REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 561 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

OCHIENG OWITI AND OTHERS.....1ST APPLICANT

JOHN OCHANDA AND OTHERS.....2ND APPLICANT

VERSUS

ANTHONY OLUOCH T/A

A. T OLUOCH AND COMPANY ADVOCATES.....1ST RESPONDENT

SILVIA MALEMBA KITONGA T/A

S. M KITONGA AND COMPANY ADVOCATES.....2ND RESPONDENT

ANTHONY OLUOCH T/A

TELKOM KENYA LIMITED .....3RD RESPONDENT

RULING

The Applicant filed a Notice of Motion dated 22nd May, 2019 seeking the following orders:

1. Spent.

2. That this Court be pleased to grant an order for review of the consent order made in Nairobi Employment and Labour Relations Court Cause No. 561 of 2014 as consolidated with Cause 1988 of 2014.

3. That the Court do order that the consents entered into be reviewed to match the terms of the consent entered into in **HCCC 216/07 John Ochanda v Telkom Kenya Ltd, HCCC 219/07 Naphutan Kibutu Kanyoro v Telkom Kenya Ltd, HCCC 255/07 – Michael Akeyo Others v Telkom Kenya (Consolidated)**.

4. That in addition to or in the alternative to prayer number 3 above, the Court directs that the aggrieved 1st and 2nd Applicants and the 3rd Respondents do enter into fresh negotiations and enter into a consent to settle this matter out of court.

5. That this Court do make a finding and declaration that the consent entered into on 16th December, 2015 by the 1st and 2nd Respondents was done so without proper instructions and authority from the Claimants aggrieved therein.

The application is based on the following grounds:

1. That vide a consent dated 16th December, 2015 was entered into by the 1st to 3rd Respondents to comprise **ELRC 561 of 2014** where the 3rd Respondent was to pay the Claimants a lump sum of Kshs.500,000,000 plus agreed legal costs of 20 million.

2. That the Applicants herein were not consulted directly concerning

any proposal for settlement and did not render express consent to the settlement order thus, they did not agree on the out of Court settlement.

3. That the consent order was unconscionably low, unreasonable and discriminative as the formula as their award was treated differently in that the settlement was based on a one month salary for every year worked as opposed to the two and a half monthly salary for every year worked plus a golden handshake as clearly stipulated in the Judgment in **HCC 216/07 John Ochanda v Telkom Kenya Ltd, HCC 219/07 Naphutan Kibutu Kanyoro v Telkom Kenya Ltd, HCC 255/07 Michael Akeyo & Others v Telkom Kenya (Consolidated).**

4. That the applicants have a reasonable belief that the consent order was obtained in a fraudulent manner as they were unaware of the dealings leading to the same being adopted.

5. That this Court has the powers to investigate the dealings leading to the consent order in exercise of its review powers and the same can only be through a full hearing and interrogation of evidence.

The application is supported by the affidavit of Joseph K. Muthui one of the Claimants in the matter, sworn on 22nd May, 2019. The affiant deposes that the Applicants are former employees of Telkom Kenya Limited who were retrenched following restructuring and reorganization of the company in June of 2006. **John Ochanda v Telkom Kenya Ltd, HCCC 219 of 2017 Naphutan Kibutu Kanyoro v Telkom Kenya Ltd and HCCC 255 of 2007 Michael Akeyo and Others v Telkom Kenya**. These suits were all consolidated.

He deposes that it initially instituted the suit as **HCCC No. 273 of 2011** with 1080 Claimants and **HCCC No. 505 of 2011** with 161 Claimants which were filed in this Court as **Cause No. 561 of 2014 consolidated with Cause No. 1988 of 2014.**

He avers that they came to their knowledge that on 16th December, 2015 a Consent was recorded where it was agreed that the 3rd Respondent pays them a lump sum of Kshs.500 Million and Kshs.20 Million as legal fees. He avers that there is no appeal against the consent which was adopted as the decree of this Court. However, they will move to Court to have the settlement amount revised upwards.

He avers that the Claimants in **HCCC 216 of 2017, HCCC 255 of 2007** and **HCCC 255 of 2014** received Kshs.1.3 Billion vide a consent dated 15th December, 2015. He avers that the formula for disbursing this amount was based on 2½ month's salary for every year worked and a golden handshake of Kshs.66,900.

