50. But more significantly, the assertion that the 15th claimant may have colluded with the law firm of M/S WM Njagi & Co Advocates and the consents may have been entered into through fraud and/or misrepresentation does not appear farfetched, direct evidence of actual collusion notwithstanding. The 2nd claimant's affidavit provides a general picture of the circumstances of the claimants.
51. Be that as it may, the email message dated December 11, 2020 from Mr. Wahome Njagi to Obura Mbeche & Co Advocates is explicit that although some claimants had actually given instructions on a settlement, the same was withdrawn except for the 15th claimant.
52. With regard to the 2nd claimant specifically, the copies of medical documents on record show that he was undergoing treatment and is unlikely to have given instructions on the alleged settlement in those circumstances.
53. Relatedly, as the email cited above demonstrate, the 2nd claimant is one of those who withdrew consent previously given to M/S WM Njagi & Co Advocates.
54. By having withdrawn their instructions, the law firm of M/S WM Njagi & Co Advocates had no authority to enter into a consent on their behalf and the consents on record cannot stand for want of authority and are liable to be set aside.
55. For the foregoing reasons, the court is satisfied that the claimants herein having instructed the law firm of M/S W.M. Njagi & Co. Advocates to enter into a settlement with the respondent on their behalf, subsequently withdrew their consent and the law firm had neither consensual or ostensible nor customary authority to consent on their behalf.
56. As regards the reliefs sought, having found that the law firm of M/S WM Njagi & Co Advocates had no authority to enter into a settlement with four (4) of the claimants in respect of whom the law firm filed consents on November 29, 2019, the court is in agreement with the claimants counsel's submissions that the law firm did not act in good faith by acting contrary to the express instructions of the four (4) claimants. *The holdings in Samuel Mbugua Ikumbu V Barclays Bank of Kenya Ltd* (Supra) as well as *Kenya Commercial Bank Ltd V Specialized Engineering Co Ltd* (Supra) reinforce this position.
57. Finally, in *Republic V District Land Registrar Nandi & another ex parte Tegerei & another* (Supra), the court was categorical that;

“ Although an advocate has ostensible authority, to compromise his client's case, employment of such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions which he has been given by a client in a matter.”
58. Further, the court observed that;

“ Where such orders completely negate the interests of an instructing client and it is shown to the satisfaction of the court that the client was not even aware of the application that gave



rise to those consent orders, leave alone having consented to the recording of the orders in the absence of any satisfactory explanation by the counsel who is accused of entering into the consent orders in question, a court of law could be entitled to conclude that there was fraud or collusion involved and will not uphold the consent orders issued.”

59. The court is guided by these sentiments.
60. In the final analysis, the court is in agreement with the claimant’s counsel that an advocate has no authority to act on behalf of a client without instructions and as a fiduciary, must always act in good faith.
61. It is also trite that all claimants in a suit are required to give individual consent to the consent, order or judgement unless one of them has authority to do so on their behalf.
62. In the instant case, it is the finding of the court that the consents on record were entered into by an advocate who had no express authority of the individual claimants and the circumstances in which they were made would appear to suggest collusion.
63. Accordingly, the notice of motion application dated December 14, 2021 is merited and is allowed.
64. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF SEPTEMBER 2022

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

