



**Republic v Mutunga & 3 others; Bandari Investment Company Limited (Interested Party); Munga & another (Exparte Applicants) (Environment and Land Judicial Review Miscellaneous Application 7 of 2017) [2023] KEHC 23785 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23785 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
ENVIRONMENT AND LAND JUDICIAL REVIEW  
MISCELLANEOUS APPLICATION 7 OF 2017**

**OA SEWE, J**

**SEPTEMBER 29, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**HON. E. MUTUNGA, SENIOR RESIDENT MAGISTRATE,  
MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**OFFICER COMMANDING POLICE DIVISION, (OCPD) ..... 3<sup>RD</sup> RESPONDENT**

**OFFICER IN CHARGE, KIEMBENI POLICE STATION ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**BANDARI INVESTMENT COMPANY LIMITED ..... INTERESTED PARTY**

**AND**

**DALU CHIGAMBA MUNGA ..... EXPARTE APPLICANT**

**EPHRAIM KITSAO BAYA ..... EXPARTE APPLICANT**

**RULING**

1. The Notice of Motion dated 7<sup>th</sup> October 2022 was filed herein by the interested party, Bandari Investments Company Limited. It is expressed to be brought under Article 50(2)(g) of the [Constitution of Kenya](#), Section 80 of the [Civil Procedure Act](#), Order 9 Rules 9 and 10, Order 45 and Order 51 Rule 1 of the [Civil Procedure Rules](#), for orders that the Consent Order dated 4<sup>th</sup> May 2020, the resulting



Certificate of Taxation of Costs dated 23<sup>rd</sup> August 2022 and the entire taxation proceedings herein be set aside. The interested party also prayed that the costs of the application be provided for.

2. The application was premised on the grounds that, on 1<sup>st</sup> October 2022, the interested party (hereinafter, the applicant) was put on notice of an impending execution of the Certificate of Costs dated 23<sup>rd</sup> August 2022 in the sum of Kshs. 5,157,840/= by the ex parte applicants (the respondents); and that, upon perusal of the file the applicant discovered that a consent dated 4<sup>th</sup> May 2020 as between the respondents and the applicant's erstwhile Advocate, Mr. George Egunza, was filed in Court on 4<sup>th</sup> June 2020. The applicant further averred that it got to learn that the consent had been adopted by the court and Party and Party Costs taxed at Kshs. 5,157,840/=.
3. Consequently, the applicant filed the instant application and prayed for orders of stay of execution of the Certificate of Taxation as well as the setting aside of the consent order along with all its consequential orders. The application was supported by the affidavit sworn by the Chairman of the applicant company, Mr. Ken Tobias Odeiro Sungu. Attached to that affidavit was a copy of the Notice sent to the applicant by the law firm of M/s S.M. Kimani Advocates dated 1<sup>st</sup> October 2022, notifying the applicant of the imminent execution proceedings. He added that, on perusal of the documents served with the notice, he noted that the applicant was all along represented by the firm of M/s George Egunza & Associates Advocates.
4. Mr. Sungu further deposed, at paragraph 8 of his Supporting Affidavit, that the firm of George Egunza & Associates Advocates has never been on the applicant's panel of legal service providers and therefore had no authority to act for applicant. Thus, the applicant contended that the said firm of Advocates acted without authority in signing the consent letter that compromised the respondent's Party & Party Bill of Costs in the sum of Kshs. 5,157,840/=. The affiant further contended that the consent was entered into without the applicant's prior approval or authority and therefore surmised that the consent is tainted with the elements of fraud, mistake and misrepresentation. It was on that account that the applicant sought for the review of the consent order.
5. At paragraph 22 of the Supporting Affidavit, it was averred that the applicant's right to be legally represented and to be heard on merits before being condemned to pay the respondent's costs was violated by the taxing officer. Mr. Sungu averred therefore that the Court has the power under the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of this dispute and ought to exercise that power by allowing the application as prayed. He concluded his affidavit by stating that the orders sought will result in no prejudice at all to the respondents or the other parties to this suit.
6. In response to the application, the respondents filed a Notice of Preliminary Objection dated 11<sup>th</sup> October 2022, contending that:
  - (a) The application is an abuse of the court process as it is made post-judgment after taxation of Party and Party Bill of Costs by a stranger who has not been properly or regularly appointed to appear as an agent or advocate for any party.
  - (b) A consent judgment recorded herein on Party and Party Bill of Costs under Section 56 of the *Advocates (Remuneration) Order* cannot be set aside by application. A suit or an Objection for the purpose must be brought to prove the alleged want of instructions and/or fraud.
  - (c) The application is an abuse of the court process and does not lie having been brought in an improper forum, and/or outside the time-line of 14 days required by the law.



