



The Standard Group Limited t/a Kenya Television Network & 2 others v Keitany (Civil Appeal 187 of 2020) [2022] KEHC 15514 (KLR) (Civ) (17 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15514 (KLR)

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

CIVIL

CIVIL APPEAL 187 OF 2020

CW MEOLI, J

NOVEMBER 17, 2022

BETWEEN

**THE STANDARD GROUP LIMITED T/A KENYA TELEVISION
NETWORK 1ST APPELLANT
ZUBEDIAH KOOME 2ND APPELLANT
NOAH OTIENO 3RD APPELLANT**

AND

WILLIAM KIMUTAI B. KEITANY RESPONDENT

RULING

1. The motion dated 30.08.2021 by William Kimutai B. Keitany, the Respondent herein (hereafter the Applicant) seeks that the consent order recorded on 11.02.2021 be set aside; and that motion dated 14.07.2020 by The Standard Group Limited, Zubediah Koome and Noah Otieno the 1st, 2nd and 3rd appellant/appellants (hereafter the 1st, 2nd and 3rd respondent/respondents) be reinstated for hearing. The motion is expressed to be brought under section 3A of the *Civil Procedure Act* (CPA), order 10 rule 11 and order 51 rules 1 & 3 of the *Civil Procedure Rules* (CPR), among others. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the Applicant.
2. The gist thereof is that the Applicant filed four suits in the subordinate court, being Nairobi Milimani CMCC No. 3524 of 2013, Nairobi Milimani CMCC No. 3318 of 2013, Nairobi Milimani CMCC No. 4457 of 2013 and Nairobi Milimani CMCC No. 4473 of 2013 which were consolidated under the lead file Nairobi Milimani CMCC No. 3524 of 2013 wherein judgment was delivered on 30.04.2020; that the Respondents who were represented by the firm of C.W. Githae & Co. Advocates were the judgment-debtors in Nairobi Milimani CMCC No. 4457 of 2013 where judgment was entered for a sum of Kshs. 3,500,000/-. He further deposes that on 14.07.2020 the Respondents filed



- a motion seeking stay of execution pending appeal which motion was compromised on 11.02.2021 on terms that there be stay of execution of the decree in the consolidated suits Nairobi Milimani CMCC No. 3524 of 2013, Nairobi Milimani CMCC No. 3318 of 2013, Nairobi Milimani CMCC No. 4457 of 2013 and Nairobi Milimani CMCC No. 4473 of 2013 pending hearing and determination of the appeal subject to the Respondents depositing Kshs. 3,961,000/- within 30 days in a joint interesting account in the names of parties' respective advocates.
3. He contends that the consent order was extracted without a draft being submitted to the Applicant's counsel for approval and that the consent order was entered into on wrong facts, as the firm of C.W. Githae & Co. Advocates had instructions to act only for the Respondent judgment-debtors in Nairobi Milimani CMCC No. 4457 of 2013, which fact was not brought to the attention of the court. That the total decretal sum for all four matters was Kshs. 13,000,000/- yet by the consent order of 11.02.2021 the security for due performance of the decree for all four matters was Kshs. 3,961,000/-. That execution in all the four matters execution was to proceed separately, and it is not possible due to the consent order recorded on 11.02.2021 to execute against the judgment debtors in the other three matters, namely, Nairobi Milimani CMCC No. 3524 of 2013, Nairobi Milimani CMCC No. 3318 of 2013 and Nairobi Milimani CMCC No. 4473 of 2013 not represented by the firm of C.W. Githae & Co. Advocates. That on account of the foregoing, the said consent order ought to be set aside on grounds of mistake, misrepresentation and or material non-disclosure by the Respondents. He asserts that no prejudice shall be suffered by the Respondents if the consent order is set aside pursuant to the court's inherent jurisdiction under section 3A of the Civil Procedure Act to promote the ends of justice.
 4. The Respondents oppose the motion through a replying affidavit of Millicent C. Ngetich who describes herself as the company secretary of the 1st Respondent, competent and duly authorized to depose the affidavit. She deposes that the Respondents motion dated 14.07.2020 was compromised by consent on a distinct prayer (prayer 3) therein to the effect that there be a stay of execution of the decree in the consolidated suits being Nairobi Milimani CMCC No. 3524 of 2013, Nairobi Milimani CMCC No. 3318 of 2013, Nairobi Milimani CMCC No. 4457 of 2013 and Nairobi Milimani CMCC No. 4473 of 2013; that the consent order was record in the presence of the respective counsel's appearing before court who at the time were cognizant and had full knowledge of the reliefs sought in the Appellant's motion dated 14.07.2020; that it is malefides for the Applicant to impute improper motives on the Respondents' counsel who attended court on 11.02.2021.
 5. She further swears that if the Applicant required or expected the sum of Kshs. 13,000,000/- to be deposited as security pending the appeal, he ought to have raised the issue prior to the consent order being recorded; that the consent order expressly stayed execution in all the four consolidated suits; and that the Applicant did not raise the issue of representation in its response to the motion dated 14.07.2021. She takes the view that the Applicant has failed to demonstrate the alleged wrong facts, mistake, misrepresentation and or material non-disclosure that induced his counsel to record the consent order. She contends that the exercise of the honorable court's inherent powers ought to be applied sparingly and the instant motion is without basis.
 6. The motion was canvassed by way of written submissions. Counsel for the Applicant firstly submitted that the firm of Messrs. C.W Githae & Co. Advocates only has instructions to act in Nairobi Milimani CMCC No. 4457 of 2013 and therefore had no standing to apply for stay of execution in the other three consolidated matters. That after the delivery of the judgment by the lower court, the judgment-debtors in the four consolidated matter have not pursued a consolidated appeal. Counsel cited the provisions of order 9 rule 5 of the Civil Procedure Rules, the decision in Victor Nabwera Wekhombe & 4 Others v Peter Sarai Wekhombe [2012] eKLR to assert that in the absence of a proper notice of