He avers that their claim is actuated by the fact that the monies paid to them is inordinately low and is based on one month's salary for every year worked as opposed to $2^{1}/_{2}$ months' salary for every year worked plus a golden handshake which was clearly stipulated in **HCCC 216 of 2007, HCCC 219 of 2007** and **HCCC 255 of 2007**.

1st and 2nd Respondents' Case

In response to the application, the 1st and 2nd Respondents on 30th July, 2019 filed Grounds of Opposition on grounds that:

1. The application is incompetent without merit, frivolous and vexatious, misconceived and legally untenable and an abuse of the Court process.

2. The application has failed to satisfy the test for seeking for review.

3. The applicants are guilty of material non-disclosure and concealment of relevant material facts.

4. The Court lacks the jurisdiction to grant the orders sought.

5. The applicants' advocates are not properly on record.

6. The 1st and 2nd Respondents herein were never parties to the original actions.

They further filed a Replying Affidavit sworn by the 2nd Respondent, Silvia Malemba Kitonga, on 25th July, 2019.

She deposes that they were advocates on record representing the Claimants in Cause 561 of 2014. The affiant deposes that the suit was initiated, proceeded as and was concluded as a representative suit for 1080 Claimants being represented by George Owiti, Barrack Otieno Acholla, Jackson Nzioka Kimatu and Paul Moyi Abong.

She deposes that the representatives fully gave instructions to the 1st Respondent and herself to compromise the suit on behalf of all other Claimants. The affiant deposes that the representatives further gave them instructions to accept a one off lump sum settlement amount of Kshs.500 Million in full and final settlement.

She deposes that the cause proceeded and was concluded as a representative suit of the 1080 Claimants being heard independently and separately from **HCCC 216 of 2007, HCCC No. 219 of 2017** and **HCCC No. 255 of 2007.** She deposes that though the claimants in HCCC 216 of 2007 as consolidated with the other suits was estimated at 3.2 Billion, the claimants therein accepted a reduced amount of Kshs.1.3 billion in return for all the cases including those pending at the Supreme Court and Court of Appeal being withdrawn and Telkom Kenya Limited making a one sum payment immediately.

She deposes that the 1.3 billion was also based on the fact that there was a judgment and a decree. She deposes that in contrast, the instant suit, **Cause 561 of 2014** did not have a judgment and was still at the hearing stage. She avers that they have paid all the claimants their due entitlement and the said Claimants signed a Discharge Form discharging them from any claim and liability. She avers that after the recording of the consent the Court became *functus officio*.

She deposes that the consent recorded on 15th December, 2015 is not vitiated by fraud, collusion or by an agreement contrary to the policy of the Court. She avers that the Applicants herein are vexatious applicants as they have constantly filed various applications in several matters in respect to the consent dated 15th December, 2015 and all matters have been dismissed.

She deposes that this being a representative suit, the applicants have not demonstrated that their representative who initiated the main suit are aggrieved by the consent order recorded on 15th December, 2015. She further deposes that the applicants are in breach of the doctrine of *estoppel*.

3rd Respondent's case

In response to the Application, the 3rd Respondent filed a Notice of Preliminary Objection dated 28th May 2019 on grounds that;

1. The Applicants' advocates are not properly on record as no leave of court or written consent from the Applicant's former counsel was obtained before coming in record.

2. The Applicants representatives have not provided any authority, written and signed to represent the parties mentioned therein contrary to Rule 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

3. There is clearly misjoinder of parties as the 1st and 2nd Respondents herein were never parties in the original action;

4. The Application for review does not meet the threshold set out under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016.

It further filed a Replying Affidavit sworn by Nelson Mogaka, its Senior Internal Counsel, on 25th July, 2019.

He confirms that upon their being dissatisfied with the Staff Rationalization Program the 3rd Respondent's employees filed several suits which included **HCCC No. 216, 219** and **255 of 2007** which were consolidated and heard as the "*Ochanda Suit*". The affiant deposes that the 2nd action was **Cause 516 of 2014** which is the instant suit and **Cause 515 of 2011** "*the Ng'ang'a suit*" which were consolidated.

