



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 2452 OF 1982

BENSON OWENGA ANJERE.....PLAINTIFF/APPLICANT

VERSUS

KIVATI NDUTO.....1ST DEFENDANT/RESPONDENT

JUBILEE INSURANCE COMPANY LTD.....2ND DEFENDANT/RESPONDENT

RULING

Background

1. This ruling emanates from an old case, now running into its thirty-third year. The plaintiff, applicant herein, was involved in an accident on 8th August, 1979. He suffered extensive injuries resulting in his being confined to a wheel chair. He filed suit through a plaint on 9th August, 1982. For numerous reasons which need not be delved into herein, the suit has not reached a hearing.
2. The recent record shows that on 8th March, 2010, the then Hon. Chief Justice, Gicheru, appointed Okwengu, J (as she then was) as the Judge to preside over this suit. On request of the plaintiff, the honourable Judge disqualified herself, and the matter was referred back to the Hon. Chief Justice.
3. On 24th May, 2010, Chief Justice Gicheru appointed Warsame, J (as he then was) to hear the matter. The record shows that at a hearing on 28th June, 2010, counsel for the defendant suggested that the parties could meet so as to resolve the matter. The plaintiff is recorded as saying he had no objection (page 149, record of proceedings). This situation where the parties were seeking settlement is recorded again on 6th July, 2010 and 19th July, 2010. The record on 30th July, 2010 shows that settlement had reached a dead end as the offer made by Defendant was too low for the plaintiff.
4. After several appearances and applications the plaint was amended. With the amendment of the Civil Procedure Rules in late 2010, parties filed witness' statements and bundles of documents in preparation for hearing.

5. According to the record, on 7th November, 2011, the plaintiff stated that amicable settlement could not be reached and he sought that the matter be listed before another Judge. The matter was referred to the then Principal Judge, Hon. Msagha Mbogholi for directions. On 17th November, 2011 the Principal Judge ordered it placed before the head of the Civil Division. Mwera, J (as he then was), heard the plaintiff on 5th December, 2011 who said that the parties were before Warsame, J for discussions on settlement. The court recorded that the parties wished to explore possibilities of settlement, and a mention was to be held before Warsame, J (as he then was).
6. On 17th January, 2012 the matter came before Warsame, J. The Defendants counsel indicated she had instructions to proceed with the hearing of the matter by both sides for determination by court. The plaintiff on the other hand stated:

“I want to renegotiate the matter in order to have a settlement. I am accepting the figure of Ksh.7 million of full and final settlement of my claim.”

The court therefore fixed a mention on 20th January, 2012 for purposes of recording a settlement.

7. When the matter came up on 20th January, 2012 the defence indicated they needed a few days to sort out the matter. The plaintiff stated he could wait. The court thus fixed a mention on 26th January, 2012 to record a settlement.
8. The matter came up on 26th January, 2012 before Justice Warsame, and the record discloses what transpired as follows:

“Jan Mohamed:

I have tried to enhance the offer to Shs.5 million on ex-gratia basis. If the plaintiff accepts the sum of Kshs.5 million, we would work out the payment modalities. That is the position of the Defendants.”

Plaintiff:

The turn of events is surprising to me. This matter has been before this court for a long time. The defendant’s lawyers told court that she had instruction from her clients to offer me Kshs.6.5 million. The sum of Kshs.5 million has never been mentioned. I am accepting the sum of Kshs.7 million to facilitate my urgent treatment. This case is against Jubilee Insurance and Mr. Kitavi: It is not against any other person. Because I know myself, my health is very, very bad. Let me accept Kshs.5 million, I need urgent treatment and I cannot wait anymore.

Jan Mohamed:

That is what we can offer.

Court:

By consent that judgment be and is hereby entered on ex-gratia basis in favour of the plaintiff for the sum of Kshs.5 million in respect of the accident that occurred on 8th August, 1979. The sum is full and final settlement of all the claims whatsoever by the plaintiff against the defendant jointly and severally in respect of the said accident or in respect of the employment of the plaintiff. The same to be paid on or before 30th January, 2012.

