Pan Africa Staff Sacco Society Ltd v Muchungu; Vusha Onembe & Mambiri Advocates (Interested Party) (Civil Appeal 491 of 2018) [2023] KEHC 21465 (KLR) (Civ) (17 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21465 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 491 OF 2018

AN ONGERI, J

AUGUST 17, 2023

BETWEEN

PAN AFRICA STAFF SACCO SOCIETY LTD .... APPELLANT

AND

DAVID KIGATHIA MUCHUNGU .... RESPONDENT

AND

VUSHA ONEMBE & MAMBIRI ADVOCATES .... INTERESTED PARTY

(Being an appeal from the ruling and order of the Cooperative Tribunal at Nairobi by Deputy Chairman of the court (Hon. Ceciliar Kithinji) in CT case no. 764 of 2015 delivered on 18/9/2018)

JUDGMENT

1. The Cooperative Tribunal made the impugned ruling on 18/9/2018 as follows;

> " This firm was in the conduct of the matter and even after the consent applied to lift warrants which was allowed. This reference to "our previous advocates Vusha Onsembe and Mambiri advocates" runs through the supporting affidavit. The advocate had general instructions. The applicant knew that the firm was handling the matter on their behalf. They cannot compromise the matter. It is only unfortunate that the clerk was involved. On the day the consent was recorded an advocate held brief for Vusha Onsembe and signed on the court record.

The issue of the position that now aggrieves the applicant is a question of accountability between the client and his advocate and the question of professional responsibility. The claimant cannot be dragged into the matter.

We are further guided by the decision in *Kenya Commercial Limited v Benjoh Amalgamated Limited & Another* [1998] e KLR citing *Little v Spreadburey* [1910] 2KB 658 that no limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their attention.

We agree that there is no proof of fraud. The applicant should deal with their advocates.

On the issue of the resolution n reduction of share value, the resolution was after this claim had been compromised. It does not affect the order on record.

The application is or without merit and is dismissed. Costs to the judgment creditor as the successful party".

2. The appellant was aggrieved with the said ruling and has appealed on the following summarized grounds;

That the Tribunal erred both in fact and in Law in;

a. Failing to hold that the consent order issued by the tribunal on 30th June 2016 and the consequential consent decree dated 17th July 2016 are vitiated by fraud, mistake, illegality and have both been overtaken by events.

b. Failing to consider and hold that the consent order issued by the tribunal on June 30, 2016 and the consequential consent decree dated 17th July 2016 were vitiated by fraud, and illegality, a fact admitted in writing by the Appellant's previous advocates who are the interested parties herein.

c. Holding that the interested party herein had general instructions to represent the Appellant notwithstanding the admission in writing by the Interested Party herein that the matter was being handled by a fraudulent law firm clerk with the knowledge of the proprietor of the interested party herein.

d. Failing to consider and hold that the consent order of 30th June 2016 was entered without the instructions and approval of the Appellant herein and, as such, the consent order was a fraudulent denial of the Appellant's right to fair trial.

e. Failing to consider the fact that the consent order of 30th June 2016 was entered without the knowledge of the Appellant's and therefore arrived at the wrong decision.

f. Permitting costs and interests to be imposed on the Appellant in the Consent order notwithstanding that costs are not awardable in Consent Judgements.

g. Failing to consider apply and uphold binding decisions of the Annual General Meeting of the Appellant, a cooperative Society, on issues before the Honourable Tribunal and thereby arrived a t a wrong decision.

h. Failing to consider the Legal effect of the consent order was to exempt the Respondent from contributing to losses occurred when he was a member of the Appellant Co-operative in violation of the Principle that members of a cooperative society equally share losses.

i. Finding that the resolution by the Appellant's general meeting on 28th October 2016 was not retrospective because the loss of 42% shareholding had already accrued and the respondent had not been refunded his shares as at the date of the AGM.

j. Failing to uphold binding decisions and documentary evidence;

k. Holding that the Respondent's shares could not be reduced by 42% because the Respondent had filed Tribunal Case no. 764 of 2015.

3. The parties filed written submissions as follows; the appellant submitted that the affidavit by the interested party dated 12/9/2019 indicated that she did not have instruction to handle the matter and proved that the consent order of 30/6/2016 was procured through fraud and illegal as it was enter without legal authority. Further, the law firm clerk is an unqualified person under the provisions of the Advocated Act and as such litigation work conducted by the law firm clerk must be declared illegal.

4. The consent order dated 30/6/2016 exempts the respondent from contributing to losses of a cooperative society in breach of the statutory provision that the member of a cooperative society equally share losses incurred by a cooperative society. Under section 22 of the Cooperative Societies Act (No. 12 of 1997), a member of a cooperative society has a statutory obligation to "observe and comply with all the society bylaws and decisions taken by the relevant organs of the co-operative society."