- (d) An Objection against the initial taxation of Party and Party Bill of Costs at Kshs. 310,490/= by Hon. Kiage was an Objection taken by the respondents; and that this attempt at a second bite of the cherry is belated and an abuse of the court process.
  - (e) The Deputy Registrar, sitting as the taxing officer has jurisdiction to record a consent as to costs under Section 56 of the Advocates Remuneration Order.
  - (f) An advocate appointed to conduct any cause or suit has general instructions to compromise any matter in the cause or suit, including costs.
  - (g) On the merits, the application does not disclose any grounds for the Court to interfere with the taxing officer's discretion to record a consent order on Party and Party Bill of Costs; and therefore there is nothing untoward to warrant the interposition of the Court.
  - (h) While the firm of M/s George Egunza & Associates Advocates was properly appointed to act for the interested party and participated in the proceedings, the current firm of advocates has purported to take over the matter post-judgment without seeking the consent of the erstwhile advocates.
7. In response to the Notice of Preliminary Objection, the applicant filed a Further Affidavit sworn on 25th October 2022 by Mr. Sungu. The purpose thereof was to demonstrate that the current advocates were duly instructed by the applicant to file the instant application; and therefore in proof thereof, the deponent annexed copies of the appointing letter, the resolution passed on 5th October 2022 and the Authority to Act. The applicant also annexed copies of letters written to their erstwhile advocates seeking to know under whose authority the firm was acting, and averred that the said firm declined to acknowledge receipt of the same or respond thereto. Thus, Mr. Sungu reiterated his assertion that the consent dated 4th May 2020 was signed without the knowledge or approval of the applicant or the respondents, and was therefore irregularly entered. He prayed that the same be set aside in the interest of justice.
8. The issue of representation that formed the basis of Grounds 1 and 8 of the respondents' Notice of Preliminary Objection dated 11th October 2022 was resolved on 7th February 2023 when Prayer (2) of the Notice of Motion dated 7th October 2022 was granted. Directions were then given that the application be canvassed by way of written submissions. Accordingly, Ms. Mosiara for the applicant relied on her written submissions dated 28th February 2023 and proposed the following issues for determination:
- (a) Whether or not the Preliminary Objection is in the right form;
  - (b) Whether or not the application is in the right forum and form;
  - (c) Whether any compelling grounds have been given by the interested party to warrant the setting aside of the consent order;
  - (d) Who should bear the costs of the application.
9. Ms. Mosiara submitted that, under Section 67(2) of the *Civil Procedure Act*, no appeal can lie from a decree passed by the court with the consent of the parties; and therefore that the only permissible procedure available to the applicant was review under Order 45 of the *Civil Procedure Rules*. She therefore submitted that the application is properly before the Court as it has nothing to do with the duties of the taxing officer under Section 56 of the Advocates Remuneration Order. Counsel relied on *Flora N. Wasike v Destimo Wamboko* [1988] eKLR to underscore her submission that the application is before the proper forum and the Court has discretion to grant the orders sought.