Warsame, Judge

Plaintiff:

I confirm that is the position

Order:

As per the consent

Signed by plaintiff in person

Signed by Jan Mohamed for Archer & Wilcock Advocates for the Defendants.”

9. After the plaintiff and Defendants’ counsel signed the consent the Judge also signed the same. This background information is included as necessary to establish the context in which the application herein was made.

The Application

10. The plaintiff/applicant filed the present notice of motion dated 15th June, 2012. It seeks the following orders:

“1. THAT the order adopting the consent as judgment issued on the 26th January, 2012 for Ex-gratia settlement of Kshs.5,000,000 be set aside and the suit be set down for the hearing on merit.

2. THAT the court reviews the said consent judgment with a view to setting aside as it was entered by Coercion, undue influence, frustrations, misrepresentation and in breach of the first offer of Kshs.7 million.

3. THAT the suit be set down for full hearing and determination for proper and meaningful and/or adequate compensation consistent with the injuries sustained by the applicant for the last 32 years.

4. THAT the said consent was made under duress.

5. THAT the costs of this application be borne by the respondent.

Parties Representations

11. The application was heard on 10th October, 2013 and concluded on 6th November, 2013. Mr. Anjere seeks the setting aside of the consent judgment entered on 26th January, 2012. He says he was ambushed by the defence to accept Shs.5,000,000/- as settlement of the claims in the main suit. He argues that the settlement was made on “*ex-gratia*” basis which he understood, as an ex-insurance practitioner, to mean, is a payment made outside of any legal obligation. That the payment is made as a token pending real settlement.

12. Mr. Anjere submitted that when the matter came before Justice Warsame on 17th January, 2012, there were many things the Judge failed to record. The record was therefore inaccurate. Further, he said the parties were to record a settlement of Kshs.7,000,000/-. Then, suddenly, without notice or prior agreement the Defendants said they would not pay Kshs.7,000,000/-. Instead, they offered Kshs.5,000,000/-. Due to his illness, desperation and frustration, and the urgent need for medical attention, he accepted the amount. He says he was advised by the Judge to accept the amount or else he would have to wait for ten years for the matter to be concluded.

13. Being dissatisfied with the consent order, Mr. Anjere seeks to have it set aside. He submits that

- the consent was an illegal *ex-gratia* consent judgment for which there are no known grounds for setting aside. According to him, a proper consent entails that the parties should have sat, agreed, and must have a record of the agreement and its terms. Such agreement becomes a contract willingly and freely accepted, not involving threats.
14. In this case, he says, there is no such agreement. Instead there was duress, coercion, misrepresentation, and that the Judge was against the applicant as he failed to record the discussion held in court. In addition, he submits that the way in which the consent of 26th January, 2012 was recorded was not what he agreed to. In particular, he did not agree that it was in full and final settlement, and that such words did not emanate from any of the parties as set out in the record.
 15. With regard to grounds for setting aside a consent judgment, Mr. Anjere relied on the cases of **Margaret Kahihu & Another vs. Samuel Njuki, H.C.C.C. No. 1476 of 2005** and **Karim Mbwana v. Wilson Magana, H.C.C. Application No. 15 of 2003**. In addition, he submitted that he is entitled to a fair hearing in accordance with **Article 47** of the Constitution.
 16. Finally, Mr. Anjere submitted that the firm of Archer & Wilcock was not properly on record, as there was no notice of change of advocate. As such, they could not be heard.
 17. Ms. Jan Mohamed, for the Respondent, relied on her grounds of opposition. She asserted that **Articles 47 (1)** and **159** under which the Notice of Motion had been brought were inapplicable.
 18. Counsel agreed that a consent judgment can only be set aside on grounds of mistake, coercion, fraud, undue influence or misrepresentation. She pointed out that these grounds had not been stated in the applicant's application. She further submitted that, on the contrary, the applicant was initially paid Kshs.800,000/- which he did not refund. In addition, after being paid the Kshs.5,000,000/-, the subject of the impugned consent, he had not offered to refund it. His complaint arose only after he had spent the money.
 19. With regard to the applicant's assertion that he was very sick at the time of consenting, Counsel submitted that Mr. Anjere was very aware of what he was going through. She argued that he signed the consent with full understanding; and that this application was an attempt by him to benefit from the money paid without being required to refund it, yet proceed with the claim on his case. The motion, she argued, was an attempt to benefit from the consent without carrying its consequences.
 20. As regards the issue of change of advocate, counsel annexed to the affidavit of Dinah Ogula, a copy of a notice of change of advocates signed by the late Mr. Sampson of Archer & Wilcock Advocates. It was filed on 14th February, 1993 and served on the plaintiff's then advocates Maosa & Co. Advocates on 17th February, 1993. She pointed out that she had been appearing for the Defendants for many years and this issue had never arisen.
 21. I have carefully considered the application and grounds of opposition thereto. I have also considered the documents in support of each party's position and their respective submissions.

