Katima v Clerk, Nairobi City County Assembly & 2 others; Situma & 5 others (Proposed Respondents) (Employment and Labour Relations Petition E169 of 2021) [2022] KEELRC 13383 (KLR) (6 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13383 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS PETITION E169 OF 2021

JK GAKERI, J

DECEMBER 6, 2022

BETWEEN

LESIYIO KATIMA ..... PETITIONER

AND

CLERK, NAIROBI CITY COUNTY ASSEMBLY ..... 1ST RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD ..... 2ND RESPONDENT

WILFRED MANYI ..... 3RD RESPONDENT

AND

ROBERT SITUMA ..... PROPOSED RESPONDENT

JENIFER KORIO ..... PROPOSED RESPONDENT

SAMMY NDANA ..... PROPOSED RESPONDENT

SHADRACK MAKOKHA ..... PROPOSED RESPONDENT

SAMMY KIPTOO ..... PROPOSED RESPONDENT

WILFRED MANYI ..... PROPOSED RESPONDENT

RULING

1. By a Notice of Motion Application dated January 27, 2022 filed under Certificate of Urgency, the Claimant/Applicant seeks orders that:

   ' Ex-parte'

a. This Application is hereby certified extremely urgent and service thereof be and is hereby dispensed with in the first instance;

b. The execution of the Consent Order issued on December 10, 2021 and/or any decree resulting therefrom is hereby stayed pending the service, hearing and determination of this Application;

'Inter-partes'

c. The aforementioned proposed 3rd Respondent's be and are hereby granted leave to join these proceedings as Respondents;

d. The Consent Order issued on December 10, 2021 and any decree resulting therefrom are hereby set aside;

e. The Proposed 3rd Respondents upon being granted entry into this suit be allowed to file the necessary responses to protect its interests.

f. The Respondents and the Petitioner are hereby ordered to pay the costs of and incidental to these proceedings;

g. Such other, further, additional, alternative and/or incidental Orders as the Honourable Court may deem appropriate, just and expedient.

2. The Notice of Motion was expressed under Articles 27, 28, 41, 47, 232 of the *Constitution* of Kenya, 2010, Sections 17 and 26 of the *Employment Act*, Section 1A, IB, 3A, Section 3 of the *Civil Procedure Act* and 12(3) of the *Employment and Labour Relations Court Act*, Rule 17 (3) (7) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Order 40 Rule 7 of the *Civil Procedure Rules, 2010*.

3. The application is further supported by the 1st and 2nd Respondents through an affidavit sworn by its Chairperson, Mr Benson Mutura. The affiant avers that the Counsel representing the 1st and 2nd Respondents did not have any written authority to enter into any consent whatsoever over this matter and that the consent as couched and presented in Court was a figment of the of the said Counsels' fertile and wild imagination. That the 2nd Respondent had taken adequate steps to address the anomaly internally, including change of Advocates.

4. In addition to the above, the affiant avers that the 2nd Respondent had never at any one point sat down to deliberate on this matter and neither had it instructed its Counsel to enter into a consent as was recorded in Court.

5. The affiant further attests that given the special jurisdiction that this Honourable Court has been clothed with and the impact the impugned consent would have far reaching consequences including rendering more than forty (40) employees redundant and/or leading to demotions; written authority to enter Consent from the parties would have been best practice.

6. He further avers that it is trite law that a Consent Order can only be set aside upon proof that it was either obtained through fraud, concealment or misrepresentation of material facts or information, it is illegal or that the same is practically impossible to implement. That the impugned consent meets the above parameters and should be set aside on these grounds.

7. The affiant, avers that the County Assembly in cognisance of the error made in passing a resolution to adopt the said Justice and Legal Affairs Committee Report, rescinded the said decision and resolved to

expunge the said report from its records. In conclusion, he avers that given the circumstances above and in the absence of any Board Resolution to record a Consent, the same should be set aside by the court.

8. The Petitioner opposed the Application vide Grounds of Opposition dated June 12, 2022.

9. The petitioner avers that the Application is frivolous, vexatious and amounts to an abuse of the court process. The petitioner avers that the application is incurably defective as the petition was settled by a consent of all the parties therein and thereafter, the court marked the matter as settled and as a result, this court had become functus officio at the time of filing the Application and the matter is res judicata.

