



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NO 1442 OF 2014**

**BENSON NDOLI GWAGE.....CLAIMANT**

**VERSUS**

**MRS. LAKBIR DHILLION.....RESPONDENT**

**RULING**

1. The applicant herein seeks to set aside the consent order between the firms of Okemwa & Company Advocates and Hamilton Harrison and Mathews which was adopted by the court on 19<sup>th</sup> June, 2017. The effect of the consent was to mark the claim as settled against the respondent.
2. The application was based on grounds inter alia that:
  - a. That the firm of *Okemwa & Co. Advocates had no instruction from the Claimant/Applicant to fully settle the matter by consent.*
  - b. That the Consent Order as adopted required the Respondent to pay the Claimant/Applicant a sum of Kshs. 150,000 *in full and final settlement of the Claimant/Applicant's claim in ELRC Cause No. 1442/2014.*
  - c. That the Claimant/Applicant was desirable of having the matter heard and determined on merits and was at all times not informed That the matter would be settled by Consent.
  - d. That the firm of *Okemwa & Co. Advocates never furnished the Claimant/Respondent with full details and particulars before resting for settlement of the matter at Kshs. 150,000.*
  - e. That the Claimant/Applicant was only perturbed upon visiting the firm of *Okemwa & Co. Advocates to be informed that the matter had been fully settled, without information as to the settlement amount.*
  - f. That the Claimant was aggrieved when he was presented with a cheque for Kshs. 60,000 *and an acknowledgement to sign in acceptance of the amount in full and final compensation of his claim in ELRC Cause No. 1442/2014 without information as to the settlement amount.*
  - g. That the Claimant then acknowledged receipt but undertook to consult on the legal means of getting full particulars and information on the nature of the Consent that was entered and adopted by court.
3. In support of the application counsel for the applicant submitted that there was no evidence that the represented litigant had knowledge of the consent settlement negotiations. The applicant accused counsel previously on record of collusion and acting to his detriment.
4. The respondent on their part submitted that there was no evidence of collusion and that one could not casually allege collusion and contend that there was collusion simply because the claimant wanted to walk out of the consent. On the issue that the matter touches on constitutional right to fair labour practice, counsel submitted that there were facts that the claimant has alleged violation of constitutional rights does not mean that the court departs from a settled principle of law. According to counsel, it was settled law that a consent judgement or order has contractual effect.
5. Counsel further submitted that there was no proof that the claimant's counsel acted without his authority and in any event advocates have general authority to compromise a suit on behalf of their clients. The claimant stated that he was aggrieved when his previous counsel presented him with a cheque for Kshs 60,000/=. He nonetheless acknowledged receipt but undertook to consult on the legal means of getting

full particulars and information on the nature of the consent entered and adopted by the court.

6. It is indeed settled law that a consent once entered into by the parties constitute a binding contract and can only be set aside on similar ground for which contract can be vitiated. The claimant alleges that all along he had wanted his case to be heard on merit and further that counsel Okemwa had no authority to settle the matter the way he did.

7. Assuming the claimant is right on his accusation against counsel Okemwa, the question which arises then is why he took and signed for the sum of Kshs 60,000/= yet he did not approve of the settlement. If there was no consent from the claimant to the advocate to settle the claim that must remain consistent throughout. He cannot be heard to accept money derived from a transaction he did not approve of and again turn around to seek from court the setting aside of the transaction forming the basis of the money he received and signed for.

8. It is a settled principle of equity that a party cannot approbate and reprobate at the same time. That is to say a party cannot be allowed to choose which part of the same transaction to respect and which one to reject. The claimant's act of receiving the proceeds of the settlement *estoppes* him from seeking to set aside the consent from which the payment he received was derived.

9. In conclusion the motion is found without merit and hereby dismissed with costs.

10. It is so ordered.

**Dated at Nairobi this 25<sup>th</sup> day of January, 2019**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 25<sup>th</sup> day of January, 2019**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**