Issues

22. Three issues arise for determination as follows:

1. Whether the Respondent's advocates are properly on record.
2. Whether the consent judgment should be set aside.
3. Whether the *ex-gratia* settlement was in full and final settlement of the plaintiff's claims.

Whether Respondent's counsel are properly on record

- 23.If the Respondents' counsel are not properly on record, the effect is that all that has transpired in this matter with their involvement has no validity. The Respondents' counsel annexed to the affidavit of Dinah Ogulla, the Legal Manager of the second Defendant, a copy of a notice of change of Advocates marked "DO2". It is dated 11th February, 1993, and duly signed for Archer & Wilcock Advocates. It shows, a faint High Court rubber stamp. A copy of the original filed notice, which counsel had undertaken during the hearing to supply, was availed. The original shows the High Court stamp for the "*Central Registry, 12th February, 1993, civil side, Nairobi*". It was served on Alexander & Kinyanjui Advocates.
- 24.The original filed copy of the notice of change could not be traced in the file. However, the record of proceedings shows that on 7th July, 1994 Ms. Jan Mohamed was acting for both Defendants. She has continued to do so since that time.
- 25.On the basis of the above observations, I have no hesitation in confirming that M/s Archer & Wilcock are and have been on record for the last twenty years. Indeed, the applicant's objection runs counter to the factual position, and is in conflict with his own conduct in dealing with the Defendant's counsel over all those years. This includes service of documents on them and arguing applications against the said counsel. Accordingly, this objection does not lie and I dismiss it.

Whether the consent judgment should be set aside

- 26.Under **Section 80** of Civil Procedure Act and **Order 45** Civil Procedure Rules. There is a general power to review judgments. As such a judge has jurisdiction to review his order making the compromise agreement an order of the court. This position was taken in **Brooke Bond Liebig (T) Ltd. v. Mallya [1975] E.A. 266.**
- 27.In the case of **Hirani v. Kassam (1952) 19 EACA, 131**, the Court of Appeal of East Africa cited, with approval, the following statement from **Seton HW on Forms of Judgment and Orders in the High Court of Justice and Court of Appeal**, 7th Edition Vol. 1 page. 124.

"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings for action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, 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 a court to set aside an agreement."

- 28.In **Brooke Bond**, the consent agreement was signed by both parties, their counsel and the Judge. The agreement provided for payment of an *ex-gratia* sum of Kshs.65,000 to the plaintiff. When the payment was tendered, the plaintiff rejected and returned it, claiming a higher sum. The plaintiff sought a review of the consent, and the Judge at first instance held that the parties "*did not come into agreement at all as they did not agree on what was the basis of the purported agreement.*" The appellate Court, holding that the Judge had jurisdiction to review his orders, however, found that this case did not fulfil the circumstances in which a consent judgment could be interfered with. The appeal was allowed and the Judge's order setting aside the compromise agreement was discharged.
- 29.In **Ongoma & Another v. Wanga [1987] KLR 159**, the Court of Appeal held, *inter alia*, that a consent judgment is a judgment, the terms of which are settled and agreed to by the parties to the action. In that case the majority, (Platt, J.A dissenting) queried: "*where is the evidence that the terms were settled? How am I to tell if the parties agreed?*" It would have made all the difference if each party had signed or thumb printed. The court then held that the consent in that case:

"... lacks all the essential ingredients of an order made by consent of the parties to an action and is invalid."

The Court allowed the appeal, Platt, J.A. dissenting.