10. The Petitioner also avers that the joinder of parties cannot occur after judgement has been rendered in a matter and after the case is closed. That there is no provision of the law that lays down the procedure for admitting a person and/or a party whether as a respondent or Interested Party after a matter has been settled and proceedings have been closed.

11. The Petitioner further avers that the applicants were not necessary parties to the proceedings and in the Petition given that the petitioner had no claim against them or sought any reliefs against them. As a result, he maintains that the applicants cannot therefore upset the consent made on December 10, 2021.

12. The petitioner maintains that there are no grounds of setting aside the consent judgement and that there must be finality to litigation. It concludes that the Application is an attempt to have this court sit on appeal on its decision.

Applicants'/Proposed 3rd Respondents' Submissions

13. The Applicants identify the following issues for determination:

    a. Whether this Court should set aside the Consent Orders recorded on the December 9, 2021 and issued on the December 10, 2021.

    b. Whether the Applicants have made out a case for joinder as Respondents in the suit.

14. The Applicants submitted that having proved that they were employees of the 2nd Respondent herein and that given that the Orders as granted would adversely affect their employment, the court should grant their prayer for joinder as respondents in the suit. They placed reliance on decision in *Pravin Bowry V John Ward and another [2015] eKLR* where the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit.

15. The Court of Appeal decision in *Civicon Limited vs Kivuwatt Limited and 2 others (2015) eKLR* was also cited on the interpretation of Order 1 of the Rules where the court held that the power given under the Rules was discretionary which discretion must be exercised judiciously.

16. The applicants submitted that the orders under the impugned consent purported to nullify and void the actions of the 2nd Respondent who is the applicants' employer to advertise, recruit and/or promote them. That this act by the 2nd Respondent to conspire with a non-employee to terminate and/or alter the contracts of the Applicants herein, without notice to them is contrary to Section 10(5) and 44(2) of the *Employment Act*, 2007.

17. Following the above arguments, the applicants submitted that it was therefore necessary for them to be joined to the suit to defend their rights.

18. As to whether the court should set aside the consent order recorded, the Applicants submitted that the same should be set aside given that there were fraudulent dealings, fraud and/or collision between Counsels on record, then, for the Petitioner and Respondent. Reliance was made on the decision in *Brooke Bond Liebig vs Mallya (1975) EA 266* which laid down the principles governing the setting aside of the Consent Orders.

19. It was further submitted that the petitioner's averments that the application was incurably defective was misleading and ought not to be entertained by the court. Having sufficiently demonstrated the need for them to be joined to the suit and also set enough grounds for the setting aside the consent orders, the applicants submitted that the application should be allowed.

1st and 2nd Respondents' submissions

20. The 1st and 2nd Respondents submitted that the Applicants were employees of the 1st Respondent and the orders sought by the Petitioner would adversely affect the applicants. Reliance was made on the decision in *Apollo Mboya & another vs Kenya Power & Lighting Company Limited & 3 Others (2020) eKLR* which held that Rule 10(2) of the Rules allowed the court to order any person whose presence before the court may be necessary in order to enable it to effectually and completely adjudicate upon and settle all questions involved in the suit to be joined as a party.

21. While referring to the decision in Brooke Bond Liebig vs Mallya (Supra) and *Flora N Wasike vs Destimo Wamboko (1988) eKLR* they argued that a consent order can only be set aside if it was procured through fraud, non-disclosure of material facts or mistake or any reason that would enable the court to set it aside. As such, they urged the court to set aside the consent order on grounds that it was procured through fraud and allow the Applicants to be joined to the suit.

Analysis and Determination

22. The issue for determination is whether the application is merited for the orders prayed for to issue. To their credit, the proposed 3rd Respondents made a twin application for review and joinder. The court will address the twin issues of setting aside of the consent orders and joinder of parties.

23. As to whether the consent orders on record should be set aside, the first port of call are the guiding principles as enunciated by courts.

24. In *Hirani V Kassam (1952) 19 EACA 131* at 134, the court stated as follows;

> ' The mode of paying the debt, then, is part of the consent judgement. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Setton on Judgements and Orders (7th Edition) Vol 1, P 124 as follows:
>
> Prima facie any order made in the presence and with 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 the consent was given without sufficient material facts, or in general for a reason which would enable the court set aside an agreement.'

