



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 52 OF 2018

HON ALFRED INDECHE.....PETITIONER

v

SPEAKER, COUNTY ASSEMBLY VIHIGA.....1st RESPONDENT

CLERK, COUNTY ASSEMBLY OF VIHIGA..... 2nd RESPONDENT

COUNTY ASSEMBLY VIHIGA.....3rd RESPONDENT

AND

HUDSON DUMUSU MUNGAFU.....INTERESTED PARTY

RULING NO. 2

1. Hon Alfred Indeché (the Petitioner) lodged a Petition with the Court on 6 August 2018, alleging that the action of the Respondents to impeach him was unconstitutional and violated his rights.
2. The Court issued an interim conservatory order staying the impeachment on 7 August 2018.
3. On 30 June 2020, Hudson Dumusu Mungafu (the Interested Party) applied to the Court to be joined as an Interested Party, and the Court allowed the application *ex-parte*.
4. On 27 July 2020, the Petitioner successfully moved the Court to grant him leave to amend the Petition, and an Amended Petition was filed on 29 July 2020 (the County Secretary, Vihiga, the County Public Service Board and the Governor were removed as Respondents).
5. The Petitioner and Respondents then engaged in negotiations leading to the filing of a consent dated 4 August 2020.
6. The Court adopted the consent on 13 August 2020.
7. The consent was in the following terms:
 - (i) THAT the proceedings conducted by the Vihiga County Assembly on 2nd August 2018 for the removal of the Petitioner from the position of County Executive Committee member in charge of Finance and Economic Planning was conducted in violation of Articles 10, 41 and 47 of the Constitution of Kenya, 2010 and Vihiga County Assembly Standing Orders No 69(9) and hence unconstitutional.
 - (ii) THAT each party bear its own costs.
 - (iii) THAT the matter is marked as settled.
8. The Interested Party was not a party to the consent, and on 27 August 2020, he filed a Motion seeking orders:
 - (i) ...

(ii) ...

(iii) THAT the Honourable Court be pleased to set aside the consent dated 4th August 2020 and adopted as judgment of the Court on 13th August 2020.

(iv) THAT the Honourable Court be pleased to revive the Petition and enter judgment thereon on merit.

(v) THAT parties to bear their own costs as this is a public interest litigation.

9. The Court declined to certify the Motion as urgent and directed that it be served. The Interested Party was to get a hearing date in the registry.

10. The Petitioner filed a replying affidavit to the Motion on 21 January 2021, the same day the Motion was coming up for hearing.

11. When the Motion was called out for hearing/directions, the Interested Party was not represented, and upon the application of the Petitioner, the Court dismissed the Motion.

12. The dismissal prompted the Interested Party to file another Motion on 22 January 2021, seeking the reinstatement of the dismissed Motion, and the Court allowed the Motion on 18 March 2021, paving the way for hearing and determination of the Motion dated 27 August 2020 seeking orders setting aside the consent judgment.

13. The Interested Party filed his submissions in support of the Motion on 4 June 2021, while the Petitioner filed submissions in opposition thereto on 30 June 2021.

Interested Party's arguments

14. The Interested Party advanced three main reasons in support of the Motion seeking the setting aside of the consent.

15. These were first that despite the Petitioner and Respondents being aware that he (the Interested Party) had been joined to the Petition, they went ahead and entered a consent without involving him.

16. Second, the Interested Party contended that the consent had been signed by an advocate who was not properly on record.

17. Third, it was submitted that the consent had been procured through material non-disclosure of the presence of an Interested Party as the judge who adopted the consent was away from the station due to the COVID19 public health pandemic and did not have the physical file.

18. Lastly, it was asserted that the Court had dismissed a similar Petition, Kisumu Petition No. 53 of 2018, *Hon Marita Mmoji Agufana v Speaker, County Assembly of Vihiga & Ors.*

19. The Interested Party was of the view that the consent had compromised the public interest and that parties could not consent to the giving of declaratory orders where alleged breaches of the Constitution were alleged.

Petitioner's rebuttal

20. In resisting the Motion, the Petitioner asserted that his then advocate on record was not served with any order joining the Interested Party to the Petition, and therefore he could not have been involved in the process leading to the consent.

21. The Petitioner also opposed the Motion on the ground that the consent was entered into solely by the substantive parties to the Petition, and there was no illegality on the consent.

22. The Court has keenly perused the record and considered the Motion and come to the view that it would be acting in vain if it were to allow the Motion.

23. The Interested Party filed a motion seeking to be joined to the Petition on 30 June 2020. The Court allowed the joinder application, *ex-parte*, on the same day.

24. It behoved the Interested Party to extract the order and serve it together with his documents.

25. The Interested Party deposed that a copy of the order was served upon the Petitioner and Respondents' advocates through email addresses ericsonmogusu@yahoo.com and rekewalaw@gmail.com on 22 July 2020.

26. The Petitioner asserted that the Interested Party had not proved that the email addresses belonged to the advocates on record.

27. The initial Petition did not disclose the email address for the Petitioner's advocate. The Motion filed at the same time did not also state the email address.

28. The record shows that the email address for the Respondents' advocate is rakewalaw@gmail.com. The email address used by the Interested Party to effect service was rekewalaw@gmail.com, an erroneous email address. The Interested Party admitted that the service failed.

29. Without sufficient evidence that the Interested Party put all the parties on notice that he had been admitted as a party to the Petition, the Court is unable to set aside the consent which was filed in Court on 7 August 2020 on the ground that the Interested Party was not part of the negotiations leading to the consent.

30. On the merits, the principles a Court should consider when confronted with an application to set aside a consent order were set out by the Court of Appeal in *Brooke Bond Liebig v Mallya* (1975) EA 266.

31. The Court of Appeal stated:

It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the 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.

32. The Interested Party did not present any evidence of fraud or collusion between the Petitioner and Respondents or their advocates on record. There was no evidence that the Respondents had repudiated the consent.

33. The consent was signed by the firms of Muguro & Associates Advocates on behalf of the Petitioner and Francis Otieno Rakewa, Principal Legal Counsel with the County Assembly on behalf of the Respondents.

34. Ms Muguro came on record for the Petitioner on 29 July 2020, while the Principal Legal Counsel had filed an Answer to Amended Petition on behalf of the Respondents on 4 August 2020.

35. Rule 29 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 contemplates parties recording a settlement with the leave of the Court.

36. In the instant case, the Court already gave its imprimatur to the consent agreed by the Petitioner and Respondents, and thus it became *functus officio*.

37. For the above reasons, the Court declines the invitation by the Interested Party to set aside the consent.

38. The Motion dated 27 August 2020 is dismissed with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF OCTOBER 2021.

RADIDO STEPHEN,

MCIARB JUDGE

Appearances

For Petitioner	Muguro & Associates Advocates
For Respondents	Francis Otieno Rakewa, Principal Legal Counsel, County Assembly of Vihiga
For Interested Party	I.E. Omboko & Partners
Court Assistant	Chrispo Aura