30. In the **Ongoma case**, Platt, J.A.'s dissent was grounded on a point which does not arise in this present case. It is the point that under the then **Section 67 (2)** of the Civil Procedure Act, no appeal lay from a decree passed by the court with the consent of the parties. That is to say, that a person who had consented to a compromise cannot think better of it later and complain on appeal. It was in that light that Platt, J.A. viewed the court's finding in the case of **Wasike v. Destimo Wamboki (1982 – 88) 1 KAR 625**, where the court found:

“...the burden on the appellant to displace a judgment would be a formidable one and possibly difficult to discharge on appeal particularly in view of the fact that (the judgment) states on the face of it that it is a judgment by consent.”

31. Platt, J.A. thus held that it was clear that the Court would not lightly overturn a consent judgment because, in his view the nature of a consent judgment is that it is a compromise which replaces the original contract in the suit by the contract of compromise. It is entered into in the presence of no less a person than a judge of the High Court. The situation is enhanced if the parties and their advocates have all agreed to the compromise and signed it. In such event, uncontroverted evidence would be required to show that it is wrongly entered.

32. In this case, what is sought is a review or setting aside of the court's consent judgment. There is no appeal, but I consider that where a consent has been entered and signed, the grounds for setting aside must be clear and cogent, and must fit within the categories identified in the **Hirani case**. See also **Kenya Commercial Bank Ltd. v. Benjoh Amalgamated Ltd. and Another, Civil Appeal No. 276 of 1997**. To achieve setting aside or review of the consent judgment, the applicant must show that there was either: (a) fraud (b) collusion (c) mistake (d) insufficiency of material facts, or (e) other grounds for setting aside an agreement (namely, fraud mistake or in capacity).

33. The basis of the applicant's request for review is that the consent was entered through (a) coercion (undue influence), (c) frustration (d) misrepresentation. In addition, he says it was in breach of a previous offer of Kshs.7,000,000/-. These are contained in paragraph 2 of the notice of motion. Further, the applicant argued that the *ex-gratia* payment did not conform to the legal requirements of drawing up a contract, that it was unconstitutional, it sought to operate as a bar to the proceedings, and finally, that Justice Warsame's record is defective and incomplete in relation to what transpired in court.

Coercion, undue influence and frustration

34. Coercion is defined in Black's Law Dictionary as:

“compulsion, constraint, compelling by force or arms or threat.”

It is to compel a person to do an act which is against his will, or a situation where one person is under a state of subjection to another person so that he is constrained to do what his free will would refuse. It is sometimes also referred to as duress.

35. Duress in contract law relates to a situation where a person enters an agreement as a result of threats: see <http://www.e-lawresources.co.uk>) Blacks Law Dictionary defines duress as follows:

“Any unlawful threat or coercion used by a person to a manner she or he otherwise would not (or would). [it is] subjecting a person to improper pressure which overcomes his will and coerces him to comply with a demand to which he would not yield if acting as a free agent.”

36. Frustration: I understood the applicant to mean by frustration, not the legal concept of frustration

of contract by dissipation of a thing contemplated, but merely that he was sick and ailing at the time the consent was being entered into and was so frustrated by his distress that he had no choice but to accept the amount offered. Here, the proper question is whether a person suffering psychological or economic distress is thereby entitled to vitiate a contract because of those conditions.

37. “Undue influence” is described in Black’s Law Dictionary as:

“persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party’s free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party.”

38. Unfortunately no case law was cited in respect of these aspects of coercion, duress, undue influence and frustration.

39. I have already quoted extensively from the proceedings whilst discussing the background of this matter. The authorities show the circumstances under which a consent judgment can be set aside. Nowhere has the Applicant asserted that the consent entered by Justice Warsame was obtained by fraud or collusion. Nor has the applicant argued that the consent was given without sufficient material facts or in misapprehension or ignorance of material facts. Accordingly, none of these grounds avail to the applicant.

40. The remaining ground for setting aside, therefore, is where there is a reason which would enable the court to set aside an agreement. The applicant’s argument is that he accepted the amount of Kshs.5,000,000/- due to desperation, frustration and the urgent need for medical attention.