10. As to whether the Notice of Preliminary Objection raises proper issues for canvassing as such, Ms. Mosiria relied on *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* [1969] EA 696 and Order 51 Rule 14(1) of the *Civil Procedure Rules* and submitted that what was filed by the respondent, namely a Notice of Preliminary Objection and Grounds of Opposition, is a document not recognized under Order 51 Rule 14(1) of the *Civil Procedure Rules* and therefore does not raise issues that ought to be raised by way of preliminary objection.
11. Ms. Mosiria further submitted, on the authority of *Kenya Commercial Bank Limited v Reginauld Ngala* [2020] eKLR that a consent order can be varied or discharged if obtained by fraud or misrepresentation, or by an agreement contrary to public policy of the court, or if the consent was given without sufficient material facts. She also mentioned misapprehension or ignorance of material fact as a plausible reason for setting aside a consent order as well as any other reason which would enable the Court to set aside an agreement. Accordingly, counsel urged the Court to find that the applicant has made out a good case for the setting aside of the impugned consent.
12. Ms. Mosiria also invited the Court to consider the applicant's constitutional right to legal representation by an advocate of its choice as enshrined in Article 50(2)(g) of *the Constitution* and submitted that the firm of M/s George Egunza & Associates Advocates was not their choice as it was not even in its panel of legal service providers as demonstrated by Annexure KTOS-S of the applicant's Further Affidavit. Counsel relied on *Kenya Commercial Bank Limited v Reginauld Ngala* [2020] eKLR for the proposition that an advocate cannot enter into a binding consent if such advocate acted without authority or instructions of the client.
13. Ms. Mosiria also pointed out that, even if the applicant's erstwhile advocates had instructions, the nature of the consent shows that he did not act *bona fide* or in the best interest of the applicants by allowing his client to enter into a consent for such a colossal amount. She relied on *Hirani v Kassam* [1952] 19 EACA 131 and urged the Court to conclude that there was fraud or collusion in this instance; particularly because Mr. Egunza did not attend court on the date of adoption of the consent. Thus, Ms. Mosiria urged the Court to allow the application and grant the orders sought.
14. In his written submissions dated 6th March 2023 and filed on 13th March 2023, counsel for the *ex parte* applicants/respondents, Mr. Kimani, submitted that after the commencement of a suit, an advocate has implied general authority to compromise and settle the action; and therefore that the applicant cannot now argue that the general instructions was limited in any way. He relied on *Kenya Commercial Bank Limited v Specialised Engineering Co. Ltd* [1982] KLR 485,493 to buttress his arguments and pointed out that, it is not the contention of the applicant that the taxing officer heard evidence when he was not required to do so, or that the taxing officer failed to consider the value of the suit land, as directed by the learned judge after the first objection; or even that the advocate was given any negative instructions.
15. Further to the foregoing, Mr. Kimani submitted that the instant application is an abuse of the process of the Court, and should therefore be dismissed with costs. He cited the following reasons for his submission:
  - (a) The recording of a consent under Section 57 of the Advocates (Remuneration) Order is not a taxation and therefore is not amenable to review or setting aside in the same cause.
  - (b) Instead of filing an Objection under Paragraph 11 of the *Advocates (Remuneration) Order*, the applicant has applied for stay of execution and review, which are not provided for under Paragraph 11 of the *Advocates Remuneration Order*; and that in any event the application has



been brought way out of time without leave of the Court and in a form not otherwise provided for in the *Advocates (Remuneration) Order*.

- (c) Even assuming that the *Civil Procedure Act* is of general application to civil proceedings generally, a consent order on costs is not amenable to an appeal or review under Section 80 of the *Civil Procedure Act* or the *Civil Procedure Rules*; and that in any case, the criteria for making an order of review have not been met in this instance.
16. Being aggrieved by that decision, the respondents filed a Reference for purposes of Paragraph 11(2) of the *Advocates Remuneration Order* seeking that the taxation of costs at Kshs. 310,490/= be set aside and that the respondents' Bill of Costs be remitted to a taxing officer other than Hon. Kiage, for re-taxation. The Reference was heard by Hon. Ogola, J. and was allowed on 8th October 2019 in the following terms:
- “The taxation and allowance of costs at Kshs. 310,490/- is set aside and the ex parte applicants' Bill of Costs dated 7.6.2018 is remitted to the Taxing Master, other than Hon. Kiage, for taxation afresh, with directions that the value of the suit land [i.e. Plot 817 (O. No. 324/2) of Section II MN] is Kshs. 178,500,000/- as stated in the instrument of Transfer filed with the application for Judicial Review orders, and referred to in the ruling of 18th October 2017 at paragraph 23.”
17. The court record further shows that the file was placed before Hon. Muchoki, Deputy Registrar, and was consequently fixed for hearing on 4th June 2020, but did not proceed as scheduled; and that on the 18th October 2022, the parties presented a consent letter dated 4th May 2020 which was adopted as the order of the Court by the taxing officer, Hon. Orora, Deputy Registrar. That adoption triggered the instant application.
18. In the premises, and having taken into consideration the written submissions filed by learned counsel, the issues that arise for consideration are:
- (a) Whether the Notice of Preliminary Objection dated 11th October 2022 raises points of law worth considering in limine;
- (b) Whether a plausible case has been made out by the applicant for the review and setting aside of the consent dated 4th May 2020 and entered on 18th August 2022.

