



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 87 OF 2016

(Before Hon. Justice Mathews N. Nduma)

SAMUEL K. KANGOGO.....CLAIMANT

VERSUS

BHAYANI NURSERY AND PRIJMARY SCHOOL.....RESPONDENT

RULING

1. The court heard and determined the suit vide a judgment delivered virtually on 28th May 2020 in which the court entered judgment in favour of the claimant in the sum of Kshs. 388,910 being service gratuity in respect of 29 years of service and costs.
2. On 4th June 2020, a consent dated 3rd June 2020 signed by the claimant and Advocate L.G. Menezes for the respondent was filed before court. The consent reads:

“*By consent*

(i) *Judgment delivered on 28th May 2020 be varied and this suit be settled at an alternative sum of Kshs. 225,000.*

(ii) *Upon payment of the sum (i) above, the claim be marked as fully settled”.*
3. The claimant/applicant filed a notice of motion application on 10th July 2020 seeking for orders *interalia*:
 - (i) That the purported consent dated 3rd June 2020 be set aside because same was never endorsed by the court.
 - (ii) That the respondent to appear in court to explain why the balance on the award has not been paid to the claimant to date despite promising the claimant to settle the balance in one week’s time.
4. The applicant deposes that the respondent has paid him Kshs. 225,000 with a promise to clear the balance on the award which was Kshs. 163,910 since the judgment was for a sum of Kshs. 388,910.
5. The applicant states that he was never made to understand the content of the consent, neither was it adopted and endorsed by the court. That the respondent took advantage of the claimant’s less understanding of the complex content of the purported consent and hoodwinked the claimant to sign a document which he did not understand its content completely.
6. That the consent be set aside and the respondent to pay the balance of the judgment sum.
7. The application is opposed vide a response filed on 22nd July 2020 sworn to by Satish Bhayani for the respondent who deposes that upon receipt of the judgment of the court he instructed the advocate for the respondent to file an appeal against the judgment. However, the claimant visited him at the respondent’s office with a copy of the typed judgment and the deponent informed the claimant that the respondent intended to Appeal the judgment and that if he had any issue he should visit the Advocate’s office for discussion.
8. The deponent states that the claimant entered into negotiations with Chris Maganga Advocate since he was unwilling to await the outcome of the intended Appeal. The parties then agreed on a settlement of Kshs. 225,000 in full and final settlement of the matter where upon the claimant signed the consent and received the sum of Kshs. 225,000 in full and final settlement. The Advocate for the respondent also signed the consent and filed the same in court as stated earlier in this ruling.

9. That the claimant at all material time of hearing and determination of the suit acted in person and had the authority to enter into the said consent order.
10. That the application is mischievous, frivolous and an abuse of court process and it be dismissed with costs.
11. That the allegation that the claimant was promised payment of a balance of Kshs. 163,910 is a blatant lie as no such promise was ever made nor was there any further discussion between the parties upon full and final settlement of the claim.

Determination

12. The court has carefully considered the facts presented by the applicant and the respondent in their deposition and is satisfied that the claimant feely and voluntarily entered into the consent filed before court with the advocate for the respondent and received Kshs. 225,000 in full and final settlement of the claim.
13. There is absolutely no evidence of alleged promise by the respondent to pay any further amount after the consent was signed and filed by the parties on 4th June 2020.
14. The claimant does not dispute that he signed the consent and received the agreed sum of Kshs. 225,000. The consent clearly stated that the payment was in full and final settlement of the suit which was then marked as fully settled upon filing of the consent.
15. It is manifestly clear that the claimant/applicant is not candid with the court and the allegations made in the application are not truthful. The claimant wants to have his cake and eat it.
16. The consent filed by the parties is valid and the fact that due to Covid – 19 constraints the court has not been sitting so as to timeously adopt the consents filed by the parties at the registry does not negate the fact that this was a valid consent entered into by the parties and was acted upon to the benefit of the claimant/applicant.
17. Setting aside the same would greatly prejudice the respondent who forfeited opportunity to file an appeal within the 14 days period provided by the law in favour of a mutual settlement of the matter.
18. A consent by the parties may only be set aside upon the applicant satisfying the court that it was entered into pursuant to fraudulent misrepresentation by the other party or there was mutual mistake on the part of the parties or that the consent violates the law and is therefore null and void.
19. Consents are sacred instruments meant to curtail litigation and aid in timeous administration of justice by taking the load from often very busy courts.
20. In the **Court of Appeal at Nairobi, Civil Appeal No. 293 of 2014, Board of Trustees National Social Security Fund vs Michael Mwalo (2015) eKLR – L.B.M Kariuki and J. Mohammed JJA weighed on the issue of setting aside consents citing Wasike vs Wamboko case per Gicheru J.** at the High Court as follows:

(i) *“A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out.*

(ii) *The Civil Procedure Act (Cap 21) Section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties where a party seeks to prove that the decree is invalid abinito and should be rescinded or that there exist circumstances to warrant varying the decree.*

(iii) *In this case there were no grounds which would justify the setting aside of the consent judgment. Appeal dismissed”*

21. In the present case having considered all the circumstances of the case there are no grounds which would justify the setting aside of the consent judgment entered into by the parties and fully acted upon before it was filed before court on 4th June 2020.
22. The application lacks merit and is dismissed with no order as to costs, considering that the claimant/applicant consented to be paid less than the initial judgment delivered by the court.

Ruling Dated, Signed and delivered at Kisumu this 15th day of October, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

Claimant/Applicant in person

Maganga for respondent

Chrispo- Court clerk