41. I have perused two English authorities on the issue of duress in commercial contracts. In **Alexander Barton v. Alexander Ewan Armstrong & Others [1976] AC 104**, the Privy Council considered a situation where the Appellant and the Respondent were major shareholders in a company. The appellant brought a suit against the respondent alleging that the respondent coerced him into agreeing to enter a contract by threatening to have him murdered, and by otherwise exerting unlawful pressure. The Privy Council held that:

***“the equitable rule which enabled a contract entered into as a result of fraudulent misrepresentation to be set aside, applied in cases of duress*”**

42. In that case, the evidence clearly disclosed that there was a contest for the controlling shareholding; that relations between the parties had deteriorated; that a series of resolutions had been passed to bar the appellant from involvement in the company; and that there were threats to murder him. In their dissenting opinion, Lords Wilberforce and Simon of Glaisdale had the following sentiments:

“...in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this, the pressure must be one of a kind which the law does not regard as legitimate.”

43. In the present case, there is no evidence of illegitimate pressure such as threats of murder and the like.

44. The second English case is **Pao On v. Liao Yiu Long [1980] AC 614**. There, the Privy Council was considering the question of commercial pressure. The Council found that although the defendants had been subjected to commercial pressure, the facts disclosed that they had not been coerced into the contract, and therefore the contract was not voidable on the grounds of duress. It was held, inter alia, at (pg.635) that:

“In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are ... relevant in determining whether he acted voluntarily or not.”

45. In the present case, all that is evident is that at the time of negotiations, the applicant was under no pressure. His pressure became evident when he disclosed that he needed the money under negotiation for medical treatment, and the Defendants had offered Kshs.5 million, two million less than he was then ready to accept *in full and final settlement*.
46. In his accepting the Kshs.5 million, he did not indicate that he needed legal advice (having previously removed various counsel who had acted for him), nor is there evidence that he had no alternative course of action such as to decline the amount, or to protest and refuse to sign the consent.
47. From the record of proceedings, it is clear that the parties were, at least from 24th May, 2010, actively engaged in negotiations for settlement. On 30th July, 2010 the plaintiff is recorded as having complained that settlement was not forthcoming because the Defendants’ offer was too low. The record shows that during that whole month negotiations were ongoing. In the year 2011, the record shows that settlement was again under consideration on 7th November and 5th December, 2011.
48. The negotiations were apparently not achieving any desired outcome, because on 17th January, 2012, counsel for the Defendant indicated she had firm instructions to proceed with the hearing and determination of the matter by court. In response, the Plaintiff altered the course of proceedings by saying he wanted to “*renegotiate*” the matter. He is recorded to have stated:

“ I am accepting the figure of Kshs.7 million of full and final settlement of my claim”

49. Clearly, it was the applicant who, on 17th January, 2012, deflected the parties’ and courts’ attention from proceeding with a hearing. He turned their minds back onto negotiations, as he was fully entitled to do. In so doing, he bared his chest and opened up his stack of cards by stating in the hearing of the court and as an open offer, the amount that he was willing to accept namely, Kshs.7 million. In addition, he stated that his willingness to accept Kshs.7,000,000 was in “*full and final settlement*” of his claim.
50. From the whole conduct of the plaintiff/applicant, I do not get the impression of someone who was under coercion, or under duress, or undue influence or in a fledgling position. Here is a person who up to this point was determined to get what he wanted, and was pushing avidly for it via a settlement. He went so far as to boldly make an open “offer” of what he would accept in full and final settlement of his claims. Had the Defendants’ counsel accepted the plaintiff’s proposal for Ksh.7,000,000/-, it appears the deal would have been sealed on that amount by consent.
51. So, when the matter came up for mention to record a settlement, on 20th January, 2012, the Defendants counsel was quite in order to say she still needed “*a few days to sort out the matter*”. To this, the applicant as a willing negotiator responded that “*I can wait.*” To my mind, the conduct of the parties was quite in consonance with people who were seriously considering their rights and obligations, their options and interests. Up to this point on 20th January, 2012, I see no evidence of duress, coercion or undue influence taking the place of the sobriety and interest-focused minds of the parties.