5. Accordingly, a Consent Order whose effect is to exempt a member of a cooperative society from observing and complying with binding decisions of a co-operative society should be declared illegal. The Annual General Meeting of the Appellant resolved on 28/10/2016 to reduce by 42% the shares of all members of the Co-operative Society as at 31/12/2013. The Respondent was a member of the Appellant as at 31st December, 2013 and, as such, his shares were subject to the 42% loss reduction. Therefore, the Cooperative Tribunal erred by failing to hold that the Respondent's shares were subject to 42% reduction. Further, the consent order was overtaken by events when the Annual General Meeting of the Appellant resolved on 28/10/2016 to reduce by 42% the shares of all members of the Appellant as at 31/12/2013.

6. The appellant submitted that in its Ruling dated 18/9/2018 the Cooperatives Tribunal held that the 42% share reduction resolution did not affect the Consent Order because the resolution was made after this claim had been compromised. However, section 27 of the Cooperative Societies Act stated that the supreme authority of a co-operative society shall be vested in the general meeting at which members shall have the right to attend, participate and vote on all matters. The Annual General Meeting of a co-operative society is therefore the supreme decision-making organ of a cooperative society and its decisions are binding on all members.

7. Finally, the appellant submitted that the Consent Order of 30/6/2016 was entered into before trial at the preliminary stages of the case and, as such, there was a special circumstance which meant that costs and interest should not have been imposed on the Appellant.

8. The interested party submitted that to prove fraud, mistake and illegality, the appellant relied on the Affidavit sworn by Advocate Onsembe on the 12/9/2019. However the Affidavit filed at the Advocates Disciplinary Tribunal and was never part of the proceedings at the Co-operative tribunal. The rules to be followed by a party seeking to introduce new evidence in an Appeal were discussed in Mzee Wanje & 93 Others v A.K Saikwa [1982-88] 1KAR 462, where commenting on Rule 29 of the Rules of this court it was stated:

> " This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak

points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."

9. The interested party argued that having failed to convince the tribunal of any fraud, mistake or impropriety on the part of the Interested Party, the appellant seeks to introduce new evidence in the Appeal without following the requisite guidelines set out under Section 29 of The Court of Appeal Rules 2010. The Appellants have not sought leave to introduce this new evidence to this Honourable Court.

10. The interested party submitted that The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig v Mallya* [1975] EA 266 where Mustafa Ag. VP stated thus;

> "The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed."

11. The interested party contended that the appellant having failed to prove that the consent was fraudulently entered into between the Respondent and the Interested Party's clerk, it is imperative that this Honourable Court uphold it and determine that the Appellants are liable to pay costs as imposed by the consent order and also the costs of this Appeal.

12. This being a first appeal the duty of this court is to re-evaluate the case before the Trial court and to come up with its own conclusion whether to support the findings of the Trial court while bearing in mind that the Trial court had the opportunity to see the witnesses.

13. The issues for determination in this appeal are as follows;

    a. Whether the consent order is binding on the parties or it should be set aside.

    b. Whether the resolution by the Appellant's General Meeting on 28th October 2016 was binding on the Respondent.

14. The law provides that a consent order can only be set aside on the same grounds for setting aside a contract.

15. In the case of *Hirani v Kassam* [1952], 19EACA 131, the Court of Appeal with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 as follows:

> "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...... and cannot

be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court..... or if 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 the Court to set aside an agreement."

16. The Court of Appeal in the case of *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR P. 485 held that:

> " A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.
>
> In the same case the Court further held that:
>
> "An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding".

17. I find that the Cooperative Tribunal was right on it's holding that the advocate had authority to bind the client.

18. It is trite law that a consent order can only be set aside on the same grounds for setting aside a contract and that is if it was entered by mistake or is vitiated by fraud and illegality.

19. In the current case, the Tribunal found that there was no fraud and that on the day the consent was recorded an advocate held brief for Vusha Onsembe and signed on the court record and I find that the Cooperative Tribunal was right on it's holding that the advocate had authority to bind the client.

20. Although the clerk was present, it was not the clerk who signed the record.

21. On the issue as to whether the resolution was binding on the parties, I find that the resolution on the reduction of share value was made after the claim had been compromised. It did not affect the order on record.

22. This appeal lacks in merit and it is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF AUGUST, 2023.

....

A. **N. ONGERI**

JUDGE

In the presence of:

.... for the Appellant

.... for the 1st Respondent

.... for the 2nd Respondent