



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 1201 OF 2013

JOHN WARUINGE KAMAU CLAIMANT

-VERSUS-

PHOENIX AVIATION LIMITED RESPONDENT

RULING

The application before me for determination is a Notice of Motion dated 7th November 2014. It was filed under certificate of urgency by Okemwa & Company Advocates on behalf of the claimant under Section 12 and 16 of the Industrial Court Act, Article 159(2)(d) and 162(2) of the Constitution and all enabling provisions of the law. The application seeks leave to allow the firm of Okemwa & Company Advocates to come on record for the claimant in place of his former advocates Koceyo and Company Advocates, and that the court sets aside, rescinds and expunges from the court record *ex debito justitiae* the consent judgment dated 9th October 2014 and adopted by the court on 4th November 2014. The application further seeks an order that the suit proceeds to full trial from the place it had reached prior to the consent and that the hearing date be fixed on priority basis. The applicant further prays that costs of the application be provided for. The application is supported by the claimant's affidavit and the following grounds:-

1. That the plaintiff took the matter to court unfortunately his erstwhile advocate:-
 - i. Failed to take into account and appreciate all the issues and facts as instructed by the claimant and entered a consent purporting to have the said consent.
 - ii. Deliberately failed, resisted, refused and neglected any action of making amend and regularizing the said consent as per the plaintiff's instructions.
 - iii. Failed to properly counsel and advice the plaintiff on the implication of the consent despite the claimants efforts to obtain the same and was all in the dark until the 4th of November 2014. When the decisive facts of the ruling and the case generally came into his knowledge prompting him to file the present application.
2. That a mistake, inadvertence of the claimant's advocates should not be visited to the claimant an innocent laid litigant.
3. That by disregarding the claimant instructions said consent was faulty is irregular and void and set aside *ex debito justitiae*.
4. That unless the honourable court grants the orders sort the claimant will suffer irreparable harm and prejudice and more an irreversible miscarriage of justice will be carried.

Background

The claimant herein filed this suit on the 30th July 2013 seeking damages for unlawful termination of employment and discrimination. The compensation sought was quantified in the claim at Kshs 2,487,850.00.

The respondent in reply to the claim denied that the claimant had been unlawfully terminated and further that it was in any way liable to the claimant for breach of contract.

The claimant's evidence was taken and the case adjourned for hearing of defence case. It was at this point that the parties negotiated an out of court settlement being that the respondent pays to the claimant four (4) months' salary in the sum of Kshs 369,607.60 plus an additional Kshs 50,000.00 as party and party costs in final settlement of the suit.

The duly executed consent dated 9th October 2014 was filed in court on the 24th October 2014 and subsequently adopted as the final court order on the 4th November 2014.

After adoption of the consent order the claimant filed this application under certificate dated 7th November 2014 challenging the validity of the consent judgment and seeking orders that the same be set aside to allow the matter be heard to "conclusion" on grounds that he did not give instructions to his then advocate to have any consent recorded.

The respondent filed a replying affidavit on the 3rd December 2014, opposing the application and maintaining that the consent judgment was good in law thus was a proper determination of the suit in finality.

The application was first heard by **Abuodha J** on 10th November 2011 when he certified it urgent and granted Okemwa & Company Advocates leave to come on record for the claimant. The application came before me for directions on 18th November 2014. On 8th December 2014 I fixed the application for hearing on 17th December 2014. On the hearing date Mr. Okemwa was not ready to proceed and since I was going on transfer in January 2015, I directed parties to file written submissions following which the file would be sent to me to prepare the ruling.

Apart from the affidavit in support of the application, the claimant filed 2 further affidavits on 17th December 2012, one in response to the replying affidavit of Mr. Titus Koceyo filed on 24th November 2014 and the other in response to the replying affidavit of Mr. Jomo Nyaribo representing the respondent filed on 3rd December 2014 opposing the application. The parties all filed written submissions.