25. This decision has been relied upon in legions of decisions including Brooke Bond Liebig Ltd V Mallya (1975) EA 266 where the Court of Appeal stated as follows;

> ' A consent order cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if the 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.'

26. In Flora Wasike V Destimo Wamboka (1988) 1 KAR 625, the court was emphatic that;

> ' It is now settled law that a consent judgement 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 which are not carried out.' In Purcell V FC Trigell Ltd (1970) 2 ALLER 671, Winn LJ at 676.

27. Similar sentiments were expressed by the Court of Appeal in *East African Portland Cement Co Ltd V Superior Homes Ltd (2017) eKLR*.

28. I will now proceed to apply the foregoing principles of law to the facts of the instant case.

29. When the matter came up November 2, 2021, the court directed that service upon the Respondents be effected within 14 days and the Respondents had an equal numbers of days to respond.

30. On December 9, 2021 when the application came up for hearing, Mr Mwalimu represented the Petitioner while Mr Gitahi represented the Respondents. Mr Mwalimu informed the court that paragraphs 19 – 22 of the Replying Affidavit by Adah Onyango appeared to admit the Petitioner's application.

31. Counsel urged his counterpart that they record a consent on the issues conceded and proceed to argue the contentious ones, if any.

32. Counsel for the Respondents indicated that he had no objection to the application and sought the court's indulgence for 30 minutes to deliberate the issue of consent. The court gave counsels 45 minutes to discuss the possibility of a consent and when the counsels returned at 11.00 am, Mr Gitahi dictated the impugned consent to the court and court recorded the same verbatim and the matter was marked as closed with no orders as to costs.

33. Instructively, Rule 29 of The *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules, 2013 (Mutunga Rules) confer upon parties liberty to record an amicable settlement reached by the parties in partial or final determination of the case.

34. The status quo remained until the application herein was filed on February 1, 2022.

35. On May 11, 2022, Mr Mwalimu and Gitahi appeared for the respective parties as did Mr Bosire for the Respondents who informed the court that the Respondents were unaware of the consent and according to them, the matter was due for hearing.

36. Counsel tendered no evidence to substantiate or buttress his claims.

37. On May 31, 2022, Mr Mwalimu for the Petitioner was in court as was Mr Bosire for the Respondents and Mr Ashioya held brief for Mr Magara for the proposed interested parties.

38. The 1st and 2nd Respondents submitted 'that there was definitely fraud and/or collusion between counsel on record' and the proposed 3rd Respondents rehashed the same statement. According to the

1st and 2nd Respondents, the 45 minutes given by the court was too short for the counsels to seek instructions from their clients.

39. Puzzlingly, none of the Respondents including the proposed 3rd Respondents or interested parties provided oral or documentary evidence to demonstrate that the counsels on record acted fraudulently or colluded or had no instructions from their clients.

40. The court is guided by the sentiments of Harns J in *Kenya Commercial Bank Ltd V Specialized Engineering Co Ltd (1982) KLR 485* as follows;

> ' A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.'

41. These sentiments were quoted with approval by the Court of Appeal in *Kuwinda Rurinja Co Ltd V Kuwinda Holdings Ltd & 13 others (2019) eKLR*.

42. The persuasive decision in Hirani V Kassam (1952) 19 EACA 131 is inapplicable to this case in that neither the Respondents nor their counsel has attached documentary evidence to demonstrate that the Respondent's counsel had no instructions or authority to record a consent. The Replying Affidavit of Mr Benson Mutura provided no attachment on the scope of the instructions given to the counsel for the Respondents. In the absence of credible material, there is nothing for the court to rely on to find and hold that the counsel on record had no instructions to act in the manner he did.

43. Section 109 and 112 of the *Evidence Act* provide that;

> 109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.
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> 112 In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

44. In *Demutila Nanyama Purumu V Salin Mohammed Salim (2021) eKLR*, the Court of Appeal expressed itself as follows;

> ' The law is clear as buttressed in the case of Vijay Murjaria V Nansigh Madhusingh Darbar & another (2000) eKLR where Tonui JA (as he then was) stated as follows;
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> 'It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.'

