



REPUBLIC OF KENYA



KENYA LAW
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**Pondor (Suing for and on behalf of The International Air Transport Association (IATA)
& another v Discount Tours & Travel Limited & 2 others (Civil Suit 283 of 2009)
[2023] KEHC 26189 (KLR) (Commercial and Tax) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26189 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 283 OF 2009
JWW MONG'ARE, J
NOVEMBER 23, 2023

BETWEEN

**MOHAMMED HASSIM PONDOR (SUING FOR AND ON BEHALF OF THE
INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA) ... 1ST PLAINTIFF**
**MERCANTILE INSURANCE COMPANY LIMITED (FORMERLY
MERCANTILE LIFE & GENERAL ASSURANCE COMPANY
LTD) 2ND PLAINTIFF**

AND

DISCOUNT TOURS & TRAVEL LIMITED 1ST DEFENDANT
JOEL MUTHUNGA WANYOIKE 2ND DEFENDANT
IRENE WANYOIKE 3RD DEFENDANT

RULING

1. The 1st defendant has moved this honourable court by a notice of motion dated 3rd August 2022, brought under order 51 rule 1; order 36 rule 10 of the [Civil Procedure Rules](#), sections 1A, 1B & 3A of the [Civil Procedure Act](#), seeking the following orders:-
 1. Spent
 2. Spent
 3. That the Consent dated July 5, 2011, be set aside in regard to the 2nd and 3rd Defendants who were not represented in this suit.



4. That the Summary Judgment issued against the 2nd and 3rd Defendants herein dated May 12, 2011 be set aside.
 5. That the Notice to Show Cause issued to the 2nd and 3rd Defendants, and dated 23rd April 2013 and scheduled for hearing on August 17, 2022 be set aside.
 6. That the Bill of Costs dated August 24, 2011, in respect to the 2nd and 3rd Defendants be set aside.
 7. That costs of this Application be provided for in the cause.
2. The application was supported by the grounds set on its face and the supporting affidavit of Samuel Patrick Kibuchi an advocate of the High Court of Kenya practicing as such in the firm of Kibuchi & Company Advocates. Mr. Kibuchi deposed that through Memorandum of Appearance dated 11th May 2009, the firm entered appearance on behalf of the 1st 2nd and 3rd Defendants with instructions from the 1st Defendant.
 3. He argued that the inclusion of the 2nd and 3rd Defendants, (the 1st Defendant's directors prior to the institution of this suit) in the memorandum of appearance was an error as there were no express instructions from the 2nd and 3rd Defendants. Although the plaint was marked for service on the 2nd and 3rd Defendants, the summons to enter appearance dated 28th April 2009 was marked for service on the 1st Defendant. Therefore, there is a strong presumption that they did not enter appearance and were not represented in the matter. Hence, it is in the interest of justice for the Court to set aside the consent, summary judgment, bill of costs, and notice to show cause as against them to allow them to defend their case. He contended that the Plaintiffs will not suffer any prejudice by setting aside these orders since the consent for debt payment was against the 1st Defendant only, and only the 1st Defendant has been settling the decretal amount.
 4. Pursuant to leave of Court granted on 23rd September 2022, the 2nd and 3rd Defendants filed an affidavit sworn on 24th October 2022 by Irene Njeri Wanyoike, the 2nd Defendant, with the 1st Defendant's authority. She deposed that she learnt about this matter on 14th July 2022, when she received a letter from the Plaintiffs' advocates dated 14th July 2022 and the notice to show cause scheduled for hearing on 25th July 2022, through WhatsApp; that the application for summary judgment was based on outdated company records, the list of directors dated 20th August 1999; that their representation by M/s Kibuchi & Company Advocates was by error and/ or honest mistake of counsel; that they were not served with the summons; that during the alleged breach they had resigned as directors of the 1st Defendant and withdrawn the deeds of guarantee and indemnity that had been issued through Commercial Bank of Africa in relation to any liabilities of the Company and the same were replaced by and on behalf of the current directors Mercy Kirika and Daniel Muthui, hence all liabilities accrued to them; and that for these reasons, the summary judgment and all consequential orders ought to be set aside to enable them to present their defence.
 5. In response, the 1st and 2nd Plaintiffs filed grounds of opposition dated 31st August 2022, on the grounds that:-
 1. That the Applicant's Application lacks merit, is an after thought, vexatious, frivolous and an abuse of the Court Process.
 2. That the Applicant's Application is unmeritorious and is a ploy to defeat the Plaintiffs from benefitting from the fruits of the lawful Judgement.
 3. That the Applicant is guilty of inordinate delay and laches.



