



**Mweresa v County Public Service Board of Vihiga & another (Cause 4 of 2022) [2022] KEELRC 13286 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13286 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**  
**CAUSE 4 OF 2022**  
**JW KELI, J**  
**NOVEMBER 24, 2022**  
**(FORMELY KISUMU E012 OF 2021)**

**BETWEEN**

**CLARENCE EBOSO MWERESA ..... CLAIMANT**

**AND**

**COUNTY PUBLIC SERVICE BOARD OF VIHIGA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF VIHIGA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Claimant on the 4<sup>th</sup> February 2021 filed a claim dated 15<sup>th</sup> January 2021 seeking declaration of violation of constitutional rights to fair labour practices, declaration of unfair termination of employment, declaration that he was constructively dismissed and sought compensation of KES 10 Million, monthly salary due from 10<sup>th</sup> May 2019 to 10<sup>th</sup> March 2020 inclusive of leave total KES 2,500,000/-. Claimed loss of income, balance of contract and other claims total of KES 6,899,000/- plus interest and in the alternative reinstatement as employee of 3<sup>rd</sup> Respondent on same terms and like other employees with salary arrears of KES. 2,500,000/- plus compensatory damages for unpaid NHIF and waning credibility (KES. 1 Million)
2. On the 20<sup>th</sup> January 2022 the court sitting at Kisumu Lady Justice C. Baari following a Notice of Preliminary Objection by the respondents challenging the jurisdiction of the court made the following orders while upholding the preliminary objection;- "The suit as filed offends the doctrine of exhaustion and this court lacks jurisdiction to entertain the same." The court then stated that it would not strike out the claim and instead gave directions on filing of the appeal before Public Service Commission and stayed the suit pending the hearing and determination of the appeal by PSC.
3. On the 25<sup>th</sup> January 2022 the court vide order of Justice Radido transferred the file to Bungoma court.



4. On the 8<sup>th</sup> April 2022 the court received a consent dated 7<sup>th</sup> April 2022 signed by the Claimant and the Secretary /CEO Vihiga County Public Service Board addressed to the Deputy Registrar Employment and Labour Relations Court Bungoma in the following terms:-

‘Dear Sir/Madam, RE: Bungoma ELRC Cause No. 4 of 2022(formerly Kisumu ELRC Cause No. E012 of 2021) Dr. Clarence Eboso Mweresa v Vihiga County Public Service Board and Others ,

The above matter refers. Kindly record the consent below:-

- a. By consent the claimant claim herein be and is hereby withdrawn,.
- b. The claimant do hereby takes up the new offer of appointment with the respondent with immediate effect
- c. No orders as to costs.

Dated this 7<sup>th</sup> day April 2022

Signed

Dr. Clarence Eboso Mweresa

(claimant)

Signed CS. Dr. (h.c) Naviava John S.

Secretary/CEO Vihiga County Public Service Board( 1<sup>st</sup> Respondent )”

5. On the 23<sup>rd</sup> May 2022 the matter was listed for mention by the Registry. Mr. Mukabi, Vihiga County Solicitor appeared virtually and in the absence of the claimant informed the court that the parties had entered into consent and the claimant issued with an appointment letter and told the court the order could be adopted.
6. The court examined the order and found it was executed by both parties and proceeded to adopt the order as judgment of the court in the following terms:-
- i. The claim dated 15<sup>th</sup> January 2021 is hereby marked as withdrawn.
  - ii. the claimant to take up the offer of appointment with respondent with immediate effect.
  - iii. No order as to costs
  - iv. File is hereby marked as withdrawn and closed.
7. On the 2<sup>nd</sup> September 2022 post adoption of the consent order the court received under certificate of urgency under vacation rules notice of motion applications dated 31<sup>st</sup> August 2022 seeking the following reliefs:-
- a. The decree of this court dated 4<sup>th</sup> August 2022 be set aside.
  - b. That pending the determination of the application for setting aside the court grant a stay of execution to the extent that the Public Service may proceed with the hearing and determination of the matter that was before it.
8. The Application was based on the grounds under the motion and supporting affidavit by the applicant being that the court’s jurisdiction had not yet been re-invoked as the matter was still pending before the Public Service Commission, that the respondents herein sought and were issued with a mention date



when the court heard their application to withdraw the matter without the respondents serving the claimant with notice to appear and be heard, that the decree of the court had the effect of terminating or interfering with the proceedings before the Public Service Commission with regard to the dispute between the parties, that the Public Service Commission has timelines and any delay would render their decision voidable, the statutory limitation on order of reinstatement would render the prayer spent and the petition materially nugatory if the decree is not stayed.

