



REPUBLIC OF KENYA



**KENYA LAW**  
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**UAP Insurance Company Limited v Mungai (Civil Suit 275 of 2016)  
[2022] KEHC 14911 (KLR) (Civ) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14911 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 275 OF 2016**

**CW MEOLI, J**

**OCTOBER 28, 2022**

**BETWEEN**

**UAP INSURANCE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**KEVIN KIMANI MUNGAI ..... DEFENDANT**

**RULING**

1. UAP Insurance Company Limited (hereinafter Plaintiff) commenced this suit against Kevin Kimani Mungai (hereinafter the Defendant) by way of a plaint dated October 24, 2016 seeking damages for defamation arising from several alleged defamatory statements said to have been published in Facebook pages by the Defendant in between November 2015 and August 2016. The Plaintiff also sought a permanent injunction to restrain the Defendant from further publishing material defamatory of the Plaintiff. Contemporaneously filed with the plaint was a motion seeking several interim orders including a temporary injunction to restrain the Defendant 'from publishing any statements, posts, or comments on Facebook or any other media or platform that is defamatory of the Plaintiff' (sic) pending the determination of the suit. An affidavit of service on the record shows that the pleadings, the motion and hearing notice for the motion being December 1, 2016. On that date both parties attended before Serگون J who allowed the Defendant's plea for adjournment to December 15, 2016 to enable him file a response. However, on that date, the parties informed the Court that they were negotiating with a view to settlement of the matter, whereupon the Court scheduled a mention for January 24, 2017. The Defendant had until then not filed any response or defence.



2. On January 24, 2017, the parties presented to the court for adoption, the consent dated January 13, 2017 (and filed on January 23, 2017). The court adopted the consent, which was duly signed by the parties, and is to the following effect:

' Republic Of Kenya

In The High Court Of Kenya At Nairobi

Civil Suit No 275 Of 2016

Uap Insurance Company Limited - Plaintiff

Versus

Kevin Kimani Mungai - Defendant

Consent

**By Consent Of The Parties:**

1. A permanent injunction be and is hereby issued against the Defendant, Kevin Kimani Mungai, his servants and or agents from publishing any statements, posts or comments on Facebook or any other media platform or howsoever that is defamatory of the Plaintiff.
2. A mandatory injunction be and is hereby issued compelling the Defendant to forthwith remove the defamatory statements published by himself or his agents or representatives on Facebook or any other platform regarding the Plaintiff.
3. The Defendant, Kevin Kimani Mungai hereby agrees not to pursue compensation from the Plaintiff, UAP Insurance Company Limited over motor vehicle registration number xxxx.
4. In default of any one (1) of the above terms, the Plaintiff be at liberty to institute contempt proceedings against the Defendant.
5. This suit be marked as settled with no orders as to costs.

Dated at Nairobi this January 13, 2017

(Signed)

Muri Mwaniki & Wamiti

Advocates For The Plaintiff

(Ref: U9/1)

**(Signed)**

**Kevin Kimani Mungai**

**Defendant'**

3. That seemed to be the end of the matter. However, the Plaintiff was subsequently to move the court through the motion dated June 10, 2021 (hereafter the Plaintiff's motion) which was followed by the Defendant's motion dated July 9, 2021(hereafter the Defendant's motion). The Plaintiff's motion dated June 10, 2021 is expressed to be brought under Section 5 of the *Judicature Act*, Section 1A & 1B of the *Civil Procedure Act*, Order 40 Rules 3(1) & Order 51 Rule 1 of the *Civil Procedure Rules* and seeks inter alia that this court finds, holds and declares that the Defendant is in contempt of the court for disobeying the consent order made on January 24, 2017 and issues an order to commit the



Defendant to prison for a term not exceeding six (6) months or for a term this honorable court may deem just and fit , as punishment for contempt of Court.

4. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the Sheila Maina described as the Regional Legal Counsel of the Plaintiff Company. Setting out the history of the suit the deponent asserts that subsequent to the consent order, the Defendant has on several particularized occasions between July 2019 and June 2021, published defamatory and offensive statements of the Defendant the Defendant in disobedience of the consent order ; that it is evident that the Defendant has deliberately refused to abide or obey the consent order which amounts to contempt of court and that the Court has power to punish a contemnor in the interest of justice; that the Plaintiff's good reputation in the industry is in jeopardy due to the Defendant's persistent and deliberate acts of harassment and defamation intended to compel the Plaintiff to accede to the Defendant's claim; that the continued publication exposes the Plaintiff to financial loss and damage; and that it is in the interest of justice that the orders sought be granted.
5. In response, the Defendant filed two affidavits dated July 1, 2021 and a further one dated July 6, 2021 wherein he admits the allegations in the motion and seeks forgiveness, promising not to repeat the actions cited by the Plaintiff. The latter affidavit further sets out the history of his claim for insurance compensation against the Plaintiff. He further asserts concerning this case that that he was under duress, without legal representation and forced to enter a consent prepared by the Plaintiff's counsel. The Defendant goes on to depose that in the immediate period he was diagnosed with mental illness (BRD/PTSD) due to stress on account of the compensation dispute between him and the Plaintiff and he reiterates his remorse for breaching the consent order and seeks the court's forgiveness.
6. In a rejoinder by way of a supplementary affidavit, Sheila Maina deposes that the Defendant was fully conversant with the facts leading to recording of the consent and that allegations that he was under duress to enter into the consent are devoid of any merit ; that contrary to the Defendant's allegations, he has always been aware of the consequences of his actions and from his email dated May 28, 2021 it was clear that his actions were intentional, deliberate and calculated , in breach of the consent order, to disparage the reputation of the Plaintiff and ; that the Defendant has not offered any justifiable explanation for disobeying court orders occasioning great loss and damage to the Plaintiff.
7. The Defendant's motion is expressed to be brought under Section 1A, 1B 3 & 3A of the [Civil Procedure Act](#) seeking that the consent order dated January 13, 2017 be wholly set aside; and that the Defendant be granted leave to file his defence to the suit out of time. The grounds on the face of the motion are amplified in the supporting affidavit of the Defendant. The contents of the supporting affidavit are similar in substance to the affidavit and further affidavit sworn to oppose the Plaintiff's motion. However, he further deposes that the court ought to set aside the consent order and allow him to defend the suit on several grounds. Namely, that the consent was entered into without sufficient material facts; that the consent was obtained under duress and undue influence; that there was misrepresentation on the part of the Plaintiff; that there was no consensus between the parties; and that it ought to be set aside on account of public policy.
8. The Defendant's motion is opposed by the affidavit of Sheila Maina. The contents of the replying affidavit are substantially similar to the contents of the supporting affidavit and supplementary affidavit sworn in support of the Plaintiff's motion. The asserts that the consent order of the court was binding between parties and can only be set aside on grounds of fraud, concealment or misrepresentation of material facts and if the agreement was contrary to public policy none of which have been demonstrated by the Defendant against the Plaintiff and that on the contrary all particulars stated in the Defendant's motion relate to the Defendant's conduct for which the Plaintiff was not responsible in control of. She further avers that the consent was signed in good faith without malice and that the



- Defendant's motion is misconceived and, in the circumstances, amounts to an abuse of the process of the court. In conclusion she asserts that the Defendant has approached the court with unclean hands and his motion should be dismissed with costs.
9. In brief a rejoined by way of a further affidavit, the Defendant contends disputes the Plaintiff's depositions and contends that the Plaintiff has failed to address pertinent issues raised in his motion and that he is willing to defend the matter if granted a chance to do so.
  10. Both motions were simultaneously canvassed by way of written submissions. Counsel for the Plaintiff placed reliance on the decision in *Cecil Miller v Jackson Njeru & Another [2017] eKLR*, Section 63(c) of the *Civil Procedure Act* and Order 40 Rule 3 (1) of the Civil Procedure Rules to argue that the consent order shows that it was signed by the Defendant which means he was fully aware of and bound by the terms therein. It was further asserted that the Defendant has admitted being in breach of the terms of the consent order and hence his conduct has been deliberate as demonstrated by his libelous publication. Counsel asserted that the factual basis has been laid for a finding that he was in contempt and he ought to be sentenced to serve to a term not exceeding six months in prison for disobedience of the consent order, or to such other appropriate sentence as is justified.
  11. Submitting on the Defendant's motion counsel called to aid several decisions including *Paul Gichubi v Nairobi Pentecostal Church Christ is the Answer Ministries (NPC- CITAM) & Another [2014] eKLR*, *Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd [1980] eKLR*, and *Irene Wangui Muruguru v Grace Wangare Muruguru [2020] eKLR* to argue that the Defendant was fully conversant with all the material facts surrounding the case before settling the matter through the consent order. It was further contended that the Plaintiff neither coerced nor exerted pressure or influence on the Defendant in settling the matter through the consent order and that the Defendant has failed to demonstrate any valid grounds to warrant the setting aside of the consent order. Citing the decision in *Benjob Amalgamated Limited & Another v Kenya Commercial Bank Limited [2014] eKLR* counsel asserted that the Defendant is guilty of laches as his motion seeking to set aside the consent order has been filed almost after four (4) years since the consent, and that the Defendant was only roused into action by the Plaintiff's motion. The Court was urged to allow the Plaintiff's motion while dismissing the Defendant's motion with costs.
  12. On the part of the Defendant's counsel in submitting on Plaintiff's motion, he asserted that the Defendant has already admitted to the contempt and what remains is mitigation as such this court should either forgive him with a stern warning or impose a suspended sentence.
  13. Regarding the Defendant's motion , counsel relied on the decisions in *Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 Others [2019] eKLR* and *Flora N Wasike v Destimo Wamboko [1988] eKLR* concerning the grounds upon which a consent order can be set aside, namely, where it was shown that the consent was procured through fraud, non-disclosure of material facts or mistake or for reasons which would justify such setting aside. Counsel contended that the Defendant had sufficiently demonstrated that the consent herein was entered into without sufficient material facts; was obtained under duress and undue influence; that there was misrepresentation on the part of the Plaintiff; that there was no consensus between the parties ; and that the consent ought to be set aside on account of public policy. In conclusion, regarding the contempt application the court was urged to exercise mercy and having regard to the grounds in support of the Defendant's motion, to allow the same.
  14. The Court has considered the material canvassed by the parties in respect of the two motions. I propose to deal with the Defendant's motion first. The court has considered rival affidavits and submissions respecting the said motion. The Defendant anchored his motion primarily on sections 1A, 1B 3 &