52. Thus, on 26th January, 2012, when the parties came again before the Judge to record a consent, it is not in the least surprising to find that the Defendants started the haggling by saying:

“I have tried to enhance the offer to Kshs.5,000,000 million on ex-gratia basis. If the plaintiff accepts the sum of Kshs.5 million we would work out the payment modalities.”

Here, it is the Defendant who introduced the basis for the payment as an ex-gratia payment.

53. It is also not surprising, therefore, for the plaintiff to have retorted:

“The turn of events is surprising to me The sum of Kshs.5 million has never been mentioned. I am accepting the sum of Kshs.7 million to facilitate my urgent treatment.”

Thus, the Plaintiff expressed disquiet, but retained his focus on the preferred Kshs.7 million settlement. He was still in bargain-mode, because he introduced a new angle to the negotiations, by saying the seven million would be to facilitate his urgent treatment. Then, for the first time, the record shows that the applicant indicated his negotiations were for money with which to go for medical treatment. But even then, there was no sense of coercion, as the applicant was still trying to get the best bargain. Prior to this, neither ill health nor any other form of inhibition in negotiating his settlement, is exhibited.

54. The applicant further stated that he knew his health was very bad, then said:

“Let me accept Kshs.5 million. I need urgent treatment and I cannot wait anymore.”

The Plaintiff climbed down from 7 million to 5 million to accept the offer. The consent was thereafter recorded in the terms indicated on the record. There is no indication of a protest or outrage. Indeed after the Judge read out the consent order the Plaintiff stated:

“ I confirm that is the position.”

So, in those terms, then, the consent was sealed as a compromise.

55. Thereafter, the Judge recorded the court’s order “*as per consent*” and handed over the written record to both parties for signature. Both parties appended their signatures to the consent, and the Judge also signed the consent on the original record of proceedings.

56. This practice of signing a consent agreement is one which the courts have encouraged. In **Munyiri v. Ndunguya [1985] KLR 370** the Court of Appeal said in obiter remarks:

“It would be wiser to obtain the signatures of the advocates or the parties to the consent judgment and orders.”

The wisdom proposed by the court, is that signature is an act of commitment, an expression of the will. It is intended as a sign that the parties are duly bound by what they have said. With the imprimatur of the signatures of the parties, the burden of showing that the consent was not one agreed upon lies heavily on the applicant, and it is a formidable one.

57. I have gone through this long analysis of the actions and conduct of the parties leading up to the signing of the consent so as to enable me to determine with due confidence whether or not the consent was binding or can be set aside. My conclusion is that I do not see anything in the concatenation of events and string of actions of the parties, that discloses that the consent was entered into without sufficient material facts, or in ignorance of material facts or on grounds of coercion, duress or undue influence.

Defective Record of Proceedings

58. The applicant also complained that the record of proceedings was defective. He said that all that transpired in relation to the proceedings at which the settlement was reached was not recorded. He asserted that the Respondents had offered Kshs.7 million which was the basis of the discussion, but that was not recorded. The Defendants denied this.

59. The applicant also refers to a letter he wrote to the Honourable Chief Justice complaining of the treatment he received from Hon Justice Warsame. In his reply dated 22nd November, 2011, the Chief Justice referred to discussions he held with Justice Warsame and the figure of Kshs.7 million was discussed as an offer for settlement which was being negotiated. It further states that the applicant initially accepted the offer but changed his mind, which was his right.

60. The applicant further referred to some letters in the bundle of his documents annexed to his affidavit, which were marked “*without prejudice*.” The court declined to read or allow any submissions on those letters on the ground that “*without prejudice*” communications on negotiations are privileged communications. They cannot be referred to or placed on the court record until an agreement is reached emanating from such negotiations.

61. In the **Ongoma Case**, the Court of Appeal had occasion to deal with the issue of the court record. The Court held that:

“The High Court is a court of record whose proceedings are recorded to furnish a judicial record.”

In that case the Court after perusing the record and identifying gaps and inconsistencies in the record, held that:

“It cannot be said that the trial Judge enabled the court to have an accurate record of proceedings.”