9. The Applicant states that the decree was based on purported consent whose validity formed part of the dispute at the Public Service Commission and whose validity would have been impeached had the claimant have been served and given an opportunity to be heard.
10. The Claimant in his affidavit admits that on the 7<sup>th</sup> April 2022 he signed a document drafted and given to him by the County Public Service Board of Vihiga as consent to withdraw the matter from the Public Service Commission and subsequently the Employment and Labour Relations Court which consent was to be attached to a cover letter which he would then be given a copy of but that he was not issued with the final letter nor with copies of the consent. That upon considering the situation in totality it became evident to him that the documents he had signed was not conscionable and could not stand.
11. That as at date of mention of 23<sup>rd</sup> May 2022 in the absence of the claimant the respondent failed to inform the court they had in their possession affidavit dated 11<sup>th</sup> May 2022 and served on them on the 15<sup>th</sup> may 2022 revoking the consent and which affidavit was also served on the Public Service Commission.
12. That the Public Service Commission was at late stage of making a decision when they were served with the court decree. That the applicant only got to know of the decree when he was called to respond by the Commission on the development. That the information got to the Commission on 18<sup>th</sup> August 2022 by letter of the 1<sup>st</sup> respondent which was never received by the claimant. That if the court does not set aside the decree and allow the Commission conclude the matter injustice will be occasioned to the claimant.

## **Response**

13. The Application is opposed vide affidavit of Navaiva John Saul, the secretary / CEO of the County Public Service Board of Vihiga County Government. The 1<sup>st</sup> respondent avers that the consent was validly entered. That the claimant was first employed in the county in the year 2019 and resigned voluntarily vide letter dated 8<sup>th</sup> January 2020. That the claimant had been directed to file case at the PSC and file decision before court in 3 months by the Kisumu court.
14. That there were vacancies in the department of health. The claimant applied, was shortlisted, interviewed and appointed on fresh terms.
15. That the Claimant attended the 1<sup>st</sup> respondent's offices and was briefed on the pending suit and the PSC case and without coercion, intimidation voluntarily agreed to withdraw both the instant suit and appeal lodged at public Service Commission. That the two consents were reduced into writing and signed by the deponent and the claimant herein in person(exhibits 2 and 3). That the claimant has come to court with dirty hands in claiming he was not aware of the consents.
16. That pursuant to the said consents the claimant duly took over his new appointment and was deployed as per letter of employment dated 29<sup>th</sup> March 2022, deployment letter of 4<sup>th</sup> may 2022 and vide letter dated 9<sup>th</sup> May 2022 by the medical superintend which stated that the claimant had reported to duty. (exhibits NJS4-6)



17. That on the 23<sup>rd</sup> May 2022 it was the court that fixed the matter for mention and by chance the County Solicitor was virtually present in court in another matter. When the matter was called out the County Solicitor informed the court since the parties and signed the consent the same could be adopted.
18. That the application to set aside the consent decree is in bad faith and meant to embarrass the respondent. That parties are bound by their pleadings hence the claimant cannot run away from the consent he admits he signs which was later adopted by the court. That the application is an afterthought, meant to reopen a concluded case wasting judicial time.
19. That the Public Service Commission gave directions in the matter before it where the parties complied with documents and submissions. The decision is due.
20. The court gave directions that the application be canvassed by way of written submissions. Both parties complied.

### **Determination**

21. The Applicant in his submission addressed the following issues:-
  - a. Validity of the consent agreement dated 7<sup>th</sup> April 2022
  - b. Jurisdiction of the court.
22. The Respondent in their submissions addressed the following issues:-
  - a. Whether the decree of the court dated 4<sup>th</sup> August 2022 should be upheld
  - b. Who should bear costs of the application.The court having perused the pleadings by the parties is of the considered opinion that the issues placed before it for determination in the application by the parties are as follows:-
  - A. Jurisdiction of the court to adopt the consent
  - B. Validity of the consent adopted as decree of the court
  - C. Whether the claimant is entitled to reliefs sought
  - D. Costs of the application.