3A. The consent order recorded herein constituted a final settlement of the suit and was therefore equivalent to a consent judgment. Hence, ideally this kind of application ought to have been made primarily under the provisions of Order 45 Rule 1 of the Civil Procedure Rules which provide as follows:

' (1) Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay. (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review'.

15. Be that as it may, it is trite that a consent judgment/order may be set aside only in certain circumstances, for instance, of fraud or collusion, misrepresentation of the facts, lack of consensus, public policy or for such reasons as would normally lead to the setting aside or rescinding of a contract.

16. The Court of Appeal in *Samson Munikah Practising as Munikah & Company Advocates v Wedube Estates Limited [2007] eKLR* cited the decision of the Court of Appeal for Eastern Africa in *Brooke Bond Liebig (T) Ltd v Mallya [1975] EA 266* where it was stated that:

' The circumstances in which a consent judgment may be interfered with were considered by this Court in *Hirani v Kassam [1952] 19 EACA 131* where the following passage from *Seton on Judgments and Orders, 7<sup>th</sup> Edn, Vol 1, P 124* was approved:

Prima facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on 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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion.

All material facts were known to the party who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham, J said in the introduction to the passage quoted above from *Hirani's* case, a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding it.'

17. Ag Vice President Mustafa stated in his judgment that:

' 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 the ground 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 have been no mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.' .

18. In the celebrated case of *Flora N Wasike* (supra) the Court of Appeal (per Hancox JA) stated that:

' It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in *JM Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983*. In *Purcell v FC Trigell Ltd [1970] 2 ACCER671*, Winn LJ said at 676:

'It seems to me that, if a consent order is to be set aside on grounds which justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside of rectification of this order looked at as a contract'

19. The learned Judge continued to state that:

' It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in *Hirani v Kassam [192] 19 EACA 131 at 134* as follows:

'The mode of paying the debt, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in *Setton on Judgments and Orders (7<sup>th</sup> Edn) Vol 1 p 124* as follows:

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'Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on 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 the court to set aside an agreement.'

See also *Brook Bond Liebig (T) Ltd v Mallya (1975) EA 266*.

See also *Kenya Commercial Bank Ltd v Specialized Engineering Co Ltd*.

20. Having looked at the matters raised by the Defendant in support of his grounds for setting aside, I note that these relate for the most part to the history of his claim for compensation against the Plaintiff for the alleged loss of his motor vehicle which he had apparently insured with the Plaintiff. That dispute is not before this court for determination. The fact that the Plaintiff had not compensated the Defendant as he had expected was only relevant as to the genesis of the alleged defamatory publications by the Defendant which gave rise to this suit.

21. Other than bandying about allegations of coercion, undue influence, misrepresentation, lack of consensus, lack of sufficient relevant facts and that the consent is contrary to public policy, the Defendant has not tendered any cogent evidence to shore up the claims. The annexure marked 'E5' and attached to his supporting affidavit and communicating to the Defendant the alleged cancellation of his medical cover is dated November 8, 2015, almost a year before the filing of the suit. This cannot



surely be evidence of coercion prior to the consent herein. Equally, while it is true that the Defendant was unrepresented and acted in person initially, the record of proceedings herein indicate that he represented himself effectively. He addressed the court during proceedings held on December 1, 2016 (to seek adjournment to file a response to the initial injunction motion); on December 15, 2016 (in confirming ongoing negotiations); and January 24, 2017 (in confirming the settlement by consent).