He deposes that in December 2015, the parties in the 3 suits instructed their Counsel on record to participate in negotiations towards the recording of consents that would have the effect of settling the suits. He further deposes that following lengthy negotiations, the parties through their counsel recorded consents in the suits. That the consent in the Ochanda suit was filed on 16th December, 2015 and the Consent in the instant suit (as consolidated with the Ng'ang'a suit) being filed on 15th December, 2015.

He avers that the consents saw the 3rd Respondent pay a cumulative sum of Kshs. 1.5 Billion to the Claimants in the Ochanda Suit and Kshs.500 Million to the Applicants in the instant suit as consolidated with the Ng'ang'a suit.

He avers that the application is fatally defective as it purports to enjoin the 1st and 2nd Respondents as parties in the application whereas they were never parties to the original action. He further reiterates the grounds in the Notice of Preliminary Objection.

He avers that this Court cannot interfere with consents except in circumstances as would afford a proper ground for varying or rescinding the contract between the parties. The parties have not shown the existence of such grounds.

He avers that the allegations that their advocates failed to obtain their consent prior to recording the consent is dubious as their advocates were deemed to have had ostensible and or apparent authority to handle a matter in any manner they deemed fit.

He further avers that if the applicants have a bonafide concern to the authority their advocates relied upon in recording the consents they ought to institute separate proceedings against the 1st and 2nd Respondents. He avers that the allegations of fraud, unfairness and discrimination are unsubstantiated, baseless, misconceived and lack merit. He avers that the applicants have not demonstrated valid reason to warrant their application to be allowed by the court.

Applicant's Submissions

The Applicant submitted that the allegation on the fraudulent conduct of the 1st and 2nd Respondent cannot in any way be separate words addressed without enjoining the responsible parties. They relied on Order 1 Rule 9 of the Civil Procedure Rules and submitted that it is prudent that parties against whom the fraud has be alleged need to be brought on board to their defence.

They submitted that the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 6 Others [2013] eKLR** perceives the issue of joinder and misjoinder as procedural technicalities that facilitate the adjudication of disputes and ensuring the orderly management of cases.

With respect to representation, the Applicants submitted that there were two applications dated 20th June, 2016 and 24th March 2017 filed by Sirma and Company Advocates and Mbuthia Kinyanjui and Company Advocates respectively, seeking leave of court to come on record for the applicants. He avers that the applications were canvassed and leave granted.

She submitted that there was a change of advocates from Sirma and Company Advocates to Mbuthia Kinyanjui and Company dated 2nd October, 2013. They submitted that it is baffling that months after, the advocates on record filed an application dated 10th April, 2018 that was withdrawn after which the 3rd Respondent filed a Preliminary Objection but did not raise the issue of representation. They referred to the proceedings of 7th August, 2017 and stated that the Court had granted leave for the current advocates to come on record on their behalf.

They relied on Rule 9 of the Employment and Labour Relations Court (Procedure) Rules 2016 and submitted that their representative duly swore the affidavit on their behalf and was properly appointed.

They submitted that the grounds for review are set out in Rule 33(1) (sic) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and that a consent judgment has a contractual effect and can only be set aside on such grounds as would obtain in a contract. They submitted that the Court of Appeal decision in **Flora Wasike v Destimo Wamboko [1988] eKLR** cited the case of **Hirani v Kasssam (1952) 19 EACA 131** that a court cannot interfere with a consent judgment except in circumstances that would afford good ground for varying or rescinding a contract between the parties.

They submitted that the allegation of forgery has not been controverted in itself as what the 1st and 2nd Respondents have pleaded is the mere fact that they had instructions to do so, which is a response to the allegation that they did not render express consent to the settlement offer.

They submitted that the Court in **Benjamin K. Kipkuliet v County Government of Mombasa [2016] eKLR** held that a fact that is asserted against a party and not controverted is deemed as admitted.

They argued that the inclination may be that by giving instructions, the client consented to bargains entered into on their behalf without their knowledge going by the replying affidavit of the 1st and 2nd respondent. They submitted that a case belongs to the litigant and not their advocate.

They relied on Rule 122 of the Law Society of Kenya Code of Ethics and Conduct for Advocates (2016) that an advocate should never waive or abandon the client's rights without the client's informed consent. They submitted that even when a settlement is too low and a client wishes to accept it, the principle of client control is near absolute. They argued that upon the offer being made by the 3rd Respondent, it was the duty of the 1st and 2nd Respondent to communicate the same to the representative who then ought to have relayed the same to the rest of the parties.