- change of advocates, the firm of Messrs. C.W Githae & Co. Advocates could not purport or be allowed to represent the judgment-debtors in the other three matters by seeking stay of execution.
7. Regarding applicable principles governing the setting aside of a consent order, counsel anchored his submissions on the decisions in *Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others* [2019] eKLR and *Edward Acholla v Sogea Satom Kenya Branch & 2 others* [2014] eKLR. To the effect that it is settled law that a consent order can be set aside upon an applicant satisfying the court that it was procured through fraud, non-disclosure of material facts or mistake. That by dint of order 21 rule 8 of the *Civil Procedure Rules* (CPR) the Respondents ought to have sent the draft order for approval to the Applicant's advocate for his approval. While calling to aid the decisions in *Esther Targok Ayabei & Another v Kithenjo Njuguna & another* [2019] eKLR, and *Martin Macharia v Peterson Njoroge & 6 others* [2021] eKLR inter alia, counsel submitted that the consent order herein is vitiated by misrepresentation, mistake, and material non-disclosure. It was submitted that in addition to these grounds, the court can also set aside a consent order for any other sufficient reason. Reiterating the affidavit material, counsel stated that the parties in the other three matters are not parties and or have no identifiable stake in the instant appeal and will not be prejudiced by the setting aside of the consent order. The court was urged to allow the motion.
 8. On the part of the Respondents, counsel anchored his submissions on the decisions in *SMN v ZMS & 3 others* [2017] eKLR and *Board of Trustees National Social Security Fund v Michael Mwalo* [2015] eKLR to argue that Applicant has failed to demonstrate that the consent order was entered into by way of fraud or misrepresentation. That Respondent's motion was compromised with the Applicant's knowledge that stay of execution was being sought in respect of the consolidated suits and not one suit, the motion having been duly served upon the Applicant. While placing reliance on the decision in *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR it was argued the motion is an abuse of the court process and bad in law and that the court ought to dismiss it with costs.
 9. The court has considered the history of this matter as set out in the rival affidavit material and submissions by the respective parties. The fact that the parties herein entered into a consent order on 11.02.2021 to compromise the Respondents' motion dated 14.07.2020 is not in dispute, all that the Applicant is disputing are the terms therein, specifically, whether the conditions of security for stay of execution were applicable to all four consolidated matters being Nairobi Milimani CMCC No. 3524 of 2013, Nairobi Milimani CMCC No. 3318 of 2013, Nairobi Milimani CMCC No. 4457 of 2013 and Nairobi Milimani CMCC No. 4473 of 2013 (hereafter the consolidated matters).
 10. The key question for determination is whether the Applicant has established grounds for the setting aside or variation of the consent order in question. In that regard, the court has taken the liberty of perusing the record of proceedings. The motion dated 14.07.2020 was initially set for hearing on 17.09.2020 and later scheduled for hearing on 9.11.2020 when the court was told that parties were engaging with a view to recording a settlement thereon and sought time to do so. The court granted the request of the parties and set the matter for mention first, on 23.11.202, and subsequently on 14.12.2020 and 19.11.2020 and finally on 11.2.2021 when the disputed consent was recorded. On all these occasions the parties were represented by the same advocates, that is, Mrs. Githae for the Respondents (then applicants) and Ms. Ndirangu h/b for Mr. Nderitu SC for the Applicant (then respondent).