62. There, the trial Judge made an order on his own motion requiring the district surveyor to visit some land and report on its acreage. Then two days before a mention, the trial Judge made another order in chambers in the presence of the plaintiffs and the Defendants, but without the Defendant’s advocate. There were gaps in the record as to whether other mentions were subsequently held and whether the surveyor reported as ordered. A consent judgment was subsequently recorded without any observation that it was read to the parties, or that they were given opportunity to make a statement thereon, or to sign or thumbprint their acceptance.

63. The court’s criticism of the proceedings was well grounded. It found as a fact that the record was wanting. It appreciated that a trial Judge has a discretion in recording proceedings but pointed out what Lord Mansfield said in **Rex v. Wilkes (1770) 4 Burr 2527, 2539** in respect of discretion:

“Discretion, when applied to a court of justice, means such discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular.”

Thus, discretion demands adequate records of proceedings.

64. In the present case, I have already carefully analysed the proceedings. Although the applicant says that on 26th January, 2012 he was in court from 2 p.m. to 4 p.m. the record does not indicate so. It is also not clear whether all that the Judge was doing was sitting in as a facilitator to enable the parties reach a consensus, as Judges sometimes do. If that was the case, and the discussions were held on a without prejudice basis, all that one would expect in terms of the record of proceedings is a record of the agreed outcome. But I would rather not speculate, so I shall stop there.

65. In the end, Judge Warsame recorded the applicant's demand (offer) for Kshs.7 million, the Respondents' counter offer of Kshs.5 million and the acceptance by the Applicant of the Kshs.5 million. It is also clear that on 17th January, 2012 it was the applicant who introduced the idea of the payment of Kshs.7 million, as a "*full and final settlement*". Whilst on 26th January 2012, it was the Respondent who introduced the payment as an *ex-gratia* amount. I therefore see no gaps or inconsistencies in the record such as were criticised by the Court of Appeal in the **Ongoma Case**. The fact that the applicant signed the consent is, in my view, sufficient, unless otherwise shown, to convey acceptance and agreement.

66. Accordingly, I am not satisfied that there is any injudicious exercise of Judge Warsame's discretion in recording the proceedings. As it is, there is no specific form or format by which a Judge is required to record proceedings. In general, I think that what is legally required, is that the record must be in writing or in some other form under the personal direction and supervision of the Judge. It should capture the essential substance of the submission or evidence and in so doing, should encapsulate the precise judicial history of the proceeding. Ultimately, the Judge must sign such record or otherwise endorse or approve it.

Whether the *ex-gratia* payment was in full and final settlement of the Plaintiff's Claim

67. The Applicant argued that the *ex-gratia* payment did not conform to the legal requirements of drawing up a contract, and could not operate as a bar to the further proceedings of the case.

68. The Respondents' position was that the payment was made out of no legal obligation to do so, and was in full satisfaction of the case. Further that an earlier amount of Kshs.800,000 had also been paid, and the Plaintiff/Applicant had not offered to return any of the said amounts.

69. Black's Law Dictionary defines *ex-gratia* as follows:

"Out of grace; and a matter of grace, favour, or indulgence; gratuitous. A term applied to anything accorded as a favour, as distinguished from that which may be demanded ex-debito, as a matter of right."

Further, *ex-gratia* payment is defined as :

"Payment made by one who recognises no legal obligation to pay but who makes payment to avoid greater expense as in the case of a settlement by an insurance company to avoid costs of a suit. A payment without legal consideration."

70. In my view, the plain wording of the consent that was entered into; the use of the words "*in full and final settlement*", the fact that there was haggling between Kshs.7 million and 5 million; the formal record and signing of the settlement by the parties in the presence of no less a person than a Judge; the absence of any protest by the applicant; the taking and use of the money without indication of intention to refund the amount; all these point to a final settlement.

71. As this was done by consent, and having declined to set aside the same, the matter should rest there.

72. In the result, I decline to grant all the Applicants prayers and the application is dismissed with costs.

Orders accordingly.

Dated this 28th day of November, 2013

.....

R. M. Mwongo

JUDGE

Ruling read in Chambers in the presence of:

- 1. Mr. Anjere, Plaintiff/Applicant in person**
- 2. Ms. Jan Mohamed – Advocate for Defendants/Respondents**