They argued that it is illogical that they would agree to be victims of discrimination yet they have an equal right as the claimants in the Ochanda case. It was their submission that they are victims of fraudulent consent that was entered into without their knowledge. In conclusion, they submitted that the consent order recorded on 15th December, 2015 was not an equivocal consent.

1st and 2nd Respondents' submissions

They submitted that it is defective to enjoin a party who was not a party to a suit through the instant application. They submitted that despite the fact that they represented the Claimants in Cause 561 of 2014, they were not parties to the suit.

With respect to Order 1 Rule 3 of the Civil Procedure Rules, they submitted that the Consent judgment was obtained against the 3rd Respondent and that there was no right of relief that existed between the Applicants and themselves. They averred that they have not been engaged in fraudulent conduct as alleged by the Applicants and that there is no report by the police on any fraud

committed by them in respect of this matter.

They submitted that the joinder of the 1st and 2nd Respondent where the right of relief does not exist between the Applicants and the 1st and 2nd Respondents when the suit was filed, is not a procedural technicality but a fundamental issue and that the application should be struck out.

They submitted that the 1st and 2nd Respondents advocates are not properly on record and that the suit was determined when the consent judgement was entered. They further submitted that by dint of the consent judgement of 15th December, 2015 the Applicant's change of advocates is to be effected by order of the court or by the consent of the outgoing advocates and without that the application dated 22nd May, 2019 is incompetent.

They maintained that there is no application filed by the proposed incoming advocates with notice to all parties seeking to come on record after Judgment. They submitted that the application filed by Sirma and Company advocates dated 20th June, 2016 has never been prosecuted and thus it has never been heard and determined. They argued that there is no Court order that granted the firm of Sirma and Company Advocates leave to come on record after judgement on behalf of the Applicants.

They maintained that there is no application filed by the firm of Mbuthia Kinyanjui seeking to come on record after judgement. They submitted that the Applicants lack jurisdiction to have this matter and consent judgment reviewed as it was entered and recorded by instructions of the representatives and award of the consent judgment was premised by the negotiations between the representative of the applicants and the Respondent.

With respect to jurisdiction, they relied on the case of **Ernest Kevin Luchidio v Attorney General & 2 Others [2015] eKLR** that without jurisdiction a court has no power to take one more step. They further relied on the case of **Seven seas Technologies Limited v Eric Chege [2014] eKLR**. They submitted that the Court lacks jurisdiction to interfere with a consent judgment where the Applicants who were 1080 in number have already been paid. They submitted that Joseph K and the other 50 Applicants received payment and signed a payment voucher.

They relied on the case of **Kasmit Wesonga Ongoma & Another v Wanga [1987] eKLR** where the Court held that a consent judgement is a judgment of the terms settled and agreed by parties to an action. They further relied on the case of **Flora Wasike v Destimo Wamboko (1982-1988) 1 KAR 625** that a consent judgment or order has a contractual effect and can only be set aside on grounds which justify setting a contract aside. They further relied on the cases of **Brooke Bond Liebig v Mallya (1975) E.A 266**, **Hirani v Kassam (1952) 19 EACA 131** and **Kenya Commercial Bank Ltd v Specialised Engineering Company Ltd (1982) KLR P. 485** where it was held that a consent order cannot be varied or set aside unless it has been obtained by fraud or collusion or by an agreement contrary to policy.

They argued that the consent judgment was not obtained by fraud or by an agreement contrary to the policy of the Court. They further submitted that the applicants have not proved fraud occasioned by them. They submitted that the applicants are guilty of material non-disclosure as they have not disclosed that they were aware of the settlement of Kshs.500 Million and that they want to unjustly enrich themselves.

They submitted that section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules are the anchor for review. They submitted that the Court in **National Bank of Kenya Ltd v Ndungu Njau (Civil Appeal No. 211 of 1996)** stated that a review may be granted whenever the Court considers it necessary to correct an apparent error or omission on the part of the Court. They further relied on the cases of **Francis Origo & Another v Jacob Kumali Mungala (Civil Appeal No. 149 of 2011)** and **Somani's v Shirinkhanu (2) [1971] EA 79**.

