



REPUBLIC OF KENYA



**Getanda & another v Ayienda & another (Civil Appeal E080 of 2021)
[2023] KEHC 25667 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E080 OF 2021
WA OKWANY, J
NOVEMBER 23, 2023**

BETWEEN

VIVIAN GETANDA 1ST APPELLANT

JOSHUA OMBATI RATEMO 2ND APPELLANT

AND

CATHERINE KERUBO AYIENDA 1ST RESPONDENT

M/S OMWOYO AUCTIONEERS 2ND RESPONDENT

(Being an Appeal against the Ruling of Hon. B. M. Kimtai – PM Keroka dated and delivered on the 21st day of September 2021 in the original Keroka PMC CC No. 4 of 2018)

JUDGMENT

Introduction

1. The Appellants herein, were the Defendants where the 1st Respondent sued them for damages arising out of a road traffic accident.
2. Judgment was delivered before the Lower Court in favour of the 1st Respondent who thereafter took out warrants of attachment and proclamation. The 1st Respondent instructed M/s Omwoyo Auctioneers to attach the Appellants' movable property so as to recover the decretal sum of Kshs. 91,050/=.
3. The Appellants' case was that they paid the full decretal sum together with the agreed Auctioneers costs but that, through a consent dated 17th September 2020 executed solely by the Auctioneers, under unclear circumstances, the Auctioneers' fees was set at Kshs. 32,900/=. They contended that the attachment and storage charges were tabulated at Kshs. 59,400/= with respect to this matter and three other related cases as only one vehicle was attached and stored by the Auctioneers. They further



contended that would be unjust and irregular to levy the same storage charges 4 times over with regard to the same vehicle.

4. The Appellants argued that the consent dated 17th September 2020 was irregularly adopted ex-parte in their absence.

The Application

5. The Appellants filed the application dated 24th February 2021 seeking orders as follows: -
 1. Spent
 2. That this honourable court be pleased to grant leave to the Applicants to have M/S Omwoyo Auctioneers be enjoined as an interested party for purposes of this Application.
 3. That this honourable court be pleased to grant an order of stay of execution of the order dated the 18th January, 2021 pending the hearing and determination of this application inter parties.
 4. That the consent judgment dated 17th September 2020 for Kshs. 32,900/= be set aside and all consequential orders arising therefrom.
 5. That this honourable court be pleased to place aside the order dated the 18th January, 2021.
 6. That the Defendants'/Applicants' movable properties namely Motor Vehicle Reg. Number [particulars withheld] be released forthwith.
 7. That the costs of this Application be provided for.
6. The 1st Auctioneer opposed the application through the Replying Affidavit dated 16th March 2021. In a ruling delivered on 21st September 2021, the Lower Court dismissed the Appellants' said application thereby precipitating the filing of the instant appeal.

Appeal

7. The Appellants listed the following grounds of appeal: -
 1. The Learned Magistrate erred in fact and in law in dismissing the appellant's application on 24th February, 2021 seeking to set aside the consent dated 17th September, 2020 for Kenya Shillings Thirty-Two Thousand Nine Hundred (32,900/=).
 2. The Learned Magistrate erred in fact and in law by finding that the amount of Kenya Shillings Thirty Two Thousand Nine Hundred (32,900/=) was owing to the 2nd Respondent despite the fact that the Applicants had already paid the auctioneers Kenya Shillings Thirty Thousand (30,000/=) and Kenya Shillings Fifty Nine Thousand Four Hundred (59,400/=) being the proclamation fees, attachment fees and storage fees in respect to the Motor vehicle registration number [particulars withheld].
 3. The Learned Magistrate erred in fact and law in declining to set aside the consent dated 17th September, 2021 despite the fact that the same had not been properly executed by the appellants herein and/or adopted as an order of the honourable court thus making it illegal and/or irregular.
 4. The Learned trial Magistrate erred in law and in fact by finding that it's the parties to the consent who could set aside and/or vary the contents of the same despite the fact that the



Appellant had provided overwhelming evidence to the effect that the same was irregular and/or illegal.

5. The Learned trial Magistrate erred in law and fact in failing to attach due weight to the appellant's evidence and submissions and authorities attached to.
8. The appeal was canvassed by way of written submissions.