### **Jurisdiction of the court to adopt the consent.**

23. The Applicant averred that he was informed by his legal advisor which he believes as true that at time of the withdraw of the claim on the strength of the consent at the court , both the substantive claim and validity of the consent were in consideration before the Public Service Commission and fell squarely on the jurisdiction of the Public Service Commission and the court could only defer to the Public Service Commission. On this submission the court finds that the said advice is neither here nor there the alleged legal advisor not having been disclosed in the affidavit.
24. The Applicant submits that by order of 20<sup>th</sup> January 2022 the court conceded it had jurisdiction to hear the matter but had not been invoked properly and that the claim be heard first by the Public Service Commission. That upon exhaustion reinstitute matter at the court. That the said order had not been reviewed or appealed against, that the jurisdiction as related to the matter could only be invoked upon exhaustion of the PSC dispute. That jurisdiction cannot be granted by consent of the parties as held in *Jamal Salim v Yusuf Abdi & another* Civil Appeal No. 104 of 2016 (2018)e KLR and the landmark



decision of the Court of Appeal in *Owners of Motor Vessel 'Lillian S' v Caltex(Kenya) Oil Ltd* 1989 e KLR.

25. The Applicant submits that the expectation ordinarily was that claim to be reopened for purposes of compromising it would only occur on termination of case before PSC. That we now have an absurd situation where the question of validity of the consent is before the court and PSC. The applicant states that the failure to comply with the 3 months timeline ought to have been raised with the PSC.
26. The Respondent did not address the issue of jurisdiction in their submissions.

### **Decision on jurisdiction.**

27. The Court agrees with the cited cases by the applicant on the jurisprudence on jurisdiction of the court namely *Jamal Salim v Yusuf Abdi & another* Civil Appeal No. 104 of 2016 (2018)e KLR and the landmark decision of the Court of Appeal in *Owners of Motor Vessel 'Lillian S' v Caltex(Kenya) Oil Ltd* 1989 e KLR. That is the law.
28. The Court in Kisumu on hearing the preliminary objection on jurisdiction found it had no jurisdiction to entertain the claim but in its own wisdom stated it will not strike out the suit. The court finds that this was akin to keeping a dead body in the ward when the doctor has no further role. Applying the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v Caltex(Kenya) Oil Ltd* 1989 e KLR, the natural consequence was to strike out the claim consistent with decision of the Court of Appeal in *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR where the court in allowing the appeal held: "The invocation of judicial review jurisdiction of the court was in the circumstances premature and uncalled for. The first ground of appeal therefore succeeds. The appeal accordingly is allowed, the judgment and decree of the High Court dated 17th July, 2015 is set aside and in lieu thereof we order that the Notice of Motion dated 16th July, 2014 be and is hereby dismissed with costs. The Respondent shall also bear the costs of this appeal". (emphasis is given). The Court finds the suit ought to have been struck out consequently.
29. This Court cannot sit on appeal of its sister court. The consequence of not striking out the claim was that the claim was left pending in the court. The court under section 12 of the Employment and Labour Relations Court has original and appellate jurisdiction over all employment matters. The court finds that claimant's argument based on the finding of the court in Kisumu that it had no jurisdiction, then the court could not take further steps in the retained suit and still pending in court not founded on law or common sense. The Court has jurisdiction over all matters pending before the court and may take any judicial steps to dispose them. In the circumstance the court holds and finds it had jurisdiction to consider the consent by the parties and adopt it in disposition of the pending suit.

### **Validity of the consent adopted as decree of the court**

30. The Claimant challenged the consent decree on reasons of being adopted in his absence and secondly on the reasons that he had allegedly changed his mind upon reconsidering the consent and issued the respondent with affidavit on the same. He accused the respondent of not disclosing that fact to the court during the adoption of the consent which he admitted to have signed and stated he was not issued with his copy.
31. The Applicant relies on Order 25 Rule 5 of the [\*Civil Procedure Rules\*](#) that require compromise of the suit to be proved to the satisfaction of the court that the agreement to comprise the suit is lawful agreement hence should be recorded. It reads:- "(1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole



or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.”

