



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO. 78 OF 2013**  
**TRANSPORT WORKDERS UNION.....CLAIMANT**  
**VS**  
**CONSOLEBASE LTD.....RESPONDENT**  
**RULING**

**Introduction**

1. The claimant brought this suit on behalf of her 31 members (grievants) claiming terminal dues plus compensation for unfair termination of their employment by the respondent. The parties herein negotiated out of court settlement and signed a settlement agreement on 16.9.2013 for an aggregate sum of kshs. 3,426,766.75/=. The whole sum was payable on 19.9.2013 after which the matter was to be fully settled. The settlement agreement was filed in court on 17.9.2013 and it was adopted as the judgment of the court on 18.9.2013.
2. On 9.2.2015, the “claimant”, brought the Notice of motion dated 2.2.2015, through A.I. Hayanga & Associates, under section 1A, 1B,3A and 63 of the Civil Procedure Act (CPA) and Order 45 rule 1, 2(1), 3(2) and order 51 of the Civil Procedure Rules (CPRs). The motion seeks review and setting aside or varying of the said consent judgment dated 16.9.2013. The reason for the application being that the claimants were not involved in the consent and their views were not considered. That they did not sign on the consent order.
3. The motion is supported by the affidavit sworn by Mr. Johnson Katama one of the 31 grievants who deposes that indeed a consent settlement for kshs. 3,426,766/= was signed by the union representative on 16.9.2013. That the union never involved the grievants in the negotiations with the respondent and never sought their approval before asking the court to adopt the settlement agreement. That the settlement agreement for kshs. 3,426,766/= was way below their estimated 11 million.
4. The respondent has opposed the motion by her replying affidavit sworn by Mr. Mohammed Yusuf Mwinyi on 29.7.2015 who deposed that the parties herein filed a settlement agreement on 17.9.2014. That the consent settlement was accepted by all the grievants on 19.9.2013 where they were paid their share of the settlement sum and signed a discharge agreement in favour of the respondent. That the settlement agreement was done voluntarily by the respondent and the claimant’s representative. That it is too late for the claimant to seek review of the consent judgment after 3 years. That there is no good reason to warrant the review of the consent judgment. The motion was disposed by way of written submissions by the two parties.

**Analysis and Determination**

5. There is no dispute that a settlement agreement was signed between the respondent and the union on 16.9.2013 which was adopted as consent judgment by this court on 18.9.2013. There is also no dispute that the whole judgment debt was paid to the grievants on 19.9.2013 and the same was acknowledged by signing a declaration of discharge of the respondent from any further claim for dues. The issues for determination are:
  - a. Whether the motion is properly before the court
  - b. Whether the motion has merits

### **Competence of the motion**

6. The motion is signed by the counsel for the claimants/applicants while the supporting affidavit is signed by Mr. Johnson Katama, one of the grievants. There is no evidence that the union is a party to the said motion or whether it appointed the said lawyers to bring the motion. On a balance of probability the court finds that the motion is brought by the grievants through their advocates without involving the union. Consequently the motion is fatally incompetent under section 73 (3) of the Labour Relations Act (LRA). The said provision only allows an authorized representative of a trade union to file court proceedings in an Industrial dispute. Section 2 of the LRA defines an authorized representative in the context of this case to mean the Secretary General of a trade union or any person appointed in writing by the authorized representative to perform the functions of the authorized representative. Mt. Johnson Katama has not produced any evidence to prove that he has written authority from the General Secretary of the union to swear affidavit to support the motion before the court. The motion is therefore incompetent and must fail.

### **Merits**

7. It is trite law that a consent judgment has the force of a contract and it can only be set aside if the threshold for setting aside a contract is met. The Threshold for setting aside a contract is the existence of any or all the vitiating factors including mistake, misrepresentation, coercion or undue influence. The applicant in this case, has not mentioned any of the said vitiating factors in the application leave alone adducing any evidence to prove the same. It follows therefore that the motion for review and setting aside of the consent judgment is bereft of merits. The said consent judgment was properly and voluntarily negotiated between the parties to the suit and the grievants accepted the proceeds thereof as full and final settlement and absolved the respondent of any further liability.
8. The court has been persuaded by a South African decision in **Mhlongo and others vs Food and Allied workers Union and Another (D1684/2000) (2006) ZALC 94 (1 November 2006)** where the court held that a settlement agreement is a collective Agreement and binds every person who is a member of the union at the time when it became binding. The court further held that, the union was not bound to consult its members when negotiating settlement agreement. The said court cited a decision of another South African court's decision in the case of **Mzeka and others vs Volkswagen (Pt) Ltd and Others (2001) 8 BLLR 857 (LAC)** at page 857 where the court stated thus:

***“It seems to us that until an employee has resigned as a member of trade union and such resignation has taken effect and the employer is aware of it, the employer is generally speaking, entitled and obliged, to regard the union as the representative of the employee and deal with it on that basis...even if the employee has resigned as a member of a union, such union remains entitled to in effect represent such employee and the employer remains obliged to deal with such union as representing, among others, such employee...”***

Consequently and in addition to lack of vitiating factors, court finds that the Motion has no merit because the claimant union had no obligation to consult each and every grievant before signing the settlement agreement under review.

9. For reasons started above the Notice of Motion dated 2.2.2015 is dismissed with no orders as

costs.

**Signed, Dated and Delivered this 11<sup>th</sup> day of December 2015.**

**ONESMUS MAKAU**

**JUDGE**