



REPUBLIC OF KENYA



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**Dayalji v Dayalji & 2 others (Civil Case 198 of 2010)
[2023] KEHC 3961 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3961 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE 198 OF 2010**

**JN KAMAU, J
APRIL 26, 2023**

BETWEEN

KISHOR DAYALJI PLAINTIFF

AND

NILESH DAYALJI 1ST DEFENDANT

SUNIL DAYALJI 2ND DEFENDANT

ASWIN DAYALJI 3RD DEFENDANT

RULING

1. In his Notice of Motion dated 25th May 2021 and filed on 26th May 2021, the Plaintiff herein sought orders that the Ruling of this court dated 24th May 2017 and all consequential proceedings thereto resting with the consent order dated 19th September 2017 be set aside, that this suit be set down for hearing on merit.
2. The Plaintiff had also sought that the firm of M/S Bruce Odeny & Co Advocates be granted leave to come on record in the matter herein. This prayer was overtaken by events as parties recorded a consent in which the firm of M/S Otieno Okeyo & Co Advocates filed their Notice of Change of Advocates on behalf of the Plaintiff herein.
3. The Plaintiff swore an affidavit in support of the said application on 25th May 2021. He averred that he filed this suit in the year 2010 seeking to dissolve the partnership he had with the Defendants whereupon on 17th March 2011, the court directed that the matter would proceed by way viva voce. He stated that he visited the office of his advocate M/S Khan & Associates Advocates several times seeking to know the progress of the matter and with a view to fixing a hearing date but they informed him that they would communicate to him once there was progress.



4. He asserted that it was not until 10th November 2020 when he heard from the Defendants that his suit was finalised on 19th September 2017 which took him by surprise as his advocate had never communicated to him on the same.
5. He further stated that he requested the court for copies of the proceedings and upon receipt of the same on 12th March 2021, he was shocked to learn that there had been no hearing but that a Ruling was delivered on 24th May 2017 without his input. He was emphatic that he was in Mombasa between 24th May 2017 and 19th September 2017 but his advocates never informed him of any progress of the case. He added that he accompanied his wife to India for medical check up in November 2017 and that when he returned back on 19th January 2018 but there was still no communication on the progress of his case.
6. He averred that he was not aware of the consent that was entered on 19th September 2017 and denied authorising and/or sanctioning his then advocates, M/S Khan & Associates to compromise this case. He was categorical that the same was a mistake and hence the said consent ought to be set aside. He contended that the petrol station building sitting on land parcel Kisumu/Municipality Block 8/251 and Kisumu Municipality Block 9/126 wholly belonged to him. He was apprehensive that the properties that were rightfully due to him were now exposed to be disposed by the Defendants following the impugned consent. He pointed out that he was willing to abide by any pre-conditions the court would issue in order to grant the injunctive relief.
7. In opposition to the said application, the 1st Defendant swore a Replying Affidavit on 17th June 2021 on his behalf and on behalf of the 3rd Defendant herein. The same was filed on even date.
8. The 1st and 3rd Defendants averred that the Plaintiff first filed Originating Summons Application dated 16th December 2010 which was compromised by parties' consent in court dated 9th September 2017 which consent was signed by respective counsel for parties on the same date. They asserted that the aforesaid consent was initiated by the Plaintiff's letter dated 8th May 2017 that suggested settlement through negotiations.
9. They stated that their then advocate M/S Amondi & Co Advocates responded to the Plaintiff but he rejected their offer and gave his proposal and that when they responded to his letter, he requested for a partners' meeting to be arranged. They asserted that he never attended the meeting on 13th July 2017 whereupon their advocates sent him a draft consent dated 26th July 2017 for his execution which he rejected and his advocates sent them his own draft of consent dated 19th September 2017. It was their contention that the court wholly adopted the said consent and that the Plaintiff was therefore not being honest when he averred that he was never aware of the progress of his case.
10. They further averred that in a letter dated 11th December 2017, his advocates notified them of his intention to close operation at Sai Petroleum but that instead, he continued to use the aforesaid property to the exclusion of the other partners without accounting for his operations at the station. They added that he wrote to them on 13th February 2019 and gave them an offer of KShs 60,000,000/= in trying to comply with Paragraph 6 of the consent and hence his assertion that he was not aware of the progress of his case was a complete lie.
11. It was their contention that they accepted the offer vide their letter dated 19th February 2019 but he responded on 12th April 2019 stating that the 2nd Defendant had rejected his offer. They pointed out that while demanding the equal share of Kisumu/Dago/656 in his letter dated 4th April 2019, he referred to the impugned Ruling. They were categorical that the Petrol Station in question was in their



