



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 172 OF 1997

STEPHEN MUKIRI NDEGWA.....1ST PLAINTIFF

CONTINENTAL MARKETING LIMITED.....2ND PLAINTIFF

V E R S U S

KENYA COMMERCIAL BANK LIMITEDDEFENDANT

RULING

1. Before this Court is the Notice of Motion dated **14th May 2020** by which **KENYA COMMERCIAL BANK** (the Defendant/Applicant) seeks the following orders:-

“1. SPENT

2. SPENT

3. The consent entered into between the Plaintiffs and the Defendant dated 10th August, 2015 and filed in Court on 24th August, 2015 be hereby adopted as an Order of this Honourable Court.

4. Consequent to Order No. 3 above, this Honourable Court be pleased to find and hold that the Defendant has fully satisfied its obligations to the Plaintiffs arising out of their claims in this suit.

5. The costs of and occasioned by this Application be borne by the Plaintiffs.”

2. The application was premised upon **Sections 1A, 1B, 3A & 34** of the **Civil Procedure Act, Order 40 Rule 1(a)** and **Order 50 Rule 1** of the **Civil Procedure Rules, 2010**, the Inherent Jurisdiction of this Honourable Court and all other enabling provisions of the law and is supported by the Affidavit dated **14th May 2020** sworn by **TOM OGOLA** the Legal Manager of the Defendant Bank.

3. The Respondents **STEPHEN MUKIRI NDEGWA** (1st Plaintiff/Respondent) and **CONTINENTAL MARKETING LIMITED** (the 2nd Plaintiff/Respondent) opposed the application vide their Replying Affidavit dated **10th July 2020** sworn by **STEPHEN MUKIRI NDEGWA**, the 1st Plaintiff in this matter. The application was disposed by way of written submissions. The Defendant/Applicant filed its written submissions dated **15th September 2020** whilst the Plaintiff/Respondents filed in Court their written submissions dated **1st September 2020**.

BACKGROUND

4. Vide a Judgment dated **2nd May 2008** the 2nd Respondent was awarded the sum of **USD 32,869.26** together with interest at Court rates from the date of filing of the suit until payment in full. The Defendant/Applicants filed an appeal against said Judgment, which appeal was partially successful. In the Judgment of **11th July 2014** the Court of Appeal varied the Judgment of the High Court and reduced and converted into local currency the sum awarded to the Plaintiff/Respondent from **USD 32,869.26** to **Kshs. 1,939,286.30**.

5. The Defendant/Applicant alleges that vide a consent entered into between the parties on **10th August 2015** the Respondents claim was

fully settled by the Applicant at an aggregate sum of **Kshs. 10.7 million** as full and final settlement of the suit. This sum comprised of **Kshs. 7.5 million** due to the 2nd Plaintiff and costs of **Kshs. 3.2 million**.

6. On **1st March 2019** Messrs **Matosha & Advocates** acting for the Plaintiffs wrote to the Defendant Bank demanding payment of **Kshs. 215,477,964.74**. The Defendants by their reply of **8th March 2019** asserted that the Plaintiff's claim had been settled in full as there had been accord and satisfaction. The Defendant therefore categorically denied that the Plaintiff had any further claims as against the Bank.

7. On **18th March 2019**, the Plaintiff/Respondents applied for a Notice to Show Cause to issue for the attachment of the Defendant for the decretal sum of **Kshs. 215,477,969.74**. The Notice to Show Cause was heard by **Hon. Claire Wanyama, Deputy Registrar** and subsequently Warrants of Attachment and sale of the Defendant's property were issued on **2nd April 2019**.

8. By way of a Notice of Motion dated **2nd April 2019** the Defendant/Applicant sought to have the Warrant of Attachment and sale set aside and prayed for declaratory orders to the effect that the Defendant had fully satisfied its obligations to the Plaintiff.

9. Vide a Ruling delivered on **15th April 2020**, this Court ordered that the Warrants of Attachment and Sale issued on **2nd April 2019** be set aside. However the Court dismissed the Defendants prayer for declaratory orders. The Court further opined that the Consent dated **10th August 2015** which had been filed in Court on **24th August 2015** remained valid as the same was on record. However it was noted that the said consent had never been formally adopted by the Court despite the fact that the obligations thereunder had been performed through the payment of **Kshs. 10.7 million** to the Advocate of the Plaintiff who was then on record.

