



Gateria v Embu County Government & 3 others; County Assembly of Embu & another (Interested Parties) (Constitutional Petition 5 of 2015) [2025] KEELRC 57 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 57 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CONSTITUTIONAL PETITION 5 OF 2015
ON MAKAU, J
JANUARY 23, 2025**

BETWEEN

MUNDIA NJERU GATERIA PETITIONER

AND

EMBU COUNTY GOVERNMENT 1ST RESPONDENT

MARTIN NYAGAH WAMBORA 2ND RESPONDENT

SECILY WANJA NAMU 3RD RESPONDENT

RUTH NJOKI MOSES 4TH RESPONDENT

AND

COUNTY ASSEMBLY OF EMBU INTERESTED PARTY

THE TRANSITION AUTHORITY INTERESTED PARTY

RULING

1. This ruling relates to the Notice of Motion dated 18th September 2024, brought under Section 1A, 1B, 3, 3A and 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. It basically seeks the following orders:
 - a. The Court be pleased to set aside and or review the consent order/judgment entered on 28th July 2023.
 - b. That costs be provided for.
2. The Application is premised on the affidavit of Amy Ruria and the grounds that: the consent order/ judgement was entered in this matter on 28th July 2024 in the presence of the Petitioner’s and Respondent’s counsels; that the Respondent’s counsel obtained authority from the 1st Respondent to



enter the consent through misrepresentation and non-disclosure; and that the 1st Respondent's counsel failed to interpret the contents of the said judgement to the 1st Respondent correctly and as such the 1st Respondent agreed to enter the consent through inadvertent mistake.

3. The Petitioner on the other had opposed the motion by his replying affidavit sworn 7th October 2024 where he deposed that the application was an afterthought as it was brought after she proffered a judicial review application for execution against the Respondent; that the impugned consent judgment was voluntarily agreed between the parties and having full knowledge; that there is no evidence of any ground for setting aside a consent judgment including fraud, collusion, coercion or mistake as claimed; and that the application lacked merits and was intended to delay execution.

Submissions

4. It was submitted for the Applicant that on 22nd May 2023, its County Secretary signed Affidavit drafted by its former counsel which led to signing of the impugned consent order against the 1st respondent to pay the whole sum decreed by the court in 2015 plus Auctioneers charges of Kshs. 350,000. It was submitted that the County Secretary was new in the office and entirely relied on the information given her counsel. It was submitted that the counsel misled the affiant in swearing the said affidavit contrary to the judgment of the court which Condemned the former Governor, Hon Martin Nyaga Wambora, personally to pay the petitioner Kshs.5,000,000 for violating his rights while the 1st respondent was ordered to pay kshs. 2,025,000 only.
5. The court was urged to review and set aside the said consent order because it purported to amend, vary or alter the judgment without any substantive application to do so. It was further argued that the petitioner will suffer no prejudice since he can still pursue part of his decretal sum from the 2nd respondent as ordered by the court. For emphasis, reliance was placed on the Court of Appeal decision in the case of *Tropical Food Products International Ltd v The Eastern and Southern African Trade and Development Bank*, Civil Appeal No. 253 of 2002 [2007] eKLR.
6. On the other hand, the Petitioner submitted on three issues: whether the consent order dated 28th July 2024 was entered voluntarily and is binding; whether the applicant has established valid grounds for setting aside the consent order; whether the Applicant's motion constitutes an abuse of court's process.
7. On the first issue, it was submitted that the consent was a contractual agreement between the parties recorded and adopted by the court and thus binding unless evidence of fraud, collusion or mistake is provided. It was further submitted that the Applicant has not proved the existence of the said factors in this case. In support, reliance was placed on the case of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR.
8. On the second issue it was submitted that the nature of the misrepresentation was not clearly outlined. It was submitted that the applicant must prove that the misrepresentation was material in influencing their entry into the consent and that it was not a mere misunderstanding of legal or factual issues. Reliance was placed on the case of *Kenya Commercial Bank Limited v Benjob Amalgamated Limited & Muiru Coffee Estate Limited* (276 of 1997) [1998] KECA 236 (KLR) (10 March 1998) where the Court of Appeal set out the principles for setting aside of consent order.
9. On the third issue, it was submitted that the Applicant's conduct undermines the principle on finality of litigation and prejudices the Petitioner's rights to realize the fruits of his judgement. Consequently, the Court was urged to dismiss the instant motion with costs.



Determination

10. Having considered the Application, the Response, the rival submissions and the Court record, the main issue for determination is whether the applicant has met the legal threshold for review and/or setting aside of a consent order recorded by the court.

11. The relevant law to consider is Rule 33 of the *ELRC Procedure Rules* 2016 which provides that:

“(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which an appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling-

(a) If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) On account of some mistake or error apparent on the face of the record;

(c) It the judgment or ruling requires clarification; or

(d) For any other sufficient reasons.”

12. The applicant did not base its application on (a), (b), or (c) above and that leaves the court to determine whether the applicant has demonstrated any sufficient reason for reviewing and/or setting aside the impugned consent order. The review herein concerns a consent order which cannot be set aside unless it is demonstrated that there existed any of the grounds that can vitiate a contract.

13. In the case of *Hirani v. Kassam* [1952] 19 EACA 131 the Court of Appeal held as follows:

“It is now well 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, which are not carried out: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

14. In the instant case Ongaya J entered judgement for the petitioner as against the 1st and the 2nd respondents as follows:

“h. That the 1st respondent to pay the petitioner a sum of Kshs.2,025,000 by 01.12.2015 and in default interest at court rates to be payable thereon from the date of this judgment till full payment.