- names and that they were not entitled to any order in the motion (sic) but that the suit should be set down for hearing.
12. It was their averment that the Plaintiff had not met the threshold of setting aside a consent since he had not shown that the consent was obtained through fraud or collusion or that there was no consensus between the parties.
 13. Both the Plaintiff and Defendants filed their Written Submissions dated 21st July 2021 on even date whereupon the court reserved its Ruling for 23rd November 2021. However, on 26th October 2021, the Plaintiff filed a Notice of Motion Application dated 15th October 2021 seeking to stay the said Ruling with a view to being granted leave to file his Supplementary Affidavit and Submissions. This court allowed the said application in a Ruling it delivered on 24th October 2022.
 14. Pursuant to the aforesaid Ruling, the Plaintiff swore a Supplementary Affidavit on 7th November 2022. The same was filed on even date. He annexed two (2) independent forensic expert evidence and denied having signed the letter dated 4th April 2019 which the Defendants purported confirmed that he had consented to a settlement of this suit. He pointed out that LR No 5 Kisumu Municipality/Block 8/251, East Kisumu/Dago/656, Kisumu Municipality/Block 10/285, Kisumu Municipality/Block 9/126, The Aga Khan Flats Property, the Patel Flats Property and the 7 ½ acres at Kiboswa had never been the properties of Sai Petroleum as a partnership between himself and the Defendants.
 15. He pleaded with the court to re-examine the primary pleadings in this matter to see the matter in issue. He was emphatic that the pleadings herein did not plead the said properties as being disputed or to be subjected to litigation as to be a subject of a consent emanating from the proceedings herein. He added that the pleadings were never amended at any one time to include the said properties as matters in issue for determination by this court.
 16. He contended therefore that in the premises, the said consent and Ruling based on properties that were not part of the pleadings herein and which were not owned by the partnership must only have been reached by mistake and having not been sanctioned by him, could not be decreed against him.
 17. It was his contention that he had amply demonstrated that the said consent was not obtained from him and neither did he consent to the same and that it could only have been reached through misrepresentation and fraud to which he was not a party. He urged the court to review the impugned consent, Ruling and order emanating therefrom be reviewed and set aside and that the orders sought in his application herein be allowed and this suit be set down for hearing orally for purposes of dissolving the partnership.
 18. His Supplementary Submissions were dated 7th November 2022 and filed on 10th November 2022. On 13th December 2022, the Defendants indicated to court that they would rely on the Written Submissions they filed previously. On 23rd November 2021, the Plaintiff informed this court that his Supplementary Affidavit would be supplemental to his Supporting Affidavit. This Ruling is based on the said Written Submissions and Plaintiff's Supplementary Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

19. The Plaintiff submitted that the consent order of 19th September 2017 was a mistake as he was never consulted and had no knowledge of the same. He asserted that prior to the aforesaid consent the court had made a Ruling on 24th May 2017 without his participation in the proceedings. He pointed out that there was a miscarriage of justice in the said proceedings that would warrant them being set aside.