10. Prompted by that Ruling the Defendant/Applicants filed this present application seeking the adoption of the consent on grounds that the Decree had been fully satisfied through the said consent. The Plaintiff / Respondents in opposing the application for adoption of the consent took the position that they ought not be coerced into adopting a consent where their Advocate had no instruction to enter into the said consent.

11. The Plaintiffs claim that they filed a complaint against their Advocate at the **Advocates Complaints Commission** vide the letter dated **7th October 2015**. The Plaintiffs further contend that the High Court became "**functus officio**" in this matter once the Judgment of **2nd May 2008** was delivered by **Hon. Justice Lessitt**.

ANALYSIS AND DETERMINATION

12. I have carefully considered this application, the various affidavits filed in the matter, the written submissions filed by both Counsel as well as the relevant law. The only issue for determination is whether the Court should adopt the consent dated **10th August 2015** and filed in Court on **24th August 2015**.

13. **Order 25 Rule 5(1)** of the **Civil Procedure Rules, 2010** which deals with the Doctrine of Consents provides as follows:-

"Where it is proved to the satisfaction of the Court and the Court after hearing the parties directs that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the Defendant satisfies the Plaintiff in respect of the whole or any subject matter of the suit, the Court shall on the application of any party order that such agreement, compromise of satisfaction be recorded and enter Judgment in accordance therewith."

14. The adoption by Courts of Consents entered into by litigating parties is done in keeping with the spirit of **Article 159(2)(c)** of the **Constitution of Kenya** which exhorts Courts to encourage all forms of **Alternative Dispute Resolution**.

15. The consent entered into between the parties which was dated **10th August 2015** provided as follows:-

"By Consent

The above mentioned [suit] be settled on the following terms:-

a. The Defendant pay the aggregate sum of Kshs. 10.7 million consisting of the sum due to the 2nd Plaintiff of Kshs. 7.5 million and costs of Kshs. 3.2 million in full and final settlement within 21 days.

b. The Defendant to execute the discharge of the charged property and release the title documents within the said period of 21 days.

c. In default of payment at the expiry of 21 days from the date of this consent, execution to continue; and

d. The Defendant to meet the costs of the Auctioneer."

16. In performance of that consent the Defendant/Applicants transferred to the Plaintiffs advocate then on record **Mr. Kelvin Mogeni** the sum of **Kshs. 10.7 million**. This fact is **not** denied by the Plaintiffs neither has their said Advocate denied having received this amount of **Kshs. 10.7 million** from the Defendants.

17. In the Ruling of 15th April 2020 this Court observed as follows:-

“In order for a court to enforce a Consent, the same must have been duly adopted as an order of the Court. This consent was not so adopted and as such cannot be enforced by the Court. This fact I believe informed the decision of Hon. Lady Justice Mary Kasango in her Ruling dated 29th November 2019 to give no consideration to the Consent dated 10th August 2015.

I find that this Consent will only be enforceable once it has been placed before Court for adoption. As such the party seeking to place reliance on said consent must move the Court to have the consent adopted as an order of Court. Only then will the Consent dated 10th August 2015 have effect and be enforceable by this Court ...”

18. The Defendant / Applicant submits that the consent ought to be adopted by the Court arguing that the same has been perfected through the payment of **Kshs. 10.7 million** to the Respondents Advocate. That after the said payment was made but before the consent could be adopted by the Court, the Plaintiff/Respondent had a falling out with their Advocate then on record. Thereafter the Respondent renounced the said consent and began to claim that the same was entered into without their consent.

19. The Applicants submitted that the fact that the consent between the parties had not been adopted as a Court order does not affect the validity of the said Consent. The Applicants urged the Court to adopt the consent and to find and hold in terms of **Section 34 of the Civil Procedure Act, Cap 21 Laws of Kenya** that the Decree had been fully satisfied. The Applicants reminded the Court that it had an obligation under **Article 159(2) of the Constitution of Kenya, 2010** to encourage and uphold alternative methods of dispute resolution and that a consent was one such mode of **ADR**.

20. In opposing the Application the Plaintiff/Respondents urged the Court **not** to adopt the Consent. It was submitted that any consent entered into between parties to a suit is required to be validated through formal adoption by the Court in order to become a Court order.

21. The Plaintiff/Respondent further submitted that in order for a consent to be valid the same must be entered into voluntarily ie there must be no coercion, duress, mistake or misrepresentation. That having been entered into without the Plaintiffs consent the said Consent Order is capable of being withdrawn. It was argued that the Plaintiff ought not be held hostage to a consent which it no longer wishes to be party to.

