



**Moorgate Investments Limited v Romsard Limited & 3 others; Chief Land Registrar & 3 others
(Interested Parties) (Civil Case 67 of 2016) [2023] KEELC 17877 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17877 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL CASE 67 OF 2016
EK MAKORI, J
MAY 31, 2023**

BETWEEN

MOORGATE INVESTMENTS LIMITED PLAINTIFF

AND

ROMSARD LIMITED 1ST DEFENDANT

BENTER CAROLYNE OTIENO 2ND DEFENDANT

IBRAHIM ABDI ATHMAN 3RD DEFENDANT

4. MARGARET NYACHAE KAPTUIYA CHEBOIWO 4TH DEFENDANT

AND

THE CHIEF LAND REGISTRAR INTERESTED PARTY

THE REGISTRAR OF COAST LAND TITLES INTERESTED PARTY

THE REGISTRAR OF COMPANIES INTERESTED PARTY

THE ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The notice of motion dated August 17, 2022 seeks to have the consent orders dated September 15, 2016 be set aside. The application is opposed.
2. The court directed parties to canvass the application by way of written submissions.
3. The applicant's contended that the consent as entered by the parties was not in accord with the instructions given to the applicant's erstwhile lawyer, Anjarwalla & Khana Advocates and that the consent was entered by the said lawyer through misrepresentation of facts, fraudulently and by a collision between the applicant's former advocate and the defendant's advocate.



4. The Applicant has cited the case of *Janet Moraa t/a Jannettes Caterers v Helma Intimates EPZ Ltd* [2019] eKLR, which held that consent entered by an advocate without the instructions of his client could be set aside.
5. The Applicant has also quoted the case of *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Ltd* [2015] eKLR in which the court held that the authority by counsel to compromise on behalf of his client must be bona fide and not contrary to express deleterious directions.
6. The Applicant further state that the consent runs contrary to commercial practicality. By allowing the hotel to close, it meant shutting down the business, it would have been worthwhile to have the apartment open and any earnings be retained in joint earning accounts of the parties until the matter is heard and determined.
7. That the orders in place have caused undue hardship and as stated in the leading authority in *Mbogo & Anor v Shah* [1968] 1 EA 93, the orders are fit for setting aside *ex debito justitiae*.
8. After setting down the long history of the matter, the 1st Respondent submitted that this is not one of those cases fit for the orders sought to be granted. The current application has been brought to forestall the citing of some contemnors in this matter. There is already a NTSC, which is yet to be disposed of.
9. The 1st Respondent asserted that nothing has been tendered to show that the former lawyers for the applicant acted without authority, misrepresented or defrauded, or did not act in the best interest of the Applicants.
10. The case of *KCB Ltd v Specilised Engineering Co Ltd* [1990] eKLR was cited in which Harris, J set down the role of counsel while under instructions from a client and the extent counsel can represent a client in entering compromises on his behalf.
11. In this particular case 1st respondent submitted that the allegations of misrepresentation, fraud, or mala fides leveled against the Applicant's former lawyer have not been substantiated.
12. The 1st Respondent has further quoted the case of *ARN Holdings Co Ltd v Gestione Ristoranti Affini Ltd* [2011] eKLR, in which Omondi, J was of a similar view.
13. The 1st Respondent is also of the view that Mohammed Abdi Mohammed - the person who swore the affidavit in support of the current application has no authority from the Company to do so, no decision under the seal of the Company has been displayed.
14. The 1st Respondent averred that the present application suffers from larches and delays. The consent order being attacked was issued in 2016, no explanation has been put forward as to why we had such a delay.
15. Further that this court is functus officio and cannot sit on an appeal of its orders.
16. The issues for determination are whether, with the material placed before me, the application dated August 17, 2022 can stand to the extent of setting aside Consent Orders entered on September 15, 2016 and who should bear costs.
17. I have considered the opposing submissions and authorities cited. To offset a consent judgment entered by counsel on behalf of a client, the following factors have to be accomplished as held in *KCB Ltd v Specilised Engineering Co. Ltd* [1990] eKLR in which Harris, J stated:

“Both counsel relied, for different purposes, upon the decision of the former Court of Appeal for East African in *Brook Bond Liebig (T) Ltd v Mallya* [1975] EA 266, where, in declining



to set aside a consent judgment, the court cited with approval a passage from volume 1 of the 7th Edition of Seton on Judgments and Orders page 124 to the effect that, prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings 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 the consent was given without sufficient materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement.”

18. In *ARN Holdings Co. Ltd v Gestione Ristoranti Affini Ltd* [2011] eKLR on the same issue Omondi, J had this to say:

“...there are well set out conditions to be taken into account when setting aside or varying a consent, which is well discussed in the case of *Flora Wasike v Desterio Wamboko* to the extent that setting aside a consent meets the same conditions required in setting aside or vitiating a contract, ie,

- (1) Fraud
- (2) Mistake
- (3) Misrepresentation none of these has been demonstrated here. It would almost appear as though the applicant plaintiff suddenly realized that it ought to have pegged some conditions to the consent entered into rather late, I think it is not the *exparte* order, which failed to provide security, is the consent order.

The upshot is that under the prevailing circumstances, I disallow the prayers sought.”

19. I fully associate myself with the pronouncements of the two decisions cited before me, which have addressed the complete consideration to consider in setting aside consent judgment/order, whether entered by a party acting in person or guided by the representation of counsel. The test has to be that the consent entered was tainted with either misrepresentation, fraud, or is against the law or public policy to allow it to stand will be aiding illegalities.
20. The consent entered on the August 31, 2016 was to have the effect of closing the apartments in question and retaining the ownership status holding sway then until the current suit is heard and determined. Much labour has been employed aimed at concluding the matter since several witnesses have testified and the matter seems headed for closure and the determination of this court. Some other applications cropped up with a contempt one already decided by this court.
21. The reasons stated to warrant the setting aside of the consent order is that the former lawyer representing the applicant Anjarwalla & Khana Advocates is said to have acted in bad faith, fraudulently, and contrary to instructions from his client. However, looking at the material placed before me, there is nothing to show that the advocate acted without instructions, fraudulently, and with mala fides. The allegations leveled against counsel are serious enough to have counsel censored by the relevant Law Society Disciplinary or the Advocate’s Complaints Commission mechanisms. Those allegations were merely pleaded without proof to warrant the setting aside of the Consent Orders in place.
22. Perhaps the only pertinent reason, that the applicant raised, was that the consent was a poor bargain leading to the closure of a business premises. A better commercial bargain would have been to have the premises opened and the proceeds channeled to a joint earning account in the names of the parties herein.



23. But then again, why is this suit dragging since 2016? Why so many unnecessary applications instead of having the matter heard on merit, concluded at once, and having the premises released for commercial purposes?
24. The application dated August 17, 2022 seeking to have the consent orders dated September 15, 2016 set aside lacks merit, it has not achieved the threshold of setting aside Consent Judgments or Orders. It is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 31ST DAY OF MAY 2023.

E. K. MAKORI

JUDGE

In the Presence of: -

Mr. Isaac Renee for the Plaintiff

In the Absence of:-

Mr. Kilonzo Aziz for the Defendant