4. That Applicant's Application is only aimed at buying more time and delaying the already concluded matter.
6. The Plaintiffs also put in a replying affidavit sworn on the same date by Sarah Weru, the 2nd Plaintiff's company secretary. She deposed that the 3rd Defendant's affidavit was made in bad faith; that the 2nd and 3rd Defendants never informed the Plaintiffs of their resignation as directors and their resignation cannot obviate them from indemnifying the Plaintiff from the present claim; that there is a ploy by the Defendants and the firm of Kibuchi & Company Advocates to deny the Plaintiffs the fruits of its judgment due to the delay and purported inability to call the person who gave instructions on behalf of the 2nd and 3rd Defendants; that the Court ought not to consider the annexure INW3A as it is purported to be written to Guram & Company Advocates from E. Muigai & Company Advocates but does not bear its letterhead and annexure INW3B purported to be addressed to the 2nd Plaintiff yet there is no proof that it was delivered and received by the 2nd Plaintiff; that the Plaintiffs stand to suffer great injustice if the Court allows the motion.
7. The application was canvassed by way of written submissions. The 1st Defendant filed written submissions dated 18th January 2023. The 1st Defendant relied on the case of *Michéal Mowesley v Kazungu Sana; Abdulrehman Mohamed Basbeikh & 2 others (Interested Parties)* [2022] eKLR for the proposition that a material non-disclosure of fact that leads to an honest mistake and belief as to the state of affairs of something can be used as a basis for setting aside a Consent if the non-disclosure causes a misunderstanding as pronounced by the Court.
8. The 2nd and 3rd Defendants filed written submissions dated 24th January 2023. The Plaintiffs filed written submissions dated 24th May 2023.

Analysis and Determination

9. I have considered the pleadings filed by the parties in this matter and their written submissions and bundle of authorities provided. From my analysis of the said documents, the issue that emerges for determination is whether the consent should be set aside for mistake or insufficient material facts.
10. The principles for setting aside consent were laid out in the Court of Appeal decision in the decision in the case of *M & E. Consulting Engineers Limited v Lake Basin Development Authority & Another* (Civil Appeal No. 263 of 2009) [2015] eKLR, as follows:-

“19. We re-affirm the dicta in the High Court case of Kenya Commercial Bank Ltd. - v-Specialised Engineering Company Ltd., 1982 KLR 485 as was upheld by this Court in Civil Appeal No. 43 of 1980 thereof where it was stated as follows:-

- “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.”

19. In *Intercountry Importers and Exporters Limited vs. Teleposta Pension Scheme Registered Trustees & 5 others* (Civil Application No. Nai. 203 of 2016) [2019] eKLR, cited by the Plaintiffs, the Court highlighted that a consent may be set aside due to material non-disclosure or mistake:-

“Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside.”

19. In this matter, the record shows that on 12th May 2011, the Court entered a consent judgment in favour of the plaintiffs as prayed in the plaint filed on 24th April 2009 and directed that the Defendants do file an application proposing an appropriate mode of payment within 30 days. On 5th July 2011, the parties in this suit entered into a consent by which the defendants were granted an extension of the time to file an application for payment of the decretal amount by a further 28 days. Upon default, the Plaintiff would be at liberty to execute for the decretal amount less any payments already made.
20. The consent was signed by the parties’ respective advocates. Mr. Kibuchi stated that although he obtained instructions from the directors of the 1st Defendant at the time, Daniel Muthui and Mercy Kirika, he did not receive explicit instructions from the 2nd and 3rd Defendants. He stated that he was misled to believe that they had the authority of the other directors, the 2nd and 3rd Defendants, to issue the instructions and based on this the firm of Kibuchi & Company Advocates entered appearance for the 1st, 2nd and 3rd Defendants. He further attributed the mistake to the omission of the 2nd and 3rd Defendants from the summons to enter appearance.
21. Looking at the record, the 2nd and 3rd Defendants were directors in the 1st Defendant from 1st July 1999 to 28th February 2005. Therefore, they were not directors at the time when the firm of Kibuchi & Company Advocates was instructed and acted on their behalf. The summons to enter appearance dated 28th April 2009 was marked for service only on the 1st Defendant. There is no evidence from the Plaintiffs that the 2nd and 3rd Defendants were served with the summons. Therefore, there is no certainty that the 2nd and 3rd defendants were aware of the suit before 14th July 2022, when the 3rd



Sefendant received a letter from the Plaintiffs' advocates dated 14th July 2022 and the Notice to Show Cause scheduled for hearing on 25th July 2022, through WhatsApp.

22. This leads me to conclude that the firm of Kibuchi & Company Advocates was not properly on record for the 2nd and 3rd Defendants at the time when it entered into the consents on their behalf. Since they did not have their instructions, the firm did not have authority to act on their behalf.
23. From the foregoing, I am persuaded that the firm of Kibuchi & Company Advocates entered appearance and acted on behalf of the 2nd and 3rd Defendants by mistake or in ignorance of material facts. Therefore, I find that the circumstances of this matter satisfy the conditions for setting aside the consent with respect to the 2nd and 3rd Defendants.
24. I am therefore inclined to allow the 1st Defendant's application dated 3rd August 2022, on the following terms:-
 1. That the Summary Judgment by Consent dated 12th May 2011 and the Consent dated 5th July 2011 be and is hereby set aside as against the 2nd and 3rd Defendants.
 2. That the Notice to Show Cause, dated 23rd April 2013, issued to the 2nd and 3rd Defendants, scheduled for hearing on 17th August 2022 be and is hereby set aside.
 3. That the Bill of Costs dated 24th August 2011 be and is hereby set aside as against the 2nd and 3rd Defendants
 4. That costs of this Application be provided for in the cause.
5. Parties shall proceed to take directions on the expeditious disposal of the suit as against the 2nd and 3rd Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF NOVEMBER 2023

.....

J. W. W. MONG'ARE

JUDGE

In the Presence of:-

PARA 1. Mr. Isolio holding brief for Mrs. Tindi for the Plaintiffs.

PARA 2. Mr. Mburu for the 2nd and 3rd Defendants.

PARA 3. Amos - Court Assistant

