



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1680 OF 2016**  
**DANIEL OTIENO NYAMUTI.....CLAIMANT**  
**VERSUS**  
**TRANS OCEANIC PROJECTS AND**  
**DEVELOPMENTS KENYA LIMITED.....RESPONDENT**

M/S Muhanda for claimant/applicant

Mrs Muchene for respondent

**RULING ON COSTS**

1. Parties entered a consent in terms of which the respondent paid the claimant Kshs.200,000 as settlement of the claim. The claimant's advocate was not involved in the negotiation of the settlement and only came to know of the consent when it was presented to court for adoption by the respondent's advocate.
2. The issue in dispute is whether costs must be paid to the claimant or not.
3. The claimant submits that in terms of section 12 (4) of the Civil Procedure Act, "*In proceedings under this Act, the court may, subject to the rules, make such orders as to costs as the court considers just.*"
4. That in terms of section 27 (1) of the Civil Procedure Act, the "*costs of and incidental to all suits shall be in the discretion of the court or Judge .....*"
5. The consent between the claimant and the respondent was filed on 16<sup>th</sup> February 2012 in a bundle of additional list of documents and the document was not specifically adopted as an order of the court.
6. Although the document is captioned "*without prejudice*", this privilege enjoyed by advocates is not extended to lay men by law and is in any event not claimed by either party in this suit. The agreement was consummated by actual payment of the agreed amount which fact is not in dispute.
7. By the time the agreement was entered into on 11<sup>th</sup> January 2017, this suit had been filed and is specifically referred to in the agreement as follows;

*"your acceptance of this cheque will forthwith relinquish Trans Oceanic Projects & Development*

*(Kenya) Limited from any further responsibility or liability for these and any future claims from you including all claims in Civil Suit No. 1680 of 2016 at the Employment and Labour Relations Court at Nairobi and that we will not be responsible for any of your costs as it pertains to your legal representation and court costs resulting thereof.”*

8. The claimant acknowledged that he had read and understood the contents of the agreement and confirmed receipt of Kshs.200,000 as his final dues and as settlement of all claims he had against the respondent in civil suit No. 1680 of 2016.

9. There has been no allegation that the claimant was induced by misrepresentation or fraud nor has it been alleged that there was no parity of arms in the negotiations that resulted in the consent. **HCCC at Nairobi, Civil Appeal No. 35 of 2013, Blue Bells Foods Limited Vs. Daystar University & another [2016] eKLR** is on point.

10. For these reasons the claimants cannot be heard to shift the goal posts after the horse has bolted. The consent entered into by the parties pursuant to which Kshs.200,000 was paid to the claimant is adopted as an order of the court.

11. The suit is marked as settled and each party to bear their own costs of the suit.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of August, 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**