



**Mose & 13 others v Mang; Wangari Ndirangu t/a Wangari Ndirangu & Co. Advocates
(Respondent) (Cause 267 of 2014) [2022] KEELRC 14657 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14657 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 267 OF 2014
M MBARŪ, J
OCTOBER 27, 2022**

BETWEEN

PETER KIMUEU MOSE & 13 OTHERS CLAIMANT

AND

HOTEL MANG RESPONDENT

AND

**WANGARI NDIRANGU T/A WANGARI NDIRANGU & CO.
ADVOCATES RESPONDENT**

RULING

1. The claimants filed application dated January 27, 2022 seeking for orders that the firm of Wangari Ndirangu Advocates be enjoined herein as a respondent to enable the court determine the issue herein and that the court be pleased to expunge the consent dated January 27, 2016 since the same was not adopted by the court.
2. The application is supported by the claimant, Peter Kimeu Mose and on the grounds that the claimants were not party to the consent and none gave verbal or written instructions for the reduction of the decretal sum and which consent dated January 27, 2016 was not adopted by the court.
3. In his affidavit, Mose avers that judgement herein was entered for the claimant for the respondent to pay ksh 4, 417,422.15 with costs and interests at court rates from the date of the award and until payment in full. The claimants' advocate paid them ksh 2 million and efforts to find out on the balance went without explanation.
4. The matter was reported to the Law Society of Kenya who informed the claimants that there was a consent reducing the decretal sum but the claimants had not instructed their advocate to reduce or



- enter consent to deduce the decretal sum. This forced the claimants to change advocates to follow up on the matter.
5. The previous advocate and the respondent insist that there was a consent drawn settling the matter but the claimants contest that there were no instructions in this regard. Such consent has not been adopted by the court as an order settling the suit. Such consent dated January 27, 2016 should be expunged.
 6. In reply, the respondent filed the Replying Affidavit of Timothy Kinuthia a director and who avers that despite the claimants receiving the agreed sum 6 years ago they only challenge the consent on the grounds that they did not instruct or authorise their advocate to record the same and that it was not adopted by the court and this application is mischievous and in abuse of court process. Following judgement, the claimants' advocate informed the respondent that the claimants had given instructions on consent to receive lesser amount as compared to that granted by the court. As a result consent was filed in court on January 28, 2016.
 7. The consent sum was paid to the claimants and no notice issued to the respondent that the claimants had not instructed their advocate. The consent of the parties is lawful and the matter is settled and binding and the claimants have no evidence to justify settling aside the consent. There is no alleged fraud, coercion or misrepresentation to justify the orders sought 6 years after the event and the application should be dismissed with costs.
 8. The 2nd respondent filed the Replying Affidavit of Wangari Ndirangu Advocate formerly on record for the claimants and avers that the claimants gave her specific instructions herein to accept the sum of ksh 2 million and it was verbally agreed that such sum be reduced into consent with the respondent in settlement of the claim herein. There was no fraud and all monies received were accepted by the claimants.
 9. Counsel also avers that the firm of Wangari Ndirangu & Co Advocates cannot be a respondent herein as it is neither an employer nor employee of the claimants and the court lacks jurisdiction in this matter.
 10. Parties filed written submissions which are put into account together with cases and authorities cited.

Determination

11. Before addressing the issue of the challenged consent, the 2nd respondent has challenged the jurisdiction of the court on the basis that there is no employer and employee relationship between the claimants and the 2nd respondent to justify enjoinder herein as a party. It is however not challenged that there was change of advocates for the claimants which process has since been addressed with finality. Out of such change, several applications have been filed to address the issue of payment of the decretal sum.
12. The instant application is post judgement. The current stage is execution. The validity and veracity of the consent entered into between the respondents has been challenged by the claimants with regard to the judgement herein delivered on January 19, 2016 and on that basis, the 2nd respondent as the author of such consent with the 1st respondent becomes a necessary party herein for the court to effectually determine the issues in dispute and to state that the 2nd respondent is not an employer pursuant to section 12 of the *Employment and Labour Relations Court Act*, 2011 is without basis. The claimants instructed counsel for good cause, judgement issued and at execution stage, consent was filed by the respondents and which the claimants have challenged and hence both respondents in equal measure become necessary and relevant respondents herein
13. As a general rule, a consent order obtained by the consent of the parties is binding.



14. A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the court.
15. Consent of the parties is therefore an expression of an agreement which once achieved must be adopted by the court for an order to issue. It remains an agreement until the same is adopted by the court as its orders for the parties to enforce. This is aptly captured in the case of *Wildung v Sanderson* {1897} 2 CL that;

A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is of course, enforceable while it stands, and a party affected by it cannot if he concludes, he is entitled to relief, simply wait until it is sought to be enforced against him, and then raised by way of defence. The matters in respect of which he desires to be relieved. He must, when he has completed obey it, unless and until he can get it set aside in proceedings duly constituted for this purpose.

16. The consent cannot be executed as an agreement. It only gets the force of law and subject of execution once it is an order of the court.
17. On June 19, 2016 judgement issued herein. The court awarded the claimants the sum of ksh 4, 417,422.15 with costs and interests at court rates from the date of the award and until payment in full.
18. Of the judgement, the claimants admit they have received ksh 2 million. That they made efforts to get the balance without success and they sought the Law Society of Kenya intervention on September 27, 2016 where they were informed that their advocates Wangari Ndirangu & Co Advocates had filed a consent with the respondent reducing the decretal sum.
19. There was no activity in these proceedings until application dated September 14, 2018 seeking to enjoin the firm of Wangari Ndirangu & Co Advocates as respondents.
20. On the record there is no order adopting the consent filed by the firm of Wangari Ndirangu & Co Advocates and the respondent on January 28, 2016 which matter both parties made effort to address through application dated October 7, 2019 under prayer (4) that;

That the consent judgment dated January 27, 2016 and filed on January 28, 2019 be deemed as adopted by the court.

21. In the ruling delivered on February 27, 2020 the court under paragraph 16 held that the consent between the advocates filed in court on January 28, 2016 was not adopted as an order of the court and that;

... It remains just consent of the 2 parties but this court has not been moved to adopt it. There being questions about the same consent, the circumstances under which it was done after the Court's judgement must be explained to this Court for it to be adopted as a Court Order.

22. The respondent and the firm of Wangari Ndirangu & Co Advocate thus directed did not move the court for the adoption of the agreement/consent. At such time the claimants had moved the Law Society of Kenya with a complaint on the non- payment of the decretal sum as evidenced by their letter dated September 27, 2016 and the ruling of February 27, 2020 captured the issues aptly.
23. The court judgement on January 19, 2016 stands.



24. The consent of January 28, 2016 is not an order of the court and has no consequence on the face of the instant application seeking that it be expunged.
25. The orders of the court is that judgement herein is for the payment of ksh 4,417,422.15 with costs and interests at court rates from the date of the award and until payment in full. On the admitted ksh 2 million as paid, the balance is due and owing with costs and interests at court rates from the date of the award and until paid in full.

Orders accordingly.

DELIVERED IN COURT AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022.

M MBARŪ JUDGE

In the presence of:

Court assistant: Okodoi