They therefore submitted that review cannot be available to the applicants as no conditions have been satisfied under Order 45 of the Civil Procedure Rules. They submitted that the Applicants have filed various cases before the Courts which have been dismissed.

In conclusion, they submitted that the Court is *functus officio* thus the Applicants cannot reopen the case. Therefore, they urged the Court to dismiss the application.

3rd Respondet's Submissions

It submitted that Order 1 Rule 10 (2) of the Civil Procedure Rules contemplates joinder of parties only where the proceedings are still pending before Court. It submitted that in the case of **Joseph Kotonya Aketch v NSSF Board of Directors & Another ELC Case No, 1136 of 2004** the Court held that the purpose of joinder is to enable the court to effectually adjudicate upon and settle the questions involved in a suit and that the suit having been determined, there were no questions to be adjudicated upon. It further relied on the case of **JMK v MWW & Another [2015] eKLR.**

It argued that the 1st and 2nd Respondents were never parties to the original claim and that they cannot therefore be joined in the proceedings of this kind as they discharged their functions as advocates.

It submitted that the Applicants advocates are not properly on record as provided under Order 9 Rule 9 of the Civil Procedure Rules. It submitted that subsequent to the adoption of the consent as a judgment of the Court, no change of advocates could take place unless by consent of the outgoing counsel or by an application, none of which was done.

It further submitted that the application has no prayer to have the firm of Mbuthia Kinyanjui come on record and thus the said firm is not properly on record.

It submitted that the Applicant has failed to provide evidence that the consent was obtained in a fraudulent manner owing to them being unware of the negotiations ancillary to the consent. It relied on the case of **Evans Kidero v Speaker of the Nairobi City County Assembly & another [2018] eKLR** where the Court held that allegations of fraud must be strictly proved. It further relied on the case of **Koinange & 13 Others v Charles Karuga Koinange [1984] eKLR** that the onus to prove allegations of fraud was on the plaintiffs and it was upon them to discharge the burden of proof.

It further argued that a claim for fraud must strictly be pleaded but the applicants have neither pleaded nor proved the particulars of fraud.

It submitted that each consent is distinct from the other and was negotiated on its own merits. It was its submission that if the suits were consolidated the Applicants would be in a position to argue that they were discriminated against as compared to the settlement in the Ochanda suit. It further submitted that a party that brings an action for violation of a constitutional right is under obligation to set out the violated provisions of the constitution. It submitted that the Applicants have failed to satisfy the threshold.

The 3rd Respondent relied on the case of **Kenya Bus Service Limited & another v Minister for transport & 2 Others [2012] eKLR** that a party that invokes Article 22 to enforce the Bill of Rights has a duty to set out the provisions that they claim have been infringed. It further relied on the case of **Mohammed Abduba Dida v Debate Media Limited [2018] eKLR** and submitted that the applicants have not stated with particularity the kind of discrimination they faced and in what way it applied to them.

It further submitted that by entering the consent, the applicants are deemed to have waived their right to plead discrimination. It submitted that the applicants' counsel were aware of the difference in the 2 consents thus it can only be presumed that the Applicants were aware of the said position. It relied on the case of **748 Air Services Limited v Theuri Munyi [2017] eKLR** on the waiver of rights by a party.

It submitted that a consent order/judgment can only be set aside if the Applicant proves that it was obtained by fraud, collusion, duress or that it was contrary to the policy of the Court, there was want of material facts. It was its submission that the applicants have not fulfilled the said threshold.

It submitted that Applicants are trying to invite the Court to re-write a contract that was entered between the parties. It relied on the case of **National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & another Civil Appeal No. 95 of 1999**.

It submitted that the Court in **Flora N. Wasike v Desmito Wambokok [1988] eKLR** and **Rehab Nyambura Ndegwa v John Ngugi Ndegwa** set out the circumstances in which the Court can set aside, review or very a consent order.

It submitted that the Applicants have failed to justify their claim for review of the consent order as required under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016.

With respect to their advocates not having ostensible authority to enter consent on their behalf, it relied on the case of **Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd [1980] eKLR** where the Court held that:

> *"…The marking by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made, such as order is not lightly to be set aside or varied save by consent or on one or other of the recognized grounds."*

It submitted that the negotiations that culminated in the subsisting consent were carried out over an extensive period of time with the Applicants' counsel. It submitted that the Applicants can now not claim that their counsel did not have authority to enter the said consent.