32. The Applicant further relies on the decision of the Court of Appeal of East Africa in *Broke Bond Liebig (T) Ltd v Mallya* (1975)E.A 266 where the court stated that a consent judgment could be set aside if the consent was given without material facts. The court in the said decision stated that: ‘the a consent judgment can be set aside only in certain circumstances e.g. on ground of fraud or collusion, that there was no consensus between the parties, public policy for such reasons as would enable the court to set aside or rescind a contract.’
33. The Applicant further relies on the decision in *SMN v ZMS & 3 Others* (2017) where the court held that generally the court will not interfere with consent judgment except in circumstances that would provide a good ground for varying or rescinding a contract between the parties and cites other authorities to same effect. The applicant further submits that a consent judgment is not affected by resjudicata relying on the decision of the supreme court in *Baldevdas & another v Filmistan Distributors*(1969).
34. The Respondent submits that the applicant signed not one by two agreements to withdraw instant suit as well as the appeal before the PSC. That the applicant is a medical doctor and not an ignorant individual and thus cannot claim ignorance of the effects and intent of the consent.
35. The 1<sup>st</sup> Respondent submitted that it had not denied the applicant his appointment letter and agrees if that was the case the Claimant had a right to start judicial review proceedings as per the case he cited of *Marbury v Madison* against the County Public Service Board. The respondent submits that the applicant opted to sign the consents together with his appointment letter. The Respondent submits that the applicant is on fishing expedition as he realised he would not be able to enjoy the benefit of his suit and still be employed by the 2<sup>nd</sup> respondent. That the applicant in paragraph 22 of his submissions agrees that he signed both the consents and his offer letters as presented to him by the secretary/ CEO of the 1<sup>st</sup> Respondent on the 7<sup>th</sup> April 2022. That the applicant had initially been called to pick his letter on 4<sup>th</sup> April 2022 and granted 3 days to consider the offer and withdrawal of the cases which he agreed in good faith and to foster good working relationship. That the applicant intention in the application are in bad faith as he wilfully entered into a binding agreement with the Board and the same should be upheld.
36. The Respondent to buttress their foregoing submissions relied on the same decision by the applicant in *Brooke Bond Liebig v Mallya* (1975)EA266 and also *Flora N. Wasike v Destino Wamboko*(1988)e KLR. The respondent further relied on the decision of Court of Appeal in [\*Intercountries Importers and Exporters Limited v Telposta Pension Scheme Registered Trustees & 5 others\*](#) (2019) e KLR where the court outlined conditions for setting aside consent order and gave definition of various terms. The Respondents further relied on case in *SMB V ZMS &3 other* (supra by applicant) and the [\*Board of Trustees National social Security Fund V Michael Mwalo\*](#) (2015) e KLR which decisions were to the effect that to impeach a consent order or consent judgment it must be shown that it was obtained by fraud , collusion or agreement contrary to policy of the court. In [\*Kericho Guest House Enterprise's Limited v Kenya Breweries Limited\*](#) (2018)e KLR where the claimant alleged consent was entered with ulterior motives, the court found no demonstration of fraud or any ground of setting aside the order.

#### **Decision on validity of the consent order.**

37. On the 23<sup>rd</sup> May 2022, upon filing in court of a consent in court on the 8<sup>th</sup> April 2022, the court mentioned the claim for adoption of the order. The claimant was absent. The respondent appeared



virtually. They state they were not aware of the case and by coincidence were in another matter. The mention notice had been effected by the Deputy Registrar.

38. The court finds that the impugned consent order outlined above was signed by both parties and addressed to the Deputy registrar of the court to record the consent. From the pleadings the court found that the applicant did not dispute the content of the order filed in court. He admitted he signed the consent voluntarily in the office of the 1<sup>st</sup> respondent.
39. The Applicant relying on order 25 Rule 5 of the Civil Procedure Rules on the recording of consent agreement faults the process followed by the court. The said rule states (1) ‘Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.’
40. The Court finds that it satisfied itself that the consent order was signed by the parties and that it was addressed to the court in the same page as the order for adoption. The court finds that the parties in the signed order knew it was to be adopted by the court. The applicant states that he changed his mind and filed affidavit before the PSC and not the court. The court finds that he cannot blame the court for failure to lodge the affidavit before the court while he knew he signed consent addressed to the court to withdraw his case.
41. On whether the consent is valid, the court finds that the parties relied on similar authorities. The Court of Appeal decisions guide the court. The test for setting aside the consent judgment was settled by the Court of Appeal in *Intercontinental Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others* [2019] eKLR as follows:-

“We have considered the application and the submissions of parties, and consider that the central issue for our consideration is whether the threshold requirements for setting aside the consent have been met. To do so, it will be necessary to consider whether the tests to be fulfilled have been satisfied.

