



REPUBLIC OF KENYA



**Njoki & 10 others v Toyota Kenya Limited & 3 others (Civil Case 231 of 2017)
[2022] KEHC 126 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 231 OF 2017
DAS MAJANJA, J
FEBRUARY 18, 2022**

BETWEEN

**MARTIN MWANGI NJOKI 1ST PLAINTIFF
MUNGAI KINUTHIA 2ND PLAINTIFF
NANCY NYAMBURA GITHUKU 3RD PLAINTIFF
PETER KAMAU NG'ANG'A 4TH PLAINTIFF
RUTH WANGUI KORIO 5TH PLAINTIFF
PETER MAINA NJUGUNA 6TH PLAINTIFF
CHARLES NJOROGE MAINA 7TH PLAINTIFF
GEORGE NGUKU NJIHIA 8TH PLAINTIFF
CITY STAR SHUTTLE CO. LTD 9TH PLAINTIFF
BEAUTY WHOLESALE (K) LTD 10TH PLAINTIFF
CHANIA PRESTIGE SHUTTLE LTD 11TH PLAINTIFF**

AND

**TOYOTA KENYA LIMITED 1ST DEFENDANT
NAIROBI HINO LIMITED 2ND DEFENDANT
TSUSHO CAPITAL KENYA LIMITED 3RD DEFENDANT
KENYA BUREAU OF STANDARDS 4TH DEFENDANT**



RULING

1. The 1st Defendant has moved the court to by the Notice of Motion dated 10th July 2021 seeking orders to record the consents entered into between the 2nd Plaintiff, 9th Plaintiff and 10th Plaintiff and the Defendants dated 21st May 2018, 14th August 2018 and 1st April 2019 respectively and that the same be adopted as orders of the court and the court finds that the 2nd, 9th and 10th Plaintiffs are lawfully bound by the said consents and are consequently estopped from proceeding with the suit.
2. The application is supported by the affidavit of the 1st Defendant's General Manager, Omar Osogo, sworn on 10th July 2021. Annexed to the deposition are the consent letters dated 14th August 2018, 1st April 2019 and 21st May 2018 addressed to the Deputy Registrar on the following terms:

Kindly record the following consent order between the [2nd, 9th, 10th Plaintiffs] and the 1st, 2nd, and 3rd Defendants:

BY CONSENT

1. The [2nd, 9th, 10th Plaintiff's] suit against the 1st, 2nd, 3rd and 4th Defendants namely Toyota Kenya Limited, Nairobi Hino Limited, Tsusho Capital Kenya Limited and Kenya Bureau of Standards be and is hereby withdrawn.
2. Each party to bear its costs.

DATED at Nairobi this 14th day of August 2018

SIGNED

J. HARRISON KINYANJUI & CO,

ADVOCATES FOR THE PLAINTIFF

SIGNED

ORARO & COMPANY

ADVOCATES FOR THE 1ST AND 2ND DEFENDANTS

SIGNED

WANDABWA AND COMPANY

ADVOCATES FOR THE 3RD DEFENDANT

LUISE RASANGA ADVOCATE

ADVOCATE FOR THE 4TH DEFENDANT

3. The application is also supported by the affidavit of Luise Rasanga, the 4th Defendant's Legal Manager, sworn on 14th December 2021. He annexed copies of the consents to the deposition.
4. The 9th Plaintiff opposes the application through the replying affidavit of Christopher Kamande, a shareholder of the 9th Plaintiff, sworn on 24th September 2021. The thrust of his deposition is that the 9th Plaintiff did not withdraw, unconditionally or otherwise, the suit against the Defendants. He asserts that the 9th Plaintiff is not bound by the consent and urges the court to decline its adoption as



the 9th Plaintiff did not instruct its former advocates to engage with any of the Defendants to resolve the matter in order to record the consent. It urges the court to dismiss that application.

5. At the hearing of the application, counsel for the 9th Plaintiff did not deny the fact that the 9th Plaintiff was at the material time when the consent was recorded, represented by J. Harrison Kinyanjui Advocate & Company Advocates, which firm recorded the consent sought to be adopted. As I understand, the reason it wants to set aside the consent is that it was recorded without its consent and instructions.
6. I think the approach to resolving this matter is well settled. First, the Advocate on record for a party is his or her agent and thus has ostensible authority to compromise the suit. Second, where a suit has been compromised by consent, the court will only set aside the consent on the same grounds that a contract may be set aside such as fraud, mistake, misrepresentation and the like. This is the position is summarized in *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd [1982] KLR 485* where Harris J., observed 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 collusion 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.

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.

7. The mere fact that the advocate did not have express instruction does not affect the validity of the consent unless of course, the 3rd party was aware of the extent and exact contours of the instruction. In other words, there is no reason for the court to decline to endorse the consent order which reflects the compromise by the parties.
8. Consequently, I allow the Notice of Motion dated 10th July 2021 and order as follows:
 - (a) This suit as between the 2nd, 9th and 10th Plaintiffs and the 1st Defendant be and is hereby marked as withdrawn with each party bearing its costs in accordance with the consent letters dated 21st May 2018, 14th August 2018 and 1st April 2019.
 - (b) There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 18th day of FEBRUARY 2022.

D. S. MAJANJA

JUDGE

Mr Ndegwa instructed by Triple N W and Company Advocates LLP for the 9th Plaintiff.

Mr Mbaluto instructed by Oraro and Company Advocates for the 1st defendant.

Mr Kamau for the instructed by Wandabwa and Company Advocates for the 3rd defendant.