It submitted that the Applicants are guilty of laches and that they have come to court almost 4 years later having given effect to the consent judgment by accepting payment and state that they were discriminated upon. It submitted that this amounts to approbating and reprobating. It further submitted that there must be an end to litigation as Judgment was entered in 2015 and the Applicants proceeded to take the proceeds of the consent.

Determination

The issues for determination are:

a. Whether the 1st and 2nd Respondents are rightfully joined in the suit.

b. Whether the firm of Mbuthia Kinyanjui is properly on record.

c. Whether the Court has jurisdiction to determine the application.

d. Dependent on the finding in (c) above, whether the Court should grant the orders sought.

Whether the 1st and 2nd Respondents are rightfully joined in the suit

The Applicants submitted that it is prudent that parties against whom an allegation of fraud has been made must be joined in the suit. They relied on Order 1 Rule 9 of the Civil Procedure Rules and further submitted that the 1st and 2nd Respondents would nevertheless have made applications to be parties to the suit to avoid defending themselves of the alleged fraud when not parties to the suit.

The Respondents herein submitted that there is no proper joinder of the 1st and 2nd Respondents in the suit. The 3rd Respondent submitted that under Order 1 Rule 10 of the Civil Procedure Rules joinder can only be where the proceedings are pending in Court. The 1st and 2nd Respondents submitted that they could not be joined in the suit where the right of relief does not exist between the Applicants and themselves.

At all material times, the 1st and 2nd Respondents were never parties to the suit. Rather, their role in the suit was as advocates representing the Claimants in the suit. The Applicant's notion in joining them at this stage was as a result of their allegation that the consent order entered into by the advocates is vitiated by fraud as they were not consulted.

Order 1 Rule 10 (2) of the Civil Procedure Rules provides:

> **(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.**

As rightfully submitted by the Respondents, this provision contemplates that joinder is only possible during the pendency of the proceedings. The issues in this suit were determined by the Consent Order of 15th December, 2015. Although Order 1 Rule 9 of the Civil Procedure Rule provides that no suit should be defeated as a result of a misjoinder. In the instant application, the challenge posed by the joinder of the 1st

and 2nd Respondent is that they have been joined herein after the Consent was adopted by Court and only in an application seeking an order to review the said consent. It is my finding that such joinder is improper and would be absolutely impractical for any action to stand against the 1st and 2nd Respondents who were not parties to the suit.

In **Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another [2015] eKLR** the Court held:

> *"Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties."*

It is therefore my finding that the 1st and 2nd Respondents are not properly joined in the suit.

Whether the firm of Mbuthia Kinyanjui is properly on record

The 3rd Respondent raised a Notice of Preliminary Objection on grounds that the firm of Mbuthia Kinyanjui and Company Advocates is not properly on record. The Applicants submitted that several applications were filed in Court and submissions in respect of these applications were also filed. However, these applications are not in the court record save for the submissions filed by Sirma and Company advocates on 26th July, 2017 which sought that the said firm comes on record for the Applicants. The Applicants aver that these applications were canvassed and heard.

What is in the Court record is a Notice of Change of Advocates dated 2nd October 2017 and filed on 3rd October, 2017 indicating that the Applicants had appointed the firm of Mbuthia Kinyanjui and Company Advocates to act for them.

From the record, there is no Ruling in respect of the said firm coming on record. Further, the proceedings for 7th August, 2017 which they refer to in their submissions are not in respect of the firm coming on record but a Ruling which was deferred to 10th August, 2017.

Order 9 Rule 9 of the Civil Procedure Rules provides:

> **When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—**
>
> **(a) upon an application with notice to all the parties; or**
>
> **(b) upon a consent filed between the outgoing advocate**
>
> **and the proposed incoming advocate or party intending to act in person as the case may be.**

Consequently, for a firm to come on record after judgment there ought to be an application seeking leave to come on record and/or a consent filed by the previous advocates and the proposed advocates. A notice of change of advocates is not the procedure contemplated under Order 9 Rule 9. In this instance the Applicants do not state the date on which the decision was made for the firm to come on record. This is despite the fact that Counsel had on many occasions appeared in Court acting for the applicants.

I therefore find that the Applicant's advocates are not properly on record.