In the affidavit in support of the application the claimant deponed that he was unfairly terminated by the respondent following which he instructed the firm of Koceyo & Company Advocates to pursue his claim in this court. The case proceeded to his satisfaction until the closure of his case. When it was the turn of the respondent to present its case the suit was adjourned severally due to non attendance and non compliance with court directions. When the case came up for mention on 4th November 2014 his former advocate Mr. Titus Koceyo did not appear in court nor inform him of the reason for the mention or non attendance. The claimant deponed that he later learned that one Mr. Kaburu had been sent by Mr. Koceyo to hold his brief and record a consent. The claimant further deponed that he was shocked and dumb-founded as he could not comprehend the turn of events. He followed Mr. Kaburu to the court corridors to find out what had transpired in court but was directed by Mr. Kaburu to contact Mr. Koceyo for briefing. The claimant deponed that he could not reach Mr. Koceyo on phone as his calls were not answered. He later went to the advocates office where he perused the file and discovered that Mr. Koceyo had without his instructions, consultation or knowledge initiated out of court settlement of the claim sometime in July 2014. He deponed that on 1st October 2014 Mr. Koceyo called and informed him of the offer of Ksh 600,000/= or 4 months salary and further advised him to withdraw the claim on discrimination. He denied instructing his advocates to withdraw the claim for discrimination. He stated that he told Mr. Koceyo that the offer by the respondent was insulting and that after 1st October 2014 he did not have any further discussions with his advocate.

In his replying affidavit Mr. Jomo Nyaribo states that this case came up for hearing on 19th March 2014 when the claimant's testimony was taken in full led by Mr. Titus Koceyo of Koceyo & Company Advocates. The case came up for defence hearing on 8th July 2014 when both parties were ready to proceed but the case could not be reached. The case was rescheduled for hearing on 8th October 2014 but on 8th July 2014 the claimant's advocates wrote to respondents advocates indicating that they had instructions to attempt out of court settlement. They proposed payment of damages in the sum of Kshs 600,000/= and compensation of 8 months salary. The respondents advocates responded on 5th September 2014 proposing compensation of 3 months salary and withdrawal of the claim for discrimination with each party bearing its costs, a proposal that was rejected in *toto* by the claimant's advocates letter of 24th September 2014. On 30th September the respondents advocates wrote to the claimant's advocates making a final offer of 4 months salary as compensation and withdrawal of the claim for discrimination by the claimant. On 2nd October 2014 the claimant's advocates responded rejecting the offer of 4 months salary with no damages or costs and counter-proposed payment of 5 months compensation without damages and payment of claimant's costs in the sum of Kshs 100,000/=. In view of the negotiations when the case came up for hearing of defence case on 8th October 2014 parties informed the court that they were in negotiations and that the matter was taken out and fixed for mention on 4th November 2014.

Mr. Nyaribo further stated in his affidavit that on 9th October 2014 he personally called Mr. Koceyo and relayed the respondent's final offer of 4 months compensation and costs of Kshs 50,000/= with the claimant retracting the claim for discrimination. The offer was confirmed by letter of the same date. Consent was eventually executed on 14th October and filed in court on 24th October 2014. When the matter came up for mention on 4th November 2014 the court adopted the consent with a 30 day stay of execution. The respondent deposited the amount agreed in the consent with its advocates on 11th November 2014.

Mr. Nyaribo stated that the consent was entered with the involvement of the claimant and his counsel, that the claimant was personally present and was also represented by counsel at all court appearances, including on the date consent was recorded. That the agreement is valid and enforceable. That the conduct of the claimant is tainted with misrepresentation, bad faith and malice and does not deserve the court's discretion being exercised in his favour.

Mr. Nyaribo further stated that the application is brought under the wrong provisions of the law and the court is *fanctus officio*.