The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig vs Mallya* (1975) EA 266 where Mustafa Ag. VP stated thus;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

And in the case of *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR Hancox JA cited Setton on Judgments and orders (7<sup>th</sup> 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.”

Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside. So, was this a case of fraud or misrepresentation or mistake by the 1<sup>st</sup> respondent that would lead to setting aside of the consent order of 27<sup>th</sup> September 2016?

To begin with Black’s Law Dictionary defines “fraud” as;

“1. Knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime.”

The same dictionary defines misrepresentation as;

- “1 The Act or an instance of making a false or misleading assertion about something, usu. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.
2. The assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts.

And “mistake” as;

“1. An error, misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (1) the parties to a contract did not mean the same thing, or (2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable.”

42. The Court upholds the foregoing authorities which were relied on by both parties to apply in the decision. The court finds that the applicant and the respondent had all material facts of the consent before its execution. That the parties were in consensus on the terms of the consent. The court found that one of the terms of the consent was for the claimant to take up new offer of appointment with immediate effect. The applicant admitted he took the offer and there was evidence placed before the court that indeed the claimant had reported to duty. In terms of contract the court finds there was offer and acceptance of the contract terms and the said consent order was implemented by the parties.
43. The Applicant submits that upon reflecting later he found the signed consent was not conscionable and could not stand. The court finds that no mistake or misunderstanding on the terms of the consent order by the parties and definitely no fraud or coercion. The applicant is a medical doctor and litigating in person thus it cannot be said he had issues understanding the terms of the consent he signed.
44. The Court applies and upholds the test of setting aside consent judgment by the Court of Appeal in *Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others* [2019] eKLR as follows:- ‘The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig vs Mallya* (1975) EA 266 where Mustafa Ag. VP stated thus; “The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case



the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

45. The Court finds that the fact that the consent order was addressed to the court and signed by both parties, the absence of the claimant in court did not taint the consent judgment. The claimant admitted he voluntarily signed the consent and in what is apparently an afterthought later did affidavit stating he changed his mind but did not address the said affidavit to the court deputy registrar. The claimant has already taken up the job offer which was also a term of the consent hence the consent which is a binding contract by parties was already implemented.
46. The Court further finds and determines the suit in court had no direct relation with the appeal before the PSC. The court had no first instance jurisdiction on the claim and the pending suit was thus of no legal consequence upon the pronouncement that the court had no jurisdiction to entertain the matter. The court consequently cannot revive a suit in which it had initially found to lack jurisdiction to entertain. It would be superfluous for the court to revive the suit. It is a maximum of equity for the court not to act in vain. The court will not assist parties out of their bad bargains as appears to be the case in the instant application where the applicant stated he reflected later on the signed consent and found it not conscionable. The court finds and determines that the PSC is an independent statutory body with jurisdiction to deal with matters before it without court interference. The court act of closing its file had nothing to do with any appeal by the applicant before the PSC.
47. The court finds and determines that it has found no reason for it to interfere or set aside the consent judgment entered on the 23<sup>rd</sup> May 2022. That it is in futility to re-open the case when the court already ruled it had no jurisdiction to entertain the suit. In the upshot the court holds that the consent order dated 7<sup>th</sup> April 2022 was valid and was validly adopted as consent judgment.

#### **Costs of the application.**

48. The court has discretion on award of costs under section 12(4) of the Employment and Labour Relations which states that it may make orders as to costs as it considers just. The court is of the considered view in the instant application to exercise its discretion and order each party should bear its costs.

#### **Conclusion and Disposition.**

49. The Court determines that it had jurisdiction to adopt the consent of the parties dated 7<sup>th</sup> April 2022 and filed in court on the 8<sup>th</sup> April 2022 addressed to the Deputy Registrar of the court.
50. The court further found no evidence of mistake coercion and or fraud or any of the grounds of setting aside consent order and consequently the orders sought under application dated 31<sup>st</sup> August 2022 are without merit. The application is dismissed for lack of merit.
51. No order as to costs.
52. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT ABUNGOMA THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

**J. W. KELI,  
JUDGE.**



**In The Presence Of:-**

**Court Assistant : Brenda Wesonga**

**Claimant :- Present**

**Respondent: Mr Mulabi**