Whether the Court has jurisdiction to determine the application

The Respondents herein aver that this Court has no jurisdiction to determine the matter as it became *functus officio* after 15th December, 2015 when the consent order was recorded.

The Supreme Court in **Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** held:

> *"This principle has been aptly summarized further in **Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550**:*
>
> > *"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."*

I find that this application being one that is brought under Rule 34 of the Employment and Labour Relations Court (Procedure) Rules, this Court has jurisdiction to determine the matter.

Whether the Court should grant the orders sought

The main issue in the application is whether the Court should review the Consent Order dated 15th December, 2015. It is the Applicants' case that they did not agree to the consent entered into by the 1st and 2nd Respondents. The Respondents submitted that the consent order cannot be set aside unless there is fraud, collusion or contrary to public policy of the Court. The 1st and 2nd Respondent aver that the representative to the suit gave them instructions to accept the one off lump sum settlement of Kshs.500 Million.

Annexed to the Affidavit of Silvia Malemba Kitonga, is an affidavit of Barack Otieno Ocholla sworn on 24th March, 2016. He depones at paragraph 1 of the affidavit that together with George Awiti and Jackson Nzioka, they were representatives of the claimants in Cause 561 of 2014., which is the instant suit. In a letter dated 25th November, 2015 from the said representatives addressed to the 1st and 2nd Respondents stated:

> "*Dear Sir/ Madam,*
>
> *We the undersigned representatives of all the Claimants in the above mentioned case now instruct and authorize you to proceed to enter the consent settlement in the following terms:*
>
> > *(a) That we fully and on behalf of all the Claimants, accept a one off lump sum settlement amount of Kshs.500,000,000 plus costs ..."*

The Applicants submitted that upon the offer being made by the Respondents, it was the duty of the 1st and 2nd Respondents to communicate the same to the representatives who then ought to have relayed the information to the rest of the parties. The instant application is supported by the affidavit of Joseph K. Muthui who was not a representative of the other claimants in the suit. Further, he does not raise any issue on their representatives to the suit and none of the said representatives have stated that the advocates acted without their express instructions.

It would appear that the Applicants herein are only disgruntled that they received a lesser amount than the Claimants in the Ochanda suit. The Applicants have already received the settlement amount of Kshs.500 Million and all this while they questioned the rationale of the amount paid to them. At paragraph 6 of the affidavit Joseph Muthui states that it is not until 16th December, 2015 that they knew that there was a consent order for the payment of Kshs.500 Million.

The applicants received the proceeds of the consent order and signed discharge vouchers. In particular, Joseph K. Muthui received a sum of Kshs.292,455 as stated in the discharge voucher dated 1st February, 2016, annexed at page 21 of the 2nd Respondent's Replying Affidavit.

The parties have relied on various decisions, that set out the grounds that the Court should consider in reviewing or setting aside a consent order. The Court of Appeal in **Kenya National Capital Corporation v Mohan Galot & 5 Others [2019] eKLR** held:

> "*The parties on their own accord and with advice of their counsel on record after negotiations entered into a consent which was adopted as an Order of the court. Once parties entered into such a consent and upon it being adopted as an Order of the court, the same became binding on the parties and could not be vitiated at all as it had contractual obligations save in circumstances where a contract could be set aside – see the case of* ***Flora N. Wasike vs. Destimo Wamboko [1988] eKLR*** *where the following passage appears:*
>
> > "*It is now settled law that a consent judgment 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: see the decision of this in* ***S. M. Mwakio vs. Kenya Commercial Bank Ltd. Civil Appeals 28 of 1982*** *and* ***69 of 1983.***"

The Applicants have not adduced evidence to prove that the 1st and 2nd Respondents fraudulently entered into a consent. In any instance, it took them 4 years to challenge the consent they allege was fraudulently entered into. It is my finding that any question that revolves around their acceptance of a lesser amount would be directed to their representatives who gave instruction to Counsel to enter into negotiations on the matter and in the end enter into the consent which was for a lesser amount. Those representative have not been joined to the application.

Consequently, the order seeking review of the consent order must fail as the applicants have not met the threshold for review or setting aside of a consent order.

Prayers 4 and 5 of the application also fail as the said orders were dependent on the success of prayer 3.

Having found all the prayers in the application not merited, the application is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF OCTOBER 2020

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE