



REPUBLIC OF KENYA



KENYA LAW
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**Auto Selection (K) Ltd v Alele & another (Civil Appeal 48, 49, 50 & 51 of 2018
(Consolidated)) [2022] KEHC 10718 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 48, 49, 50 & 51 OF 2018 (CONSOLIDATED)**

SN RIECHI, J

MAY 31, 2022

BETWEEN

AUTO SELECTION (K) LTD APPLICANT

AND

EDMOND SHIUNDU ALELE 1ST RESPONDENT

PETER NJOROGE NGANGA 2ND RESPONDENT

RULING

1. By an application dated February 3, 2022 brought under certificate or urgency, the applicant seeks the following reliefs;
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of this application, the respondents be restrained from executing the proclamation notices dated 13/01/2021 issued by Dominion Yard Auctioneers from the party and party Bill of Costs arising out of Bungoma High Court Civil Appeal No. 48 of 2018 (consolidated with HCA No. 49, 50 and 51 all of 2018).
 4. The honourable court be pleased to set aside the consent judgement recorded in court by the applicant's previous advocate on record consenting to the bill emanating from this appeal.
 5. The court does enlarge the time to file an objection to the taxing master ruling on the assessment of the bill of costs.
2. The application is premised on the grounds on the face of the Chamber Summons and supported by the affidavit of Shima Shah who depones that the party and party bill of costs between the applicant and their previous advocate on record were assessed on 26/11/2021 and the 30-day stay granted is due



- to lapse on 26/12/2021. That upon being informed of the outcome, they informed counsel on record to prefer an objection to the taxed bill on the ground that the bill emanated from one consolidated appeal as opposed to four as suggested by the assessment.
3. He depones that counsel did not proceed with the instructions with the result that the respondent's advocates wrote to them with threats of execution whereupon they tried to reach out to counsel in vain. He further depones that the respondent's auctioneers have served a 7-day proclamation notice emanating from the order settling the Bill of Costs. He depones that they never instructed counsel to record any consent on the bill of costs as they wished to file an objection and if the prayers sought herein are not granted, the respondents will execute and cart away their properties in execution of an exorbitantly high bill.
 4. The 1st respondent opposed the application and filed grounds of opposition whose crux is that the application is frivolous, vexatious and abuse of the court process whose fate is to be struck out. That the applicant has demonstrated sufficient to warrant a grant of orders sought.
 5. The application was disposed of by way of written submissions. The applicant submits that the only issue for determination is whether the consent order ought to be set aside. Citing the case of *Hirani v Hirani* (1952) EACA 19, it is submitted that the consent was given without sufficient material facts because their previous counsel did not have instructions to enter into the consent and that the same is against public policy.
 6. Counsel submits that the purpose of consolidating is to save on time and costs and there is no sense to sever the consolidation when it comes to taxation of bills at the tail end of the trial. The cases of *Warutere & Associates Advocates v Robert Kangethe Baar & 3 others* (2018) eKLR, *Grace Wangui Ngenye v Wilfred Kibor & another* (2013)eKLR and *James Nyangiye & others v Attorney General* (2020)eKLR have been cited in support.
 7. That from the bills as taxed, the sum claimed by the respondent is exorbitant and goes against the objective of award of costs which is merely meant to reimburse the successful party and not to unjustly enrich that party.
 8. The respondent on the other hand submits that a stay order cannot issue on a bill of costs. See *Francis Kabaa v Nancy Wambui & another* (1996)eKLR. On whether the consent bill can be set aside, counsel submits that the consent order is binding since the applicant has not demonstrated any fraud and or collusion between the firms of Menezes & Co. Advocates and that of Abok Odhiambo & Co. Advocates to necessitate the setting aside of the consent so recorded. The cases of *Board of Trustee National Social Security Fund v Michael Mwalo* (2015) eKLR and *Kenya Commercial Bank v Specialized Engineering Co Ltd* (1982) KLR 485 have been cited in support of their submission.
 9. On the issue of enlargement of time to file an objection to the bill of costs, counsel submits the bill was not assessed on 26/11/2021 but a consent was recorded on 25/11/2021 and the prayer for enlargement of time to file an objection is not available once a consent has been recorded. Counsel refers to Rule 11 of the *Advocates Remuneration Order*.
 10. The issue to be determined in this application is whether the appellant/applicant has advanced sufficient reasons to be granted the orders sought.
 11. It is common ground that this court delivered its judgement in the matter on November 11, 2021 dismissing the appeal with costs to the 1st respondent. The record shows that after the delivery, the firm of Abok Odhiambo & Co. advocates for the respondents recorded a consent with the firm of L.G Menezes & Co. advocates for the appellant settling the bill of costs at Kshs 178,460/=. The consent is



dated 25/11/2021 and executed by both parties. A certificate of costs was issued by the Deputy registrar of this court on January 19, 2022 in the sums aforesaid.

12. From the above, it is therefore clear that the parties herein had negotiated and agreed on the bill and the court's role in the taxation was ousted by agreement of the parties and Deputy Registrar's role was to merely endorse and issue a certificate of costs. There is no evidence that the bill has ballooned to the sum of Kshs 713, 840/= as alleged by the applicant apart from the proclamation notices issued by Dominion yard Auctioneers.

13. The powers and role of the Deputy Registrar sitting as the Taxing officer is captured in Order 49 Rule 3 of the [Civil Procedure Rules](#) which provides;

Any order may, by consent of the parties evidenced in writing, be entered by the registrar or, in a subordinate court, by an executive officer so authorised in writing by the Chief Justice.

15. The Deputy Registrar in issuing the certificate of costs was thus exercising the powers donated by the above provision. Under the [Advocates Remuneration order](#), Rule 11 provides;

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

16. From the above provisions, an aggrieved party may object to the decision of the Taxing Officer, however in the instant case, the parties recorded a consent settling the 1st respondent's fees and there are no reasons to be given by the Taxing Officer since it was a consent order and not the decision of the Deputy Registrar. Similarly, the issue of enlargement of time cannot issue for the reason that the order was by mutuality. The question then that ought to be answered is whether the consent order should be set aside for the reason that counsel did not have instructions to do so.

17. The grounds for setting aside a consent are well settled. In *Brooke Bond Liebig v Mallya* (1975) EA 266 it was held;

The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.

18. In the case of *Flora N. Wasike v Destimo Wamboko* (1988) eKLR Hancox JA held that;

19. 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 the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.



20. In the matter before the court, the reason given by the applicant is want of instructions on the part of counsel to enter into such consent and that the bill is exorbitantly high and goes against public policy. There is material on record evidencing communication between the firm of L.G Menezes & Co. Advocates to the appellant informing the appellant that the bill had been taxed. It cannot be true as the applicant alleges that it had no idea that the bill had been taxed. It is not enough to merely assert that counsel lacked instructions to proceed with the matter the way it did.
21. It is worth noting that costs follow the event and a successful party is entitled to be reimbursed costs incurred in litigation. It would be unjustifiable for the party who lost to delay the enjoyment of this right by the winning party.
22. As such the application herein is lacking in merit and is hereby dismissed with no order as to costs.

DATED AT BUNGOMA THIS 31ST DAY OF MAY, 2022

S. N. RIECHI

JUDGE

