



REPUBLIC OF KENYA



**Magnate Ventures Limited v Upadhaya (Civil Appeal 84 of 2019)
[2023] KEHC 1423 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 84 OF 2019
FA OCHIENG, J
FEBRUARY 28, 2023**

BETWEEN

MAGNATE VENTURES LIMITED APPELLANT

AND

DIPAK UPADHAYA RESPONDENT

*(An appeal from the ruling/order of the Principal Magistrate's Court at Winam
(Hon. F. M. Rashid) delivered on 11th June, 2019 in Civil Case No. 64 of 2008)*

JUDGMENT

1. By a ruling dated June 11, 2019, the learned trial magistrate dismissed the appellant's application dated April 25, 2019.
2. The trial court had been invited to review, vary or set aside the order issued on December 7, 2018.
3. It is common ground that the order dated December 7, 2018 was a consent order, which was in the following terms;

' By consent of both parties, judgment be entered in favour of the plaintiff against the defendant for Kshs 145,427 less 20%, making 116,342/- plus costs.

That there be stay for 30 days and costs to be deferred for one week, pending consent, failure to which taxation to proceed.'
4. On April 25, 2019, the appellant filed an application seeking, *inter alia*, the review, variation or setting aside of the consent judgment dated December 7, 2018. That is the application which was dismissed on June 24, 2019, prompting the present appeal.
5. When canvassing the appeal, the appellant told this court that it had never issued instructions to its advocate to consent to the payment of costs.



6. The appellant said that it had been willing to pay the sum of Kshs 145,427/- in full settlement of the cases.
7. According to the appellant the payment of Kshs 145,427/- was to be in settlement of the case, inclusive of the costs.
8. Counsel for the appellant submitted thus;

' We submit that the consent as instructed by the client was vitiated. The appellant did not give instructions to the effect that 'costs be agreed on failure to which taxation shall proceed', and the 'contract' was therefore frustrated at the point of its formation.'
9. In answer to the appeal, the respondent submitted that the appellant had failed to demonstrate that the consent judgment had been obtained irregularly.
10. On the whole, the parties are in agreement that a consent judgment has a contractual effect.
11. Citing the case of *Flora N Wasike v Destimo Wamboko [1988] eKLR*, the appellant noted that a consent judgment or order can only be set aside on grounds which would justify setting aside a contract;

' or if certain conditions remain to be fulfilled, which are not carried out'
12. In this case, counsel for the appellant said that his client's intention was to settle the case through an all-inclusive payment. The appellant went on to say the following;

' However, the trial court proceeded to include such other terms to the consent that were contrary to the appellant's directions. The consent as was ordered was against the instructions of the appellant.'
13. The appellant submitted that if the client's written instructions were contrary to the authority exercised by the advocate, then such authority cannot be upheld.
14. This court was told that the appellant did not give any distinct instructions on the issue of costs.
15. It is noted that the appellant has not alleged that there was fraud, collusion, misrepresentation, mistake or coercion.
16. The appellant has also not shown that the consent was contrary to either the policy of the court or to public policy in Kenya.
17. The appellant has not demonstrated that there was any material information which it did not have at the time when the consent was being entered into.
18. I have given due consideration to the record of the proceedings at the trial court, on December 7, 2018. The record shows that the appellant herein was represented by Mr Oduor, whilst the respondent herein was represented by Mr Amule. It was Mr Oduor who dictated the terms of the consent, for recording by the court.
19. After the court had recorded the terms of the consent, Mr Amule confirmed the same.
20. The appellant has not indicated to this court, anything which was not spelt out by its advocate, yet was recorded by the trial court.
21. I find absolutely no basis for trying to blame the trial court for including in the judgment, terms which were contrary to the appellant's directions.



- 22. The court did not add anything to what the advocates for the parties said, constituted the terms of the consent between the parties.
- 23. A reasonable person, dealing with the duly appointed advocate of a party, expects the said advocate to have the requisite authority to do what he does.
- 24. In my considered opinion, neither the trial court nor the respondent had any reason to doubt the authority of the appellant’s advocate, to enter into the consent.
- 25. Furthermore, the order for payment of costs appears to be in tandem with the law which governs costs in litigation. In effect, the said order was not inconsistent with the policy of the court or public policy.
- 26. The learned trial magistrate found guidance from the following words, which were in the case of *Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd [1982] KLR 485*:

' A duly instructed advocate has an implied general authority to compromise and settle the action, and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.'
- 27. In this case, the alleged limitation to the advocate’s implied authority, was never brought to the attention of the respondent herein, at the time when the advocate for the appellant was reciting the terms of the consent.
- 28. Accordingly, I find that the appellant cannot call to its aid the limitation which it had allegedly imposed upon its advocate.
- 29. In a nutshell, there is no merit in the appeal. It is therefore dismissed, with costs to the respondent.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF FEBRUARY, 2023.

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FRED A. OCHIENG

JUDGE

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