In his replying affidavit Mr. Titus Koceyo stated that the claimant was aware about negotiations to attempt out of court settlement and the consent was entered into with claimant's knowledge and authority. That the claimant was present in court during all court sessions including on mention dates when the court was informed about the negotiations, that the claimant never raised any objection to the negotiations or settlement. That in an email dated Saturday 4th October 2014 addressed to Mr. Koceyo the claimant state "... I have given the matter of settling out of court a very serious thought and have decided to go by what you will advise me as this is your area of speciality ..." That this was before the consent was recorded on 4th November 2014, and after discussions held with the claimant in Mr. Koceyo's office on 1st October 2014. That the claimant appears to have changed his mind only after the consent was recorded. Mr. Koceyo denied that he abused the claimant when he responded to the claimant's email of 4th November 2014. He stated that he only informed the claimant that his firm cannot continue acting for the claimant due to his insincerity.

In the written submissions of the claimant it is submitted that although the general rule is that an advocate has full control of a case on behalf of his client and can compromise the case, each case should be considered in light of the particular circumstances of the case. It is further submitted that consent orders infringing on the fundamental human rights are illegal and unenforceable. That the respondent infringed on the claimant's rights under Articles 27(1), (4) and (5), Article 28 and Article 25(c). The claimant cited **Petition No. 285 of 2013 Mike Sonko Gideon Kioko Vs A. G & 8 Others** where the court set aside a consent order on the grounds that the consent order was illegal and cannot stand as it outlawed actions lawfully contemplated under Article 37.

The claimant also cited the case of **Mula International Ltd Vs His Eminence Cardinal Nsubuga & Another (1982) HCB11** where the court observed that "A court of law cannot sanction what is illegal and illegality once brought to the attention of the court, overrides all questions of pleadings, including admissions based thereon."

The claimant further relied on the case of **Albert Rutiri & Others Vs The Minister for Finance & Another; HC Misc. Appl. No. 980 of 2001** as quoted by **Rawal J** (as she then was) in **Otieno Mak'Onyango Vs Attorney General [2012]** eKLR when she stated that;

"We must be goal-oriented i.e vigilantly uphold the Constitution of Kenya, and do justice according to the law in the context of our socio-cultural, environment and avoid paying undue attention to abstract technical strictures and procedural snares merely for the sake of technicality which may have the effect of restricting access to justice which is itself a Constitutional right which cannot be abrogated or abridged by trazon or subtle schemes or manoeuvres".

The claimant also relied on the case of **Diamond Trust Bank V Ply Panels Ltd & Others** in which it was held that a court has jurisdiction to set aside consent orders if it is shown to be based on an agreement induced by misrepresentation if it is shown that the misrepresentation induced the representee to enter into the agreement. It was submitted for the claimant that in this case there were three misrepresentations. The first was that Koceyo and Company Advocates started negotiations on 9th July 2014 without disclosing the same to the claimant. The second was on 1st October 2014 when Mr. Koceyo informed the claimant that they had been approached by the respondent's advocates for an out of court settlement and the third was that Koceyo & Company Advocates informed the claimant that no agreement had been agreed on by 9th October 2014.

It was further submitted for the claimant that the consent order was contrary to the policy of the court and must be set aside. The claimant relied on the case of **Samson Ole Tina V Clerk, Trans Mara County Council [2010]** eKLR where the court stated that "whereas an advocate has general authority to compromise on behalf of his client, he can only do so if he acts bona fide and not contrary to express and/or negative direction. The claimant also relied on the case of **Republic V District Land Registrar & Another Ex - Parte Kiprono Tegeri & Another [2005]** eKLR where the court stated that although an advocate has ostensible authority to compromise his client's case, employment of such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instruction which he has been given by a client.

It was submitted for the claimant that this court has jurisdiction to grant the orders sought, that the court is espoused by Article 159(2) (d) of Constitution to uphold justice without technicality and by Section 12(3)(iii) to grant the orders sought. Further that the Civil Procedure Rules do not apply to this court as the court has its own rules. It was further submitted that the granting of the orders sought will not prejudice either Koceyo & Co. Advocates or the respondent's advocates, that the sums already received by the claimant be treated as part payment by the respondent. It was further submitted that the court is not *functus officio* and that the claimant should not be punished for the mistakes committed by his advocates.