11. The consent order was eventually recorded before Mbogholi, J (as he then was) on 11.2.2021. The terms of the consent dictated by Mrs. Githae, confirmed by Ms. Ndirangu, and adopted by the court as an order are reproduced hereunder: -

“Mrs. Githae

We have agreed to compromise the application by depositing Kshs. 3,961,000/- with Stanbic Bank within 30 days from today (in a joint interest account in the name of both advocates for the parties).

Ms. Ndirangu

That is so.” (sic)

12. The grounds upon which a consent order may be set aside are settled. Hancox JA in the celebrated Court of Appeal decision of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR 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 F. C. 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...”

13. 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* [1952] 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* (7th Edn) Vol. 1 p. 124 as follows: -

“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.



14. The latter passage was also followed by the High Court in *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1980] eKLR where the court held that:-

“..[A]fter the commencement of an action, the solicitor for a party has an implied general authority to compromise and settle the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the notice of the other aside.”
15. Both the courts in the Brook Bond Liebig (supra) and the above case refused to set aside the disputed consent orders. On an appeal in respect of the Kenya Commercial Bank Ltd case, the Court of Appeal held that the advocate had both the implied and ostensible general authority to bind the appellant client “in effecting the compromise”. The court affirmed the judgment of the High Court and dismissed the appeal. In a more recent decision in *Intercountries Importers and Exporters Limited vs. Teleposta Pension Scheme Registered Trustees & 5 others*[2019] eKLR, the Court of Appeal pronounced itself as follows:-

“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...”
16. The Applicant herein was the plaintiff and decree holder in all the consolidated suits. He has not disputed the authority of his own counsel to act for him in this appeal, but that of the counsel for the Respondents to represent the judgment debtors in the remaining consolidated suits. He has not shown that these other parties were represented by different counsels before the lower court or otherwise shown that Mrs. Githae was duly not instructed in bringing the motion dated 14.07.2020. The memorandum of appeal herein was presented by C.W. Githae & Co. Advocates regarding all the consolidated suits. Moreover, at no time was the question of representation raised by his counsel in the several appearances in respect of the compromised motion, to which he had filed a response, or even at the time of the consent. The advocates representing the parties must therefore be deemed to have had the requisite authority to compromise the motion as they did.
17. The Applicant appeared to front the strained argument that the consolidation of the four suits was purely for purposes of determining the issues before the trial court and once judgment was rendered the suits were so to speak “de- consolidated”. First, the memorandum of appeal filed herein reflects all the consolidated suits and challenges the awards therein. If it were otherwise, and the consent order limited to one suit, the Applicant’s counsel ought to have opposed the omnibus stay order in respect of the consolidated suits. Besides, the live prayer in the motion at the time of the compromise is prayer 3 which expressly sought to stay execution of the decree in the consolidated suits being Nairobi Milimani CMCC No. 3524 of 2013, Nairobi Milimani CMCC No. 3318 of 2013, Nairobi Milimani CMCC No. 4457 of 2013 and Nairobi Milimani CMCC No. 4473 of 2013. There was no qualification to limiting the application of the stay order to one suit alone, and the amount of security for stay was spelt out in the dictated terms. In the court’s view the Applicant has failed to demonstrate the alleged wrong facts, mistake, misrepresentation and or material non-disclosure that induced his counsel to record the consent order.
18. Finally, the Applicant’s argument in respect of the provisions of order 21 rule 8 of the *Civil Procedure Rules* (CPR) holds no water as the consent herein was recorded orally in court. The extracted order replicated the oral consent. Considering all the foregoing, the Court is of the view that the present motion is not only devoid of merit but also appears to be an afterthought. The motion is without merit and is dismissed with costs to the Respondents.



DELIVERED AND SIGNED ELECTRONICALLY ON THIS 17TH DAY OF NOVEMBER 2022.

C.MEOLI

JUDGE

In the presence of:

Mrs. Githae for the Appellant/Respondents

Mrs. Ndirangu for the Respondent/Applicant

C/A: Carol