#### **A. On the Preliminary Objection dated 11th October 2022:**

18. In *Mukisa Biscuit Company v West End Distributors Limited* (supra), it was held that a preliminary objection consists of:

“...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”



19. Hence, a preliminary objection properly so called must be on a pure point of law and not blurred with factual details that require testing by way of evidence. In *Oraro v Mbaja* [2005] eKLR, the point was underscored thus:
- “...As already remarked, anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”
20. Similarly, in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others\** [2015] eKLR the Supreme Court emphasized the point that:
- ...a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record...”
21. With the foregoing in mind, I have perused and considered the grounds set out in the Notice of Preliminary Objection filed herein by the respondents’ counsel, and as has been pointed out hereinabove, Grounds 1 and 8 have been overtaken by events. Grounds 3 to 7 are, in effect plain grounds of opposition that raise no issues capable of disposing of the application in limine. Nevertheless, the prayer for the dismissal of the Preliminary Objection as urged by Ms. Moriasi is unwarranted, granted the provisions of Order 51 Rule 14 of the *Civil Procedure Rules*, which stipulates that:
- (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents –
- (a) a notice preliminary objection: and/or;
- (b) replying affidavit; and/or
- (c) a statement of grounds of opposition;
22. In the premises, the grounds set out under the rubric of Preliminary Objection remain valid as a response to the application and I propose to consider them as such.

**B. On the merits of the application for review and/or setting aside of the impugned consent order:**

23. The applicant’s basic contention is that it did not instruct the firm of M/s George Egunza & Associates Advocates to represent it in the matter and endeavoured to support this assertion by producing a document to demonstrate that the said firm not in their panel of legal service providers. I note however that the said letter was written to Ms. Mosiara and is dated 5th October 2022. It was therefore written shortly before the instant application was filed. It is however significant that the Judicial Review matter was filed in 2017; and right from inception, the firm of M/s George Egunza & Associates has been on record for the applicant without any objection from the applicant. Those circumstances only go to show that the said firm had instructions to so act.
24. The real issue, as I see it, is the assertion that Mr. Egunza did not have the authority of the applicant to enter into a consent to the tune of Kshs. 5, 157,840.00/= in respect of the respondents’ Party and Party Bill of Costs; and therefore whether sufficient cause has been shown to warrant the review and setting aside of the consent order.



25. Whereas under Paragraph 57 of the *Advocates (Remuneration) Order*, a taxing officer has the jurisdiction to record a consent on costs, that power is only available before the filing of a Bill of Costs for Taxation.

The provision is quoted here below for its full tenor and effect. It states:

“If, after the disposal of any proceedings by the Court, the parties thereto agree on the amount of costs to be paid in pursuance of the Court’s order or judgment therein, the parties may in lieu of filing a bill of costs and proceeding to taxation thereof, request the registrar by joint letter to record their agreement and unless he considers the amount agreed upon to be exorbitant the registrar shall do so upon payment of the same court fee as is payable on the filing of any document for which no special fee is prescribed.

Such agreement where recorded shall have the same force and effect as a certificate of taxation by the taxing officer;

Provided that if the taxing officer shall consider the amount so agreed upon to be exorbitant he may direct the said costs to be taxed in accordance with this Order and the provisions of rule 11 shall apply in regard to every such taxation.”