For the respondent it was submitted that the application by the claimant does not meet the threshold for setting aside consent orders, that the consent was properly entered, that the claimant has not proved any vitiating factors and the application is an abuse of court process and should be struck out.

It was submitted for the respondent that it is trite law that a consent judgment is a contract in which parties make reciprocal concessions in order to resolve their differences and therefore avoid litigation or where litigation has already commenced, bring it to an end. That when it complies with the requisites and principles of contracts, it becomes a valid agreement which has the force of law as between the parties. That a consent once given judicial approval, becomes more than a contract. Having been sanctioned by a court it becomes a determination of the controversy and has the force and effect of a judgment. This was the determination in **Agrafin Management Services Ltd V Agricultural Finance Corporation & 5 Others**.

It was submitted that a court has qualified discretion in interfering with consent orders, as was stated in the case of **Brooke Bond Liebig Ltd V Mallya (1975) E. A 266**. In that case the court stated that "a court cannot interfere with a consent judgment except in such circumstances as would afford a good ground for varying and rescinding a contract between the parties". Again in **Flora Wasike V Destino Wamboko (1982 - 88) 1 KAR** the Court of Appeal (Hancox J) stated:-

"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 ..."

It was also submitted for the respondent that an advocate has ostensible authority to compromise suits on behalf of his client provided he acts in good faith as was reiterated in the case of **Waigh V HB Clifford & sons [1982] Ch. 374**. Again The Supreme Court Practice 1976 (Vol. 2) Para 2013 at Page 620 states "Authority of Solicitor:- A solicitor has a general authority to compromise on behalf of his client, if he acts *bona fide* and not contrary to express negative direction." The respondent cited the case of **Kenya Commercial Bank Ltd V Specialized Engineering Company Ltd [1982] KLR 485** where the court held that:-

"The making 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 an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds".

The respondent also relied on the case of **Ismail Surnderji Hirani V Noorali Esmail Kassam (1952) 19 EACA 131** where the court cited with approval the following passage from **Set on Judgments and Orders, 7th Edition Vol. 1 p. 124**;

"... Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement ..."

It was submitted that the foregoing passage emphasizes that the ostensible authority of an advocate can only be limited to the extent that the other party has been informed.

The respondent further relied on Hulsbury's Laws of England 4th Edition, Vol. 16, para 144 which states as follows:-

"... The court will not interfere with the freedom of contract and will not ... merely because a man has made an improvident contract, relieve him from its consequences".

The respondent further submitted that the claimant's application is an abuse of court process and relied on the case of **Ngugi Vs Kinyanjui (1989) KLR 146** where the court held that the law will not allow any dispute between the same parties to be reopened while judgment still remains on record.

The respondent further relied on the case of **Peter George Anthony D'costa V Attorney General and Another**, Nairobi Petition No. 83 of 2010 (unreported in which the court stated that:-

"The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is breach of the petitioner's fundamental rights as the petitioner will not receive a fair trial. It is the duty of court to stop such abuse of the justice system."

It was also submitted for the respondent that the court became *functus officio* after delivering its judgment and cannot sit and interrogate the validity of the decision. The respondent referred to the Supreme Court decision in **Raila Odinga & Others V IEBC & Others [2013]** eKLR in which the court cited with approval an article by Daniel Malan Pretorius titled "The Origin of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in which the author states:-

"The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter ... The (Principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

The respondent urged the court to disallow the application and give directions on the disposal of the Kshs 50,000/= held by the respondent's advocates as consented costs.

Koceyo and Company Advocates in their submissions stated that the claimant was aware of the negotiations to settle the case out of court as he was present at all court sessions and was usually given a brief immediately after every court appearance. It was also submitted that there was nothing wrong with the consent judgment being drafted on respondent's letter headed paper and that the claimant appears to have changed his mind only after the consent was recorded. Mr. Koceyo urged that the application be dismissed and an order be made for release of the Kshs 50,000/= costs held by respondents advocates to Koceyo & Company Advocates.