45. As regards the standard of proof, this court in the case of *Kinyanjui Kamau V George Kamau (2015) eKLR* expressed itself as follows;

> ' It is trite law that any allegation of fraud must be pleaded and strictly proved. See Ndolo V Ndolo (2008) 1 KLR (G and F) 742 wherein the court stated that: 'we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that

required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.'

46. On the standard of proof being beyond that of balance of probabilities, the decision in *Central Bank of Kenya Ltd V Trust Bank Ltd & 4 others (1996) eKLR* is also instructive.

47. Similarly, in *Moses Parantai & Wanjiku Mukuru suing as legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) V Stephen Njoroge Macharia (2020) eKLR*, the Court of Appeal stated that;

> ' Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable doubt, but above balance of probabilities.'

48. Applying the foregoing provisions and propositions of law to the facts of the instance case, it is clear that the heavy burden imposed by the law in matters fraud was to be borne by the applicants who have tendered no tangible evidence of either fraud, collusion as submitted by the Petitioner/Respondent, or any other vitiating factor for the court to set aside or vary the consent judgement recorded on December 10, 2021.

49. Guided by the authorities cited herein above, the court is satisfied and finds that the applicants have failed to discharge the burden of proof imposed by the provisions of the *Evidence Act*. The court lacks a basis on which to set aside the consent judgement.

50. As regards joinder of parties in a constitutional petition, Rule 7 of the Mutunga Rules provide that,

> ' 7
>
> (1) A person, with leave of the court may make an oral or written application to be joined as an interested party.
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> (2) A court may on its own motion join any interested party to the proceedings before it.'

51. When Mr Ashioya holding brief for Mr Magara appeared in court, he was emphatic that he was appearing for the proposed interested parties though the application dated January 27, 2022 states that they were the proposed 3rd Respondents and are applicants in this case.

52. A critical issue to dispose of at this juncture is whether a party or parties may join a suit as interested parties or respondents after judgement.

53. A plain reading of Rule 7 of the Mutunga Rules, 2013 leaves no doubt that joinder of parties can only take place on exercise of the courts discretion and more significantly during the pendency of proceedings, the interest or state of the party or parties notwithstanding.

54. The essence of joinder is to enable persons who may have a stake in the outcome or affected in any way by such outcome are afforded the opportunity to participate in the canvassing and determination of the issues before the court and this typically occurs in the course of the proceedings.

55. (See *Francis Karioki Muruatetu & another V Republic & 5 others (2016) eKLR*, Central Bank of Kenya V Trust Bank & 4 others (Supra), T*ang Distributors Ltd V Said & others (2014) EA 448*).

56. In *Jerotich Seii & 7 others V Kenya Power & Lighting Co Ltd & 3 others (2020) eKLR* cited by the Petitioner/Respondent, where the court had the opportunity to address an application similar to the one before this court, the court expressed itself as follows;

> ' It is not disputed by the parties before this court that by the time the instant application was filed, the petition had already been dispensed with by way of the consent recorded on October 23, 2018, between the Petitioners and the Respondents. Once that consent was adopted by the court, there was nothing to be done in the case.'

57. The issue of interested parties and the matters they could introduce in proceedings was addressed by the Supreme Court in Francis Karioki Muruatetu & another V Republic & 5 others (Supra) as follows;

> ' Therefore, in every case, whether some parties are joined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties.'

58. In Jerotich Seii & 7 others V Kenya Power & Lighting Co Ltd & 3 others (Supra), the court was emphatic that after the principal parties had compromised on the issues with approval of the court as provided by the Mutunga Rules, 2013, the applicants could not seek it being set aside to prosecute the petition. 'What the interested parties are saying is that the Petitioners should be kicked out of their case so that they can prosecute the same on behalf of the Petitioners.'

59. From the foregoing analysis, it is evident that by the time the application herein was filed on February 1, 2022, the Petition had been disposed of by way of a Consent Order recorded on December 9, 2021 between the Petitioner and the Respondents and there were no pending issues.

60. In conclusion, it is the finding of the court that the application dated January 27, 2022 is without merit and is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF DECEMBER 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B** 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.