20. He placed reliance on the case of Wachira Karani vs Bildad Wachira [2016] eKLR where it was held that setting aside an ex parte judgment was a matter of the discretion of the court.
21. He urged the court to exercise its discretion in his favour for the reason that prior to the Ruling of 24th May 2017, the last communication he received was that the case would proceed by way of oral evidence. He added that there was no indication that things would change and that the matter would then be determined summarily by a ruling.
22. He asserted that it was incumbent upon the court to call upon the parties to tender their evidence and not to deny them audience through summary ruling because doing so was against the parties' constitutional rights under Article 47 (1) on fair administrative action that dictated that every person had the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.
23. He also referred to the cases of Gerishom Likechi Kitungulu vs Patel Prabhakar Issuer Bhai [2005] eKLR, BrookBondliebig (T) Ltd vs Mallya (1975) EA 266 and Flora Wasike vs Destino Wamboko (1882-88) (sic) 1 KAR where the common thread was that a consent order or consent judgment could only be set aside on the same grounds as would justify the setting aside of a contract, for example, mistake, fraud or misrepresentation.
24. He asserted that he had discharged the burden on a balance of probability and the Defendants had been unable to prove his participation with respect to the Ruling of the court dated 24th May 2017 and all consequential proceedings thereto resting with the consent order dated 19th September 2017. He added that his prior advocate had not filed any affidavit to disprove having acted without instructions and that the Defendants were also unable to trace his finger prints on the impugned consent that compromised the suit.
25. He argued that the Defendants' response was based on letters that he disputed were crafted and were executed without his knowledge and sanction. He was categorical that the fact that he made reference to the Ruling in one of his letters did not in any way mean that he participated in the same. He pointed out that he had introduced two (2) expert forensic evidence to show that he did not author or sign the letter dated 4th April 2009.
26. He was emphatic that his consent was never obtained before the recording of the impugned consent and subsequently, he never ratified the same. He pointed out that the directions given by court on 17th March 2011, 16th January 2013 and 17th February 2017 were very clear that this matter did not involve land but rather it was a commercial suit for the dissolution of a partnership known as Sai Petroleum. He submitted that the said partnership had never owned any of the properties, the subject of the impugned consent and averred that no evidence had been adduced before this court to show otherwise.
27. He pleaded with the court to grant him his day in court as the Defendants would not suffer any prejudice as they would have a chance to prove why the issues of the properties should be dealt with by this court in light of his opposing pleadings. He urged the court to allow his application so that evidence could be taken viva voce with respect to the dissolution of the partnership as per the directions of this court dated 17th March 2011.
28. On their part, the Defendants submitted that the law allows parties to resolve their dispute and where an agreement was reached, parties could file the agreement and/or record the same in court. They asserted that in the instant case, parties reached an agreement to dissolve their partnership and that each partner would get their rightful entitlement before the said dissolution. It was their contention therefore that the said consent could not be faulted and should stand.