The Appellants' Submissions

9. The Appellants' submitted that they did not execute the consent dated 17th September 2021 and that the said consent was a forgery that was irregularly adopted ex-parte in their absence. They argued that since they had already paid the full decretal sum and costs, they were entitled to an order for the release of the attached motor vehicle. For this argument, the Appellants cited the decision in *Aircab Travel Services Ltd & Another v Olisa Allne Aliyo* [2020] eKLR where the court ordered for the release of an attached motor vehicle upon payment of the decretal sum.

The 2nd Respondent's Submissions

10. The Auctioneer, on the other hand, faulted the Appellants for the unexplained five months' delay in filing the application seeking to set aside the consent recorded on 17th September 2020. For this argument, reference was made to the decision in *In Re Estate of Nazir Khan Mobamad* (Succession Cause No. 2 of 2019) [2022] KEHC 14929 (KLR) where the court discussed the import of delay on a party seeking the exercise of the court's discretion.
11. It was submitted that a party cannot record a consent, benefit from it, and later seek to backtrack on the consent arguing illegality. Reference was made to the case of *Samuel Ayienda Mokuva v Tinga Trading Co. Ltd* [2014] eKLR where it was held: -

“... Mr. B. K. Gichana, the learned counsel for the respondent, in opposing the appeal, submitted that the appellant was a vexatious litigant who had mounted a multiplicity of applications in various courts. Counsel further urged that the judgment entered on the counter-claim was a regular judgment which had been executed and the appellant's parcel of land had been sold. He further argued that the appellant had benefited from the consent order and can't disown it.

We have considered the record and memorandum of appeal, submissions made and the law.

In the course of the Ruling appealed from the learned Judge stated: -

“As a result of the consent orders, the applicant was released from prison. He also vacated the suit premises but did not fully comply with clause 3 regarding payment of the outstanding debt. Several years after the said consent was entered into and acted upon, the applicant now wants it set aside because his advocate did not have a practicing certificate for the year 2001. The default clause in the consent order has also been operationalized.

I think it will be inequitable for this court to do that. I ask myself, why didn't the applicant or whoever acted on his behalf in instructing Mr. Maari not bother to find out whether he had a practicing certificate at that time?

If the applicant had complied with clause 3 of the said consent, this matter would not be in court any more. It is his own default that has raised all these issues. The applicant, having benefited from the impugned consent orders, cannot now



be allowed to turn around and argue that his own appointed counsel had no capacity to record the consent. I am of the view that there are instances in which the interests of justice are better served by asking a litigant to pursue his or her own advocate for his own negligence or misconduct rather than re-opening proceedings unnecessarily and this is one of them. See *Municipal Council of Thika & Another v Local Government Workers Union* (thika Branch) Civil Application No. Nai. 4 of 2001...”

We totally agree with the learned Judge. The appellant, who had been committed to civil jail for inability to pay a civil debt, was released from prison after a consent order was recorded where he was released on condition that certain conditions be met. The appellant was therefore a beneficiary of the consent order but upon being released from civil jail he instead of meeting his part of the bargain mounted a multiplicity of applications that have run a good 13 years culminating in this appeal. The learned Judge was right to hold that there are instances in which the interests of justice are better served by asking a litigant to pursue their advocate for negligence or misconduct rather than re-opening proceedings. Once consent order was recorded it became a binding contract between the appellant and the respondent and the interests of justice cannot be served by re-opening the matter. The appellant had the option, if he deemed it necessary, to pursue the lawyer who allegedly acted without authority although, again, the lawyer’s action had a direct benefit to the appellant who was released from civil jail after the consent order was recorded.”

12. The Auctioneer argued that the Appellants’ application before the trial court did not meet the threshold set for the granting of an order for review. It was submitted that this court lacks the jurisdiction to hear and determine the appeal on the basis that the Appellant did not obtain leave to file the appeal as required under Section 75(1) of the [Civil Procedure Act](#) and Order 43 Rules 2 and 3 of the [Civil Procedure Rules](#).

The Duty of the Court

13. The duty of the first appellate court was stated in *Peters v Sunday Post Ltd* [1958] EA 424, where the Court held as follows: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”

Analysis and Determination

14. I have considered the Record of Appeal and the parties’ respective submissions. The main issues for determination are firstly; whether this court has the jurisdiction to hear the appeal and secondly, whether the appeal is merited.

Jurisdiction

15. The Respondent/Auctioneer argued that this Court lacks the jurisdiction to hear and determine the appeal on the basis that it was filed without the leave of the court yet the appeal did not lie as of right as stated under Section 75 (1) of the [Civil Procedure Act](#).