26. In this instance, the parties opted for taxation and a Bill of Costs was duly filed in that regard. Moreover, the outcome was contested and an appeal preferred therefrom by way of Reference. Needless to add that the Reference was successful and a re-taxation ordered. Instead of re-taxation, a consent was filed which the applicant has impugned. In those circumstances the proper course to take, which is what the applicant took, is to seek the setting aside of the consent by way of review, particularly in the light of the grounds relied on by the applicant. Another Objection by way of Reference, as proposed by Mr. Kimani, would be inappropriate, seeing as no re-taxation took place. Moreover, Section 67 (2) of the *Civil Procedure Act*, is explicit that:

(2) No appeal shall lie from a decree passed by the court with the consent of parties.

27. The above provision applies likewise to orders. In the circumstances the application is competently before the Court for determination.

28. The review jurisdiction is reposed in Section 80 of the *Civil Procedure Act*, which states as follows:

Any person who considers himself aggrieved

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

30. The procedural imperatives for the above provision are to be found in Order 45 Rule 1 of the *Civil Procedure Rules*, wherein it is provided that:

(1) any person considering himself aggrieved-



- (a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or
  - (b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
31. Ordinarily therefore, a review is called for whenever there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced at that time when the order sought to be reviewed was made; or there is some mistake or error apparent on the face of the record; or there is any other sufficient reason to justify the application. In the case of a consent order however, the position was well explicated in *Flora Wasike v Destimo Wamboko* [1988] 1 KAR 625, thus:
- “It is now settled law that a consent judgment or order has a 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.”
32. Similarly, in the case of *James Muchori Maina v Kenya Power & Lighting Company Ltd* [2005] eKLR it was held:
- “A consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of *Kenya Commercial Bank Ltd v Benjob Amalgamated Ltd.* – Nairobi Civil Appeal No. 276 of 1997, wherein the Court of Appeal applied the reasoning in the case of *Flora Wasike v Destimo Wamboke* [1988] 1 KAR 625 at page 626 where Hancox JA (as he then was) stated-
- 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”.
33. In the instant matter, the consent letter was written and signed by the firm of M/s Stephen Macharia Kimani Advocates as well as the firm of M/s George Egunza & Associates Advocates. In the absence of proof that the applicant expressly instructed Mr. Egunza not to enter into any such consent, the consent letter is itself valid and proper for all intents and purposes. This is because the applicant's advocate had the ostensible authority to enter in consents on its behalf. This is the essence of the decision in *Kenya Commercial Bank Ltd. v Specialised Engineering Company Ltd.*, (supra) in which it was held:
- 1. 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 collusion or by an agreement contrary to 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.

2. 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.
  3. 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.
  4. The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes he would not have given his consent had he known these facts.
  5. The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.”
34. It is noteworthy however that the taxing master adopted the consent on the 18th August 2022 in the presence of Mr. Kimani, instructed by M/s Stephen Macharia Kimani Advocates, in the absence of Mr. Egunza or his representative. In the circumstances, although an Affidavit of Service had been exhibited which showed that the latter firm was served with a mention notice and was therefore aware of the date, the question remains as to whether a consent order can be adopted in the absence of one party or their counsel.
35. In *Brooke Bond Liebig (T) Ltd vs Mallya* [1975] EA 266 in which a passage from Seton on Judgments and Orders, 7th Edition, Vol. 1 p. 124 was quoted with approval, it was held that the presence of counsel is imperative. The Court observed that:
- “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 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.”
36. Similarly, in *Wema Foundation Trust Company Limited v County Government of Nairobi City & Another* [2022] eKLR, it was held:
- “...It is trite law that the parties who would want to have the court to adopt a consent judgment must be present in court on the day when the document is presented for adoption and confirm the same to be the one they both signed and agreed on...”
37. The rationale for such attendance is of course so that the court can avoid scenarios such as this, where a party claims that they were not aware of consent. In the circumstances, I am satisfied that the omission by the taxing master of not ensuring that all parties were present to confirm the consent is fatal and amounts to sufficient cause for setting aside the consent dated 4th May



2020 and entered on 18th August 2022. Accordingly, the Notice of Motion dated 7th October 2022 is hereby allowed and orders granted as hereunder:

(a) That the Consent Order dated 18<sup>th</sup> August 2022 and the resulting Certificate of Taxation of Costs dated 23<sup>rd</sup> August 2022 be and is hereby set aside.

(b) Each party to bear own costs of the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF  
SEPTEMBER 2023**

**OLGA SEWE**

**JUDGE**

