



Intercountries importers and Exporters Limited v Mwikya & another (Commercial Suit 198 of 2013) [2021] KEHC 49 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)

Neutral citation: [2021] KEHC 49 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT 198 OF 2013
DAS MAJANJA, J
SEPTEMBER 23, 2021**

BETWEEN

INTERCOUNTRIES IMPORTERS AND EXPORTERS LIMITED PLAINTIFF

AND

JENNIFER N'THENYA WAMBUA MWIKYA 1ST DEFENDANT

GREEN VIEW LODGE LIMITED 2ND DEFENDANT

RULING

1. Fearing execution of the decree herein, the Defendants moved the court by the Notice of Motion dated 29th July 2021. The Defendants seek to set aside the execution but principally, they pray that the court vacate and or set aside the consent judgment recorded on 24th October 2018 and the consent on costs recorded on 17th October 2019.
2. The application is supported by the 1st Defendant's affidavit and supplementary affidavit sworn on 30th July 2021 and 26th August 2021 respectively. The Plaintiff opposes the application by the Grounds of Opposition dated 6th August 2021 and the replying affidavit of Naushad Abid sworn on 19th August 2021. Both parties filed brief written submissions in support of their respective positions.
3. The gravamen of the Defendants' application is that they did not issue instructions and had no prior knowledge of the consents recorded in the matter on 24th October 2018 and 17th October 2019. They contend that they have a valid defence and should be granted leave to defend the matter on its merits.
4. In the replying affidavit, the Plaintiff gave an account on how the consents in issue were reached as follows. The firm of Mugambi and Company Advocates came on record 17th October 2018 after taking over from Njenga and Company Advocates for the Defendants and in that regard filed a Notice of Change of Advocates. Mugambi and Company Advocates then wrote to the Plaintiff Advocates a letter



dated 19th October 2018 proposing settlement and enclosed a consent letter. It is this consent letter that was recorded in court when the matter came up for hearing on 24th October 2018. By a letter dated 26th February 2019, the Plaintiff's advocates wrote to Mugambi and Company Advocates to settle the amount. Mugambi and Company wrote back and requested for computation of the decretal sum. By a letter dated 18th March 2019, the Plaintiff's advocates advised Mugambi and Company the amount due following which they drew up a consent for costs in a letter dated 17th October 2019. The consent settling costs at Kshs 700,000.00 was signed by Mugambi and Company.

5. In their submissions, the Defendants restate that the firm of Mugambi and Company Advocates did not have instructions to act on their behalf and that the firm acted without informing them of the suit. They add that the circumstances under which the consent was recorded were suspicious. For example, the haste in which the advocates recorded the consent only two days after they came on record and the fact that the issue of costs was settled almost a year later. They further state that at the material time, Mr Mugambi did not have a practicing certificate and was not licensed to practice. The Defendants cite the case of *Kenya Sugar Board v Mumias Sugar Company Limited and 2 Others [2006] eKLR* where the court held that the presumption that a consent is binding on all parties in proceedings or action and those claiming under it is rebuttable. In this case, they submit that they have demonstrated that the consent should be set aside.
6. In response, the Plaintiff submits that the Defendant have not made out a case of setting aside the consent order. It cites *Flora N. Wasike v Destimo Wamboko*, where the Court of Appeal held that a consent can only be set aside on grounds that would justify setting aside a consent order. Counsel also cites *Risper Maende Olando v Praxidis A. Soale and 6 Others [2018] eKLR* to argue that that even without specific instructions to enter into a consent, the Advocates on record has general authority to defend the suit and apparent authority to compromise all matters connected to the action. The Plaintiff also points out that the consent judgment was recorded in open court on 24th October 2019 and cited *Brooke Bond Liebig (T) Ltd v Mallya [1975] EA 266* where the court held that a consent recorded in court in the presence of and with the consent of counsel was binding and could only be set aside if it was obtained by fraud, collusion, or by an agreement contrary to the policy of the court.
7. The Plaintiff also submits that there is no evidence that Mr Mugambi did not have a practicing certificate in 2018 when the consent was recorded. It contends that Mr Mugambi's lack of practicing certificate in 2018 cannot render the judgment irregular or warrant the setting aside of the judgment.
8. The principles governing setting aside of a consent orders are well established within this jurisdiction. In *Brooke Bond Liebig v Mallya (Supra)* Mustafa Ag. VP expressed the following principal as follows;

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.

9. In *Flora N. Wasike v Destimo Wamboko (Supra)* Hancox JA cited *Setton on Judgments and orders (7th edition) vol 1 page 124*, and reiterated that;

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.

10. *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd*, Harris J. correctly held inter alia, 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.

11. In light of the principles I have cited, have the Defendants established that the consent orders were obtained by fraud, collusion, misrepresentation or any other grounds that would entitle the court to set aside the contract? First, it must be noted that there is no suggestion in these proceedings that the Plaintiff or its counsel was engaged in any form of fraud or collusions. The evidence of correspondence originating from Mugambi and Company Advocates shows the exchange was at an arm's length. As was stated in the *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd*(Supra) the Advocate on record, being an agent of the client, has apparent or ostensible authority to bind his client. In this case there was nothing to alert the Plaintiff of any lack of instructions hence the consent was binding.
12. Moreover, the circumstances which the Defendants raise as suspicious do not establish any fraud at all. Mugambi and Company Advocates came on record when the suit had already been fixed for hearing and it is equally plausible that the he recorded a consent to obviate the hearing of the suit. The same advocate is the one who prepared and recorded the consent on costs. Despite knowledge that consent orders had been entered, it surprising that the Defendants did not complain to the police about a fraud perpetrated on them by an advocate. They did not bother to write to the advocate to seek an explanation why he would purport to act on their behalf. Even before the application was filed, there appeared to be discussions with the parties to resolve the matter without any suggestion that the consent was fraudulent. Finally, it is the Defendants who instructed the Advocate, whether or not he had a practicing certificate does not affect the consent orders recorded. At the end of the day, the Defendants have not established the grounds for setting aside the consent judgment and order.
13. Since the I have refused to set aside the consent judgment, the judgment is now due. The Defendant's complain that they were no aware of the judgment. They are now aware. I grant them the opportunity to show cause why execution should not proceed.
14. For the reasons I have set out above, I dismiss the Defendant's Notice of Motion dated 29th July 2021. The Defendants shall appear before the Deputy Registrar on a date fixed to show cause why execution should not be proceed.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Kilonzo instructed by Kilonzo and Company Advocates for the Plaintiff



Mr instructed by Githinji Mwangi and Company Advocates for the Defendants