16. A perusal of the record reveals that the issue of this court's jurisdiction to entertain the appeal is spent as it was earlier raised as a preliminary point before Kamau J. who handled the application dated 21st October 2021 for stay the execution of the Lower Court's orders. In a ruling delivered on 30th May 2022, the Learned Judge (Kamau J.) held as follows on jurisdiction: -

“26. After carefully analyzing the parties' respective submissions, this court agreed with the Appellants that the auctioneer's costs they were referring were not determined either by the Learned Trial Magistrate or the Auctioneers Board contemplated in Rule 55 of the *Auctioneers Rules* 1997. Rather, the same were pursuant to a consent that was recorded by parties to the suit in the lower court. The provisions of Rule 55(5) of the *Auctioneers Rules* on the time within which an appeal ought to have been preferred were therefore not applicable.

27. The question of whether an appeal lay as of right from the said Ruling was a different question altogether. Order 43 (1)(n) of the *Civil Procedure Rules* provides that :-

“An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act Order 25, rule 5 (compromise of a suit);”

28. Order 25 Rule 5 (1) of the *Civil Procedure Rules* states that:-

“Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith (emphasis court).”

29. It did therefore appear to this court that a party aggrieved by such entry or recording of agreement, compromise or satisfaction as a judgment could appeal as of right from such decision.

30. In the understanding of this court, the basis of the Appeal herein was to determine whether or not the Learned Trial Magistrate erred in having determined that consent judgment was validly recorded. The court did not therefore analyse the parties' Written Submissions on the validity or otherwise of the said consent judgment as that would be pre-empting the decision of the Appeal which could otherwise embarrass another court that might hear and determine the Appeal herein and come up with a different decision from this court on that issue.

31. As the decision the Appellants wished to appeal against was delivered on 21st September 2021 and the Memorandum of Appeal herein was filed on 15th October 2021, the Appeal herein was properly before this court for hearing



and determination having been filed within thirty (30) days as provided in Section 79G of the *Civil Procedure Rules* that stipulates that:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time when the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”

17. Having found that the issue of jurisdiction had already been determined, I find that this Court will not revisit the issue as doing so will be tantamount to sitting on appeal on the decision of a court of concurrent jurisdiction.
18. Turning to the merits of the appeal, I note that the gist of the appeal is whether the trial court arrived at the right decision in dismissing the application dated 24th February 2021.
19. The trial court rendered itself as follows when dismissing the said application: -

“I have perused the application before court. I wish to state as follows that before court is a small issue that I will not proceed and write here. I wish to point out that the parties entered a consent on 17/09/2020 where the auctioneers’ bill of cost was agreed at shs. 32,900/= and 14 days stay was also agreed on. I note that since the parties entered a consent, it’s the same parties to either review or vary the terms of the consent and not the court. I therefore will rule that the auctioneers’ bill of costs has not been settled and therefore the auctioneer is free to note to court and have his fees paid. I find the Application is not merited and I will dismiss it with costs to the Respondent ... ”
20. The contention in this Appeal is that the impugned consent of 17th September 2020 was not executed by the Appellants herein and was therefore not founded on a mutual agreement of the parties. The Appellants submitted that the consent was adopted, as an order of the court, in their absence. The question that arises is whether the ex-parte orders were valid and legal.
21. In the English case of *Ridge v Baldinn* {1964} AC 40 (1963) 2 ALL ER 66, it was held thus: -

“The principle of fairness has an important place in the administration of justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and quash the decisions of a tribunal or subordinate court made in violations of right to a fair hearing and due process.”
22. I have carefully perused the Record of Appeal and noted that there were no proceedings in respect of the adoption of the impugned consent. I am therefore unable to verify whether the said consent was adopted ex parte in court as alleged by the Appellants. This means that the consent was either not regularly adopted by the court and/or Appellants were not heard during the said adoption.
23. I also note that the Record of Appeal contains a letter dated 14th January 2021 wherein Counsel for the Appellants notified the auctioneers, and the court, of their intention to withdraw the subject consent. The record also shows that the court adopted the impugned consent on 18th January 2021 4 days after the 2nd Respondent had received the letter in which the Appellants had expressed their wish to withdraw from the consent.



24. It is trite that a consent can only become an order of the court once it is adopted. This is the position that was adopted in the case of *Edward Acholla vs Sogea Satom Kenya Branch & 2 others* [2014] eKLR where the court held that: -

“Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out.”