22. The Plaintiff/Respondent cited and relied upon the decision in the case of **MOHAMED BARE & 48 OTHERS –VS- KENYA RURAL ROADS AUTHORITY ELRC CAUSE NO. 915 OF 2015** where the Court held that:-

“In this case even through the consent agreement was received as filed on 19th April 2016, the same is not reduced as an order of the Court to be binding upon the Claimants in compromise of their claims. A record of the Court should follow such filing of the consent agreement, for the Judge to adopt and confirm the same in its terms and conditions”

23. The Respondents also relied on the case of **HIRANI –VS- KASSAM (1952) 19 EACA** where the Courts cited a passage from **Seton on Judgments and Orders 7th Edition, Volume 1 page 124** which stated as follows:-

“... Although an advocate has ostensible authority to compromise his client’s case, employing such authority cannot be upheld where counsel consents to order which is diametrically opposed to the express instructions which a client has given him ... and if it is shown to the Court that the client was not even aware of the application that gave rise to those consent orders, leave alone having consented to the recording of the orders, in the absence of any satisfactory explanation ... a Court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the Consent Order issued.”

24. Finally the Plaintiffs submitted that despite the consent having been filed by their previous Advocate, that Advocate failed to have the said consent adopted by the Court. The Plaintiffs stated that they do not wish to adopt the terms of the consent as they contend the said consent varies the decree and they had not instructed their former Advocate in enter into such a Consent. According to the Plaintiff the **Kshs. 10.7 million** received by their former Advocate should be reimbursed to the Applicant as the Respondent has to date never received the said amount.

25. It is trite that a Consent only becomes binding on parties and attains legal character once it is adopted as an order or judgment of the Court. Authorities to this effect are legion. In **CHURCH ROAD DEVELOPMENT CO. LTD –VS- BARCLAYS BANK OF KENYA & ANOTHER HCCC No. 296 OF 2006 Hon Justice Onyancha** (as he then was) held as follows:-

“I wish to point out that my examination of the file records, as earlier pointed out, confirms that the “consent orders” were received in court. They were stamped and filed in this file. BUT they were not recorded in the file by the Deputy Registrar. I hold the opinion that no such consents by the parties or their counsel in a suit, become part of the court proceedings or judicial proceedings until they are so recorded and duly signed by the Deputy Registrar. The act of recording the consent and signing it, is not merely administrative in my view. It is judicial and holds judicial or legal consequences.”

26. Further in the case of **SIMON AYIEMBA –VS- KENYA INDUSTRIAL ESTATES LTD BUSIA CIVIL APPEAL No. 5 OF 2001 Hon. Justice Sergon** held:-

“There are only two ways in which a Consent can be legally accepted by the Court; the first instance is when the parties file in Court a fully executed written contract which becomes a Court Order the moment it is domesticated and approved by Court and the second instance is when one of the parties orally addresses the Court on the contents of the proposed Consent

thereafter the adversary as called upon to confirm the contents. The names of the parties orally addressing the Court must be recorded and the Court receiving the Consent must then approve and subsequently adopt the terms of the Consent as an Order ...”

27. Finally the Supreme Court of Kenya rendered itself on this issue in the case of **GEOFFREY M. ASANYO & OTHERS –VS- THE ATTORNEY GENERAL [2018]eKLR** where their Lordships held:-

“Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of *evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption.* This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court. It is only from that stage, that the Court becomes *functus officio.* This Court having ruled that the Judgment of the Court of Appeal (dated 13 November 2015) was a nullity; and that Court having not *formally adopted the consent by parties, was not yet functus officio.*” [own emphasis]

28. A Consent entered into between parties is deemed to be tantamount to a contract between said parties and will have the same binding force as a contract. As such the Court cannot interfere with the terms of a consent unless circumstances are shown to exist that would amount to grounds for rescinding a contract. In **FLORA N. WASIKE –VS- DESTIMO WAMBOKO [1988]KLR** the Court of Appeal held thus:-

“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, then, 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.” [own emphasis]

29. The Plaintiff/Respondent allege that the Advocate on record for them at the time the consent was entered into one **Mr. Kelvin Mogeni** did not have instructions to enter into the said consents on their behalf. The Plaintiffs state that they have referred the matter to the **Advocates Disciplinary Tribunal**. However aside from the mere allegation he Plaintiffs have not availed any evidence to show that the said Advocate had specific instructions **not** to enter into the Consent on behalf of the Plaintiff. In the **FLORA WASIKE –VS- DESTIMO WAMBOKO CASE [Supra]** the Court of Appeal observed that an Advocate who is on record for a party is deemed to have authority to act on behalf of their client.