I have considered the application together with the supporting affidavits and documents attached thereto. I have also considered the replying affidavits and the further affidavits, the written submissions and the authorities relied upon by the parties.

The nature of a consent judgment and the circumstances under which such judgment may be set aside are well settled. A consent judgment is an agreement by parties in which they make reciprocal concessions in order to resolve their differences to avoid litigation or bring to an end litigation which have already commenced. Once adopted by the court a consent acquires the force and effect of a judgment. The circumstances under which a consent order may be set aside are grounds which would justify the setting aside of a contract, or if the conditions required to be fulfilled by the agreement have not been fulfilled. The grounds for setting aside contracts are fraud, coercion, mistake or misrepresentation.

The issue for determination in this application is whether the claimant has met the threshold for setting aside of the consent judgment.

The claimant admitted meeting his counsel Mr. Titus Koceyo on 1st October 2014 and sending an email to Mr. Koceyo on 4th October 2014 advising him as follows:-

"I have given the matter of settling out of court a very serious thought and have decided to go by what you will advise me as this is your area of speciality."

The claimant's advocate subsequently signed a consent with the respondent's advocates on 9th October 2014. The consent was filed in court on 24th October 2014 and adopted as a judgment of the court on 4th November 2014. The claimant did not produce any other instructions given between 4th October and 4th November 2014 withdrawing the instructions given in his email of 4th October 2015. As stated in Halsburry's Laws of England 4th Edition Vol. 16 para 144, the court will not relieve a man of the consequences of a contract merely because it is improvident.

I find that the claimant has not proved there was misrepresentation, mistake or coercion by Koceyo & Company Advocates or that the said advocates acted contrary to express and/or negative directions of the applicant. What the claimant termed as misrepresentation is not the misrepresentation anticipated by

the law. Misrepresentation in contract denotes a false statement that is likely to induce a reasonable person to assent or that the maker knows is likely to induce the recipient to assent (Blacks Law Dictionary, 9th Edition, page 1091). What the applicant has argued to be misrepresentation is therefore not material for purposes of setting aside a consent judgment.

The claimant argued that the discrimination he suffered in the hands of the respondent is an infringement of his rights and that a consent order that limits fundamental rights is illegal and a nullity. I do not find such argument or the cases cited by the claimant in support thereof to be applicable to the present case. The consent agreement *per se* do not breach any rights of the claimant to warrant it being declared a nullity. The agreement was a compromise of the right, not a breach of the right. The claimant did not plead infringement of any constitutional rights in his claim. The claim is for breach of employment contract. As has been stated by courts in many cases, not every simple case can be elevated to the constitutional pedestal, and a person alleging breach of constitutional rights must plead the same. What is in issue in this application is whether the consent judgment was properly entered into and not whether the rights of the claimant had been infringed. Koceyo & Company Advocates being the counsel for the claimant, had ostensible authority to compromise his case in the manner it did based on the instructions contained in the claimant's email of 4th October 2014. The respondent properly acted on the consent and has already fulfilled its obligation under the consent order by releasing the agreed sum to its advocates for transmission to the claimant's advocates.

I however do not think that the application is an abuse of court process or that the court was *functus officio* as argued by the respondent. Under the Industrial Court Act and the Rules, this court has jurisdiction and power to set aside and to review its decisions hence it is not *functus officio*. I also do not think that asking for a review or setting aside a court decision *per se* constitutes abuse of court process. I do not find the claimant's application to be without basis. My only finding is that the application does not meet the threshold for setting aside or review of consent judgments.

For the foregoing reasons I dismiss the application by the claimant and order that the sum of Kshs 50,000/= held by the respondent's advocates be released to Koceyo & Company Advocates. Each party shall bear its costs of this application.

Orders accordingly.

Dated and signed at Kisumu this 16th day of June, 2015

MAUREEN ONYANGO

JUDGE

Delivered in Nairobi this 7th day of July, 2015

HELLEN WASILWA

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)