



**Gatheru Gathemia & Co Advocates v Dado & another (Miscellaneous Civil Case E1006 of 2020) [2023] KEHC 21472 (KLR) (Commercial and Tax) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21472 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL CASE E1006 OF 2020**

**JWW MONG'ARE, J**

**JULY 31, 2023**

**BETWEEN**

**GATHERU GATHEMIA & CO ADVOCATES ..... ADVOCATE**

**AND**

**HUSSEIN DIBA DADO ..... 1<sup>ST</sup> RESPONDENT**

**TULLA RESERVE SUPPLIES (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On October 4, 2020 the parties herein entered into a consent for the settlement in the following terms;
  - i. That the respondents Hussein Diba Dado for himself and as the director for Tulla Reserve Supplies (k)limited shall pay to Gatheru Gathemia & Co Advocates the sum of five million, one hundred thousand(Kshs 5,100,000/=) in full and final settlement of the respective Bill of costs herein.
  - ii. That the amount herein shall be paid within one hundred and twenty days (120) days from the date of this consent order.
  - iii. That in the event the respondents shall fail to pay the entire amount within the time specified herein the applicant shall be at liberty to extract a certificate of costs and proceed to execute.
  - iv. That the matters be marked as settled with no orders as to costs.
2. From the face of the consent order which was signed and duly witnessed by two sets of advocates, the matters in respect of the consent are two, namely; Hccomm Misc Appl No E019 of 2020- Gatheru Gathemia & Co Advocates v Hussein Dida Dado & Tulla Reserve Supplies Ltd And Hccomm Misc No E1006 of 2020- Gatheru Gathemia & Co Advocates v Tulla Reserve Supplies (k)ltd.



3. On November 26, 2021 was adopted as an order of the court. The respondents did not comply with the terms of the consent necessitating the applicants to commence execution proceedings in terms of the consent order. The present applications seeks to have the certificate of costs adopted as a judgment of this court.
4. The Respondents have opposed the application and filed a replying affidavit sworn by the 1<sup>st</sup> respondent Hussein Diba Dado. In acknowledging that he indeed signed the consent, he challenged the fact that the said sum of Kshs 5,100,000/- was to cover all outstanding legal fees where the firm of advocates had represented the two respondents either jointly or severally. These included the matter in HCCOMM Misc No E370 of 2019 which had not been reflected in the consent order. The respondents also applied to and did cross examine Gatheru Gathemia Advocate and Byaruhanga Macdonald Advocate on their affidavits sworn in support of the application for entry of judgment.

#### **Analysis and Determination:-**

5. I have carefully considered the application before me, the supporting affidavits of the applicant/ advocate and the response filed by the respondents herein. I have also taken into consideration the evidence of the applicant during cross examination. The application before me seeks entry of judgment on the taxed costs pursuant to a consent order on the same filed and adopted as an order of the court.
6. While the respondent does not deny that he signed the consent order to settle the matter of fees between himself and his previous advocates, the issue he raises is the same has left out some of the court matters the parties had agreed to settle and therefore is opposed to the same being used as the basis for the entry of judgment on the taxed amount. The respondent therefore urges the court to set aside the certificate of taxation and dismiss the application for entry of judgment on the taxed costs. The issue that this court must settle is “whether this court should set aside the consent order.”
7. Courts have held the position that a consent order is binding upon the parties and can only be set aside if it was proved that the same was obtained through misrepresentation, undue influence or coercion. The Court of Appeal in the case of *Hirani v Kassam* (1952) EACA 131 observed as follows:-

“It is now 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....”

Similarly the court of appeal in *J.M Mwakio v Kenya Commecal Bank Limited*, civil appeal No 28 of 1982 and 69 of 1983, citing with approval *Purcell V, F.c Trigell Ltd* (1970) All Er 671, Winn LJ sad at 676:-

“It seems to me that, if a consent order is to be set aside, it can only be set aside on grounds of which would justify 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 as a contract.”

8. From the response filed by the respondents, it was admitted that indeed the 1<sup>st</sup> respondent did sign the consent order and that he did that in the company of a person close to him who negotiated the reduction of original fees demanded by the advocates to the sum of Kshs 5,100,000/-. During cross examination I found the two advocates, Mr Gatheru Gathemia and Mr Byaruhanga McDonald as truthful in their testimony. The impression created is that when the consent was presented in court for



recording the respondent was not represented by legal counsel. Despite the fact that the respondents appeared in this matter represented by counsel, they did not file a reference to oppose the certificate of taxation that was issued by the registrar. Instead they chose to protest the bill during this application which was brought by the advocate /applicant for entry judgment of the taxed costs.

9. I find therefore, the protestation by the respondents to be insincere. They admit that they engaged the advocate to represent them in various matters some which they settled the fees charged without raising an objection. Further, in my view, I find that the respondents have not placed any evidence before the court to prove that there was coercion or undue influence in entering the consent. They met with the advocate at a public place and in full view and company of other parties. I am therefore satisfied the consent order was entered with the full knowledge and approval of the parties and I find no good reason to set it aside.
10. The application as filed by the advocate has merit and is hereby allowed with costs awarded to the advocate/applicant. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2023**

.....

**J. W. W. MONG'ARE**

**JUDGE**

**In The Presence of:-**

Mr. Macharia for the Applicant/Advocate.

Mr. Wanjohi for the Respondents/Clients.

Sylvia- Court Assistant