The Court held:-

“Furthermore *Waugh v H B Clifford & Sons [1982] Ch 374, is persuasive authority that a solicitor or counsel would ordinarily have ostensible authority to compromise suit so far as the opponent is concerned, and Mr Dhanjal would seem to have had such authority in this case. I can detect no valid reasons on the record for saying that there exist grounds such as I have referred to which would justify the setting aside of this judgment as a contract, though this does not preclude the appellants from proceedings by one of the other methods which I have indicated as being open to her.*”

30. The fact that a complaint against **Mr. Kelvin Mogeni** has been filed with the **Advocates Disciplinary Tribunal** does not prove that the said Advocate had no instructions to enter into the consent. That court has not been informed of the decision (if any) from the Tribunal. The Tribunal may very well end up dismissing the complaint against the Advocate.

31. Accordingly I find that the allegations by the Plaintiffs against their Advocate remain just that – mere allegations. The Advocate was properly on record and as such any actions undertaken by the Advocate are binding on the client. In **KENYA COMMERCIAL BANK LIMITED –VS- SPECIALISED ENGINEERING CO. LIMITED [1982]KLR 485;** it was held that:-

“A duly instructed advocate has an implied authority to compromise and settle the action and the client cannot avail himself any limitation by him of the implied authority to his Advocate unless such limitation as brought to the notice of the other side.”

The contestation that this Advocate had no authority to enter into a consent with the Defendants has not in my view been satisfactorily proved.

32. The Plaintiff/Respondents have submitted that they ought not be coerced into accepting the consent on record. As stated earlier a consent is tantamount to a contract between the parties and the grounds upon which a consent / contract can be set aside, discharged and/or varied are clear in law. In the **KENYA COMMERCIAL BANK –VS- SPECIALIZED ENGINEERING COMPANY LIMITED [1982]KLR** the Court held 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 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.”

33. The Applicants plead that they should not be coerced into a consent they did not authorize. However there is no evidence that the consent was not entered into voluntarily by all the parties. There is no evidence of collusion, fraud and/or misrepresentation by either party. The Plaintiffs did not object at the time the consent was entered into. They only began to raise issues **after** the consent had been filed when they fell out with their Advocate on record.

34. The consent dated **15th August 2015** though on record in this matter has not yet attained the legal character of a Court order. However, in my view that consent certainly does have legal implications under the law of contract. In order to satisfactorily impugn the consent the Plaintiff must demonstrate that the same was procured through ‘fraud’ ‘collusion’ ‘misrepresentation’ or is otherwise contrary to policy.

35. The Plaintiffs herein have **not** made any application to have this consent set aside or varied. In **BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND –VS- MICHAEL MWALO, CIVIL APPEAL No. 293 OF 2014**, the Court of Appeal said:-

“A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of Court.” [own emphasis]

I find and hold that the Plaintiff have failed to adduce evidence to meet the threshold for the discharge and/or withdrawal of the consent dated **10th August 2015**.

36. The Applicants have asserted to the Court that relying on the consent the sum of **Kshs. 10.7 million** was forwarded to the Plaintiffs Advocate. The Plaintiffs have not controverted this evidence. Therefore I find that the said consent has already been perfected. The only thing remaining is the formal validation of the consent by the Court. In the circumstances I find no valid grounds exist for this Court to decline to adopt the consent.

37. I therefore allow the Notice of Motion dated **14th May 2020** in terms of prayers **(3)** and **(4)** thereof and make the following orders:-

- i. The Consent entered into between the Plaintiffs and the Defendant dated 10th August 2015 and filed in Court on 24th August 2015 is hereby adopted as an order of this Court.**
- ii. Accordingly Court declares that the Defendant has fully satisfied its obligations to the Plaintiff arising out of their claims in this suit.**
- iii. Costs of this Application shall be borne by the Plaintiff/Respondent.**

DATED IN NAIROBI THIS 26TH DAY OF FEBRUARY, 2021.

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MAUREEN A. ODERO

JUDGE