22. Not to mention that he appended his signature to the written consent, which is in plain and ordinary English and whose contents, given the Defendant's level of literacy as demonstrated in his undisputed correspondence exhibited as annexures 'SM2' to 'SM11' in the affidavit supporting the Plaintiff's motion, the Defendant must have understood. Including the genesis of the dispute which he has set out extensively in his affidavits herein. Therefore, the fact that the Defendant was unrepresented without more, cannot in the circumstances vitiate the consent. As regards claims at paragraph 23 and 24 of his affidavits, there is no evidence that at the time of entering into the consent, the Defendant was labouring under a mental health illness. His letter from Mathari National Teaching & Referral Hospital (annexure 'E8') is dated October 24, 2019. It is not a medical report and does not disclose the date of diagnosis and history of the Defendant's alleged illness. Be that as it may, it took the Defendant to be served with the contempt motion after five years since the consent, to move the Court. It is not conceivable, and neither has it been demonstrated that the Defendant had for that whole period been under some medical disability.
23. For the foregoing reasons, it is the Court's considered view that the Defendant has not established any of the grounds that would justify the setting aside of the consent. A consent recorded before the Court is akin to a contract between parties, and the court's duty is to enforce the terms of such contracts and not to rewrite them for parties. Prayer (1) in the Defendant's motion having failed, prayer (2) must also fail. The entire motion is devoid of merit and is hereby dismissed with costs.
24. Now turning to the Plaintiff's motion, the Defendant has all but admitted the fact that he is in disobedience of the consent order as asserted by the Plaintiff. This court has found while dealing with the Defendant's motion that the Defendant was fully aware of the terms of and voluntarily entered into the consent herein. He cannot hide behind alleged ignorance or any of the grounds raised in support of his motion, which in any event the Court has found unproven, as he has sought to do in to excuse his undisputed conduct after the consent. It is not in dispute that despite the clear terms of the consent order, the Defendant had proceeded to wilfully engage in conduct that was inconsistent with the terms of the contract by further publishing material defamatory of the Plaintiff. (See annexure SM2 to SM11 exhibited in the Plaintiff's supporting affidavit).
25. In *Stewart Robertson v Her Majesty's Advocate, 2007 HCAC 63* it was held that:

' Contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.'

And according to Black's Law Dictionary (Ninth Edition), contempt of court is 'Conduct that defies the authority or dignity of a court.'

26. As the Supreme Court of Kenya observed in *Republic v Ahmad Abolfathi Mohammed & Another (2018)eKLR* obedience of court orders is fundamental to upholding the rule of law and that is the essential reason why Courts do not countenance contempt of court through disobedience of such orders. The Court stated that:

(24) In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in



Gulabchand Popatlal Shah & Another Civil Application No 39 of 1990 (unreported), where the Court of Appeal stated as follows:

'It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. In *Hadkinson V Hadkinson*(1952) 2 All ER 567, it was held that: It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void'.

- (26) The Court of Appeal in *AB & Another v RB*, Civil Application No 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in *Burchell v Burchell*, Case No 364 of 2005 where it was held:

'Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The *Constitution* states that the rule of law and supremacy of the *Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.'

- (28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v Babarini Farm Limited [1985] KLR 229, 234* the Court of Appeal held that:

' In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.'

27. The Supreme Court proceeded to explain the rationale for the high standard in the following terms:

' (29) The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.'

28. In this case, the Defendant has admitted by his affidavits and submissions that that his conduct is in contempt of the Court but has expressed remorse and pleaded for a lenient sentence. The Court hereby finds the Defendant guilty of contempt of court in terms of prayer 3 of the Plaintiff's motion. In *Christine Wangari Gachege v Elizabeth Wanjiru Evans and 11 Others (2014 e KLR)* the Court of Appeal stated that in punishing for contempt, the court exercises ordinary criminal jurisdiction. In



the circumstances, pursuant to the finding of contempt of court, this court directs the contemnor Defendant to file an affidavit or submissions in his mitigation and the Plaintiff to file submissions, both within 14 days of today's date, in preparation for sentencing hearing on the date to be hereafter taken. The costs of the motion are awarded to the Plaintiff.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 28TH DAY OF OCTOBER 2022.**

**C. MEOLI**

**JUDGE**

**In the presence of:**

**For the Plaintiff: Mr. Manyara**

**For the Defendant: N/A**

**C/A: Carol**