- j. That the 2nd respondent to pay the petitioner a sum of Kshs.5,000,000 by 01.01.2016, for the violation of the petitioner’s fundamental rights and freedoms and in default interest at court rates to be payable thereon from the date of this judgment till full payment.”
15. In ordering the 2nd respondent to personally compensate the petitioner for the violation, the court observed as follows on page 13 of the judgment:
- “as submitted for the petitioner, the 2nd respondent continued to violate the petitioner’s rights after receiving the advice and the court finds that taking all the circumstances into account, the 2nd respondent’s violation of the petitioner’s rights was not in pursuit of justified or genuine government purpose. It is the opinion of the Court that it would be unjustified to burden the tax payer to meet the compensation for violation of the rights in this case whereby the 2nd respondent engaged in the illegalities and his actions were clearly in violation of the law and were advanced in clear disregard of the advice given by the relevant government agency. The 2nd respondent and not the tax payer is therefore found liable for paying the compensation of the fundamental rights and freedoms.”
16. It would appear from the Warrants of Attachment marked MNG in the petitioner’s Replying Affidavit that the 2nd respondent failed to pay the sum of Kshs 5,000,000 decreed against him as at 25th April 2023 necessitating the execution process. By then the decretal sum against him had increased to Kshs.11,118,425 inclusive of interest and taxed costs.
17. In a strange turn of events, the respondents filed a notice of motion dated 22nd May 2023 seeking among other things, an order of stay of execution, and that the 1st respondent be allowed to liquidate the judgment in six equal instalments, to be factored in the budget. The motion was supported by an affidavit sworn by the County Secretary Ms Amy Ruria.
18. The same County Secretary has sworn the Affidavit in support of the instant motion contending that she swore the affidavit when she was new in the office and based on the information given by the counsel who had already drafted the application. She maintains that the counsel misled her to signing documents which were contrary to the judgment of the court. The said affidavit resulted to the impugned consent order which purported to amend or vary the judgment without a substantive application for the same.
19. The consent order was signed by the counsel for the two sides on 27th July 2023 and stated as follows:
- “By consent of the parties; -
1. The 1st Respondent, Embu County government, shall pay an all-inclusive sum of kshs 8,965,975 to cover the pending decretal sum, lawyer’s fees, interest and costs as follows;
 - a. Kshs 2,500,000 shall be paid on or before 30th September, 2023.
 - b. The balance shall be paid in 4 equal instalments skipping every one (1) successive month from the date of the first instalment until settlement in full.
 2. The 1st Respondent, Embu County government, shall pay an agreed Auctioneers fees of Kshs 350,000 alongside the first instalment.



3. In default, execution to issue against the 1st respondent, Embu County government.

Dated...”

20. Having considered all the above material presented before the court, I am not satisfied that the applicant has demonstrated sufficient reason to justify a review of the impugned consent order. It has not been shown that the instructions to file the application that culminated in the impugned consent was obtained through misrepresentation and misleading information by the respondents’ counsel to the new County Secretary. The application attached warrants of attachment issued against the 2nd respondent and not the 1st respondent.

21. By the application and the supporting affidavit, the 1st respondent undertook to settle the entire decree arising from the judgment of 20th November 2015 using tax payers’ money to be factored in its budget. The said instructions were given by the County Secretary voluntarily if not negligently. I say so because a County Secretary is a very senior officer in the County Government whose qualifications have been legislated by the parliament under section 44 of the County Government’s Act, thus:

“ 44. Appointment of county secretary

(1) There is established for each county the office of the county secretary who shall be secretary to the county executive committee.

(2) The county secretary—

(a) shall be competitively sourced from amongst persons who are university graduates with at least ten years’ experience in administration and management;

(b) shall be nominated from persons competitively sourced under paragraph (a) by the governor and, with the approval of the county assembly, appointed by the governor; and

(c) may, subject to the conditions and terms of appointment, be dismissed by the governor.”

22. I am not satisfied by the explanation given by the 1st respondent’s County Secretary that she was misled by the lawyer on such obvious court documents. I see her explanation as an afterthought or an admission of negligence on her part. I say so because being new in the office she ought to have exercised caution before signing affidavits to support an undertaking to pay more than Kshs. 9,000,000, on behalf of the 2nd respondent without his written request, and from the government coffers.

23. The County Secretary is not a lay person as she purports otherwise, she would not have been appointed to that office. She deposed that she is an administrator by profession and therefore it is presumed that she was able read and understand the contents of her affidavit in support of the application that culminated in the impugned order. She is an educated person expected by law to hold over 10 years’ experience.

24. For this reason, I decline the argument that the Applicant’s secretary lacked the knowledge to comprehend the contents of the affidavit she signed. There is no evidence that the lawyer misled her



to signing the affidavit and she has not shown any action taken against the lawyer for the alleged professional misconduct. Furthermore, by signing the same, she adopted the contents of the same as the matter belongs to the litigant. Allowing the application would prejudice the petitioner who was made to stop execution by the applicant herein when it undertook to settle the whole decree.

25. Having found that the County Secretary was literate enough to understand what she was signing, and that both parties voluntarily signed the consent order, I must hold that the same is binding upon the parties. I say so because the Applicant has not proved existence of any elements that would vitiate the consent order as required by law. See the case of *Hirani V. Kassam* [1952] 19 EACA 131, *supra*.
26. In the end, I dismiss the application dated 18th September 2024 with costs to the Petitioner.

DATED, SIGNED AND DELIVERED AT NYERI THIS 23RD DAY OF JANUARY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