29. They referred this court to the case of Kenya Commercial Bank Ltd vs Specialised Engineering Co Ltd [1982] KLR 485 where it was held that a consent order that was entered into by counsel was binding on all parties to the proceedings and could not be set aside or varied unless it was proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of court or where it was given without sufficient material or misapprehension or ignorance of such facts in general.
30. It was their case that the Plaintiff had not provided any evidence to show illegality in the impugned consent and that no evidence had been tendered to show that his then advocate had been relieved of his duties before the recording of the consent. They added that it had not been demonstrated that the Plaintiff had taken up the advocate's matter for professional misconduct for recording the consent without authority.
31. They asserted that all along the Plaintiff knew what had transpired in court but chose to remain quiet and hence, he should not be allowed to raise such issues at this stage. They pointed out that the said advocate had ostensible authority to negotiate and compromise the suit and that the dispute had been amicably resolved and therefore litigation must come to an end.
32. They further relied on the cases of Samuel Wambugu Mwangi vs Othaya Boys High School [2014] eKLR, Kenya Commercial Bank Limited vs Benjo Amalgamated Limited & Another [1998]eKLR and Flora W. Wasike vs Destimo Wamboko (Supra) where the common thread was that a consent order or consent judgment could only be set aside on the same grounds as would justify the setting aside of a contract, for example, mistake, fraud or misrepresentation.
33. They were emphatic that the impugned consent was recorded in the presence of all advocates and therefore any attempt to set aside the same over three (3) years down the line was an afterthought.
34. It is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract, for example on grounds of fraud, mistake or misrepresentation as was held in the case of Flora Wasike vs Destimo Wamboko (Supra).
35. It was not in dispute that there was a Ruling of this court dated 24th May 2017 and a consent order dated 19th September 2017 on record in the suit herein. The only contention was that the Plaintiff did not participate in the proceedings that led to the aforesaid consent and Ruling. The Plaintiff denied ever having instructed the firm of M/S Khan & Associates Advocates, his then advocates to execute the impugned consent on his behalf. If the advocates entered into a consent without his instructions, that was a sufficient reason to warrant a review of the consent.
36. Be that as it may, whenever an advocate records a consent order or signs a consent order, the other party is not required to first verify that that advocate has the requisite authority to do so. An advocate is deemed to have ostensible authority from its client to represent it in a case, including the execution of consent orders.
37. It was this court's considered view that indeed the Defendants and their advocate had no obligation to verify that the then Plaintiff's advocate had been duly instructed to enter into the consent. In this regard, this court had due regard to the holding of the Court of Appeal in the case of Kuwinda Rurinja Co Limited vs Andkuwinda Holdings Limited & 13 Others [2019] eKLR where it held that a third party was under no obligation to ensure that the advocate of the opposite party is duly instructed.
38. Having said so, the Plaintiff swore a Supplementary Affidavit in which he annexed two (2) independent forensic expert evidence and averred that he never signed the letter dated 4th April 2019. This is the letter that formed the basis of the Defendants' assertions that he had consented to a settlement of this suit.



39. In the Forensic Report dated 30th September 2012, Martin E. Papa, the Forensic Document Examiner, opined that based on the documents he examined, the Plaintiff herein did not write the disputed signature. This court cognisance of the fact that the issue of forged signatures was one that was best heard during trial as opposed to the same being determined summarily. Even so, this court noted that the Defendants did not rebut this expert evidence in any way.
40. In this respect, this court had due regard to the case of CMC Holdings Ltd vs Nzioki [2004] KLR 173 where the Court of Appeal held that:-
- “In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...”
41. Taking into account all the circumstances of this case this court was satisfied that the justice of the case mandates that the Plaintiff be given an opportunity of being heard. A court of justice, it has been held, has no jurisdiction to do injustice as was held in M Mwenesi vs Shirley Luckhurst & Another [2000] eKLR.
42. As the Plaintiff had denied that he ever instructed his then advocates to enter into a consent which was an issue that could only be resolved by hearing the said advocates but whose presence in the present proceedings could not be compelled as they were no longer acting for him, this court was persuaded that that was a sufficient reason to set aside the said consent order for expediency purposes and to bring the contested issues to a conclusion. Indeed, this matter had been pending in the court system since 2010 and it was necessary that the same be fast tracked.
43. Notably, directions had been given that the matter would be heard by viva voce evidence. There was no evidence that the 1st and 3rd Defendants would suffer any prejudice if this case was heard on merit. If there was any prejudice, they did not demonstrate the same.
44. On the other hand, this court found that the Plaintiff was more likely to suffer prejudice in the event he was denied an opportunity to prosecute his case having denied that he instructed his advocates to record a consent on his behalf. Indeed, there was a likelihood of him being deprived of properties, if at all they belonged to him and issue could only be determined by way of viva voce evidence.

DISPOSITION

45. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s Notice of Motion application dated 25th May 2021 and filed on 26th May 2021 was merited and the same be and is hereby allowed. Costs of the application will be in the cause.
46. It is hereby directed that this matter be mentioned on 3rd May 2023 for further orders and/or directions.
47. It is so ordered.

DATED and SIGNED at KISUMU this 20th day of April 2023

J. KAMAU

JUDGE

DATED, SIGNED and DELIVERED at KISUMU this 26TH day of APRIL 2023

M. S. SHARIFF

JUDGE