25. From the above narration of the sequence of events preceding the adoption of the impugned consent, it is evident that the Appellants did not agree to the settlement of the auctioneers’ bill of costs at 32,900/= . Furthermore, the fact that there are no proceedings to confirm the manner in which the trial court adopted the impugned consent lends credence to the Appellants’ assertions that the consent was not regularly adopted by the court.

26. I find that the auctioneers did not act in good faith when they proceeded to have the impugned consent adopted as a court order when they were fully aware that the Appellants had already withdrawn from it. It did not also escape the attention of this court that it took the auctioneer more than 4 months, from the time the consent was signed, before he could file it in court. I find that, in the circumstances of this case, it cannot be said that there was a proper consent to be adopted by the court.

27. The next issue for determination is whether this Court can interfere with the trial court’s order arising from the impugned consent. The principles applicable in this case were stated in *KCB Limited v Specialized Engineering Co. Ltd* {1982} KLR 485 where Harris J. held:-

“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 in misapprehension or ignorance of suit facts in general for a reason which would enable the court to set aside an agreement.”(See also *Flora Wasike v Destimo Wamboko* [1982-1988] 1 KAR 625)

28. In the instant case, I have already found that the 2nd Respondent proceeded to file the consent letter 4 days after the Appellants had informed him, and the court, in writing, that they no longer wished to be party to the said consent. It is therefore clear that the 2nd Respondent misrepresented facts before the trial court thus resulting in the adoption of a consent letter that was no longer inclusive owing to the withdrawal by one party. For this reason, I find that the consent was not valid and the subsequent court order improper and illegal.

29. Turning to the issue of whether the Appellants had fully settled the auctioneer’s fees, it was the Appellants’ case that the parties had initially agreed upon a fee of Kshs. 30,000/= for each file. The Appellants averred that the auctioneer’s costs with respect to attachment and storage charges was tabulated at Kshs. 59,400/= for all the four (4) related files. They contended that since the auctioneers had only attached one motor vehicle and stored it once for the duration of the suit in order to recover the decretal costs for 4 related matters, it was irregular and incorrect for them to levy their charges 4 times.

30. On his part, the 2nd Respondent averred that the Appellants paid Kshs 30,000/= for proclamation charges vide consent date 6th August 2020 and that the attachment and storage charges of Kshs. 32,900/= was agreed upon as a compromise on the auctioneers’ costs vide consent dated 17th September 2020. It was their case that the Appellants paid Kshs. 59,400/= which comprised the storage and attachment



charges at 32,900/= and party to party costs for only one file being PMCC No. 4 of 2018. The auctioneer argued that the Appellants breached the terms of the impugned consent after they had already benefited from it. They also averred that the execution was pursuant to 3 separate warrants and that auction process was individual and separate for each file thus necessitating the separate consents addressing execution in each file.

31. I have considered the rival arguments over the auctioneer's fees and I find that the 2nd Respondents herein only attached one motor vehicle in respect to the judgment in question. The record shows that the motor vehicle was advertised for sale by public auction to recover the decretal sum in respect of the 3 cases. I find that it is logical to conclude that the vehicle was attached and stored once to recover the decretal sum in the 4 related cases. In this regard, it was not possible to attach and store one vehicle severally in respect of three files so as to justify 3 separate payments as indicated in the impugned consent order that I have already found to have been irregularly adopted. I further find that the auctioneers demand to be paid 3 times for a single attachment is unconscionable.
32. It is therefore my finding that the amount of Kshs. 59,400/= paid by the Appellants in respect of storage and attachment charges was sufficient for the three files. It is my view that it will be unjust for the auctioneer to attach one vehicle and put out one joint advertisement in respect of the 3 files to save on costs and then proceed to court to make demands for payment of each file individually. While justice requires that the auctioneer be paid for the services rendered, the motor vehicle was in this case attached, stored and advertised only once. It is therefore not proper that each file is considered individually for purposes of computing attachment and storage costs. In any case, I have already found that the impugned consent of 17th September 2020 was unenforceable. I therefore find that the auctioneer cannot demand to be paid the disputed amount for each file.
33. In conclusion, I find that this appeal is merited and I therefore allow it. Having found that the 2nd Respondent was duly paid for his services, I order that motor vehicle registration No. [particulars withheld] be released forthwith from his custody to the Appellants.
34. It is so ordered.
35. This appeal is marked as closed.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 23RD DAY OF NOVEMBER 2023.

W. A. OKWANY

JUDGE

