



**Owuor (Suing as the legal administrator of the Estate of Ishmael
Owuor Molo - Deceased) v Oleche (Environment and Land Appeal
8 of 2023) [2023] KEELC 20196 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20196 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 8 OF 2023
AY KOROSS, J
SEPTEMBER 28, 2023**

BETWEEN

**PETER AKUMU OWUOR (SUING AS THE LEGAL ADMINISTRATOR OF THE
ESTATE OF ISHMAEL OWUOR MOLO - DECEASED) APPELLANT**

AND

BILL ONYANGO OLECHE RESPONDENT

*(Being an appeal from the ruling of PM Hon. J. P. Nandi given
on 16/02/ 2023 in Bondo ELC Case Number E052 of 2022)*

JUDGMENT

Background of the appeal

1. This appeal emanates from a ruling of the trial court rendered on 16/02/2023 on a notice of motion dated 10/01/2023 filed by the appellant against the respondents. He had sought several orders from the trial court primarily, the consent order that had been entered by their respective counsels on 08/12/2022 allowing Francis Otieno Odola (deceased) to be buried on land parcel no. Siaya/Memba/2803 ('suit property') be set aside on grounds counsel M/s. Martha Mukoya neither had instructions nor did she have a practicing certificate.
2. In opposition to the motion, the respondent filed his replying affidavit which he deposed on 27/01/2022. This appears to be an erroneous date. In it, he contended counsel M/s. Martha Mukoya had instructions from counsel Mr. Odinga to record the consent.
3. The appellant filed an undated supplementary affidavit in which he asserted the court record did not demonstrate counsel M/s. Martha Mukoya had instructions from Mr. Odinga to enter into the consent.



4. The motion was disposed of by written submissions. In its ruling that is the subject of this appeal, the trial court after analyzing several court decisions, arrived at the conclusion that the absence of counsel M/s. Martha Mukoya's practicing certificate did not interfere with the consent order and in the absence of fraud or collusion, the appellant had not met the threshold to warrant setting aside the consent order. It dismissed the motion with costs to the respondent.

Appeal to this court

5. Dissatisfied, the appellant preferred an appeal to this court in which he raised the following grounds of appeal:-
 - a. The trial court erred in law and fact by failing to set aside, vary, vacate and/or review the consent order recorded on 08/12/2022.
 - b. That the trial court erred in law and fact by failing to find counsel M/s Martha Mukoye being a newly admitted advocate made a mistake by recording a consent.
 - c. The trial court erred in law and fact by failing to appreciate and hold that counsel M/s Martha Mukoye recorded the consent order without express authorization or instructions from either the appellant or Mr. Oduor Odinga Advocate for the appellant at the material time.
 - d. That the trial court erred in law and fact for failing to grant the notice of motion dated 10/01/2023 contrary to compelling and cogent evidence of mistake and lack of authorization on the part of counsel M/s Martha Mukoye.
6. Counsel prayed for the decision to be varied, vacated, set aside and reviewed and the notice of motion dated 10/01/2023 be allowed as sought. As directed by the court, the appeal was canvassed by written submissions.

Appellant's submissions

7. The appellant's counsel, Mr. Jaoko, filed his written submissions dated 08/05/2023. Counsel identified 8 issues he considered for determination by this court. Despite identifying them, he condensed them into one issue: whether the trial court had erred in not setting aside the consent judgment.
8. Counsel submitted that the law was settled on setting aside consent judgement; it could only be set aside on grounds such as fraud and collusion. Counsel relied on the Court of Appeal decision of *Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees and 5 others* [2019] eKLR that cited the case of *Brooke Bond Liebig v Mallya (1975) EA 266* where Mustafa Ag. VP stated thus;

“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.”



9. Counsel also relied on the well cited Court of Appeal decision of Flora N. Wasike v Destimo Wamboko [1988] eKLR where Hancox JA cited Setton on Judgments and Orders (7th edition) vol 1 page 124 as follows: -

“ 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. Counsel also cited the persuasive decision of Protus Hamisi Wambada & another v Eldoret Hospital [2020] eKLR which stated: -

“ the omission to obtain a written agreement from the parties makes this matter suitable for setting aside the consent that did not meet the threshold of a contract.”
11. Counsel submitted the consent was akin to disposing of land and contravened the provisions of Section 3 (3) of the Law of Contract Act since it was in not in writing and the parties were not present in court when it was recorded.
12. Counsel submitted that counsel M/s. Martha Mukoya had not been instructed by either Mr. Odinga or the appellant to record a consent but was merely instructed to hold brief for Mr. Odinga with limited instructions to notify the court on the status of a case in Kisumu law courts.
13. In referring to Order 25 Rule 5 (1) of the Civil Procedure Rules, counsel submitted the consent had not been proved, there was no written agreement signed by the parties, it was not established there was a meeting of minds and it contravened Section 3(3) of the Law of Contract Act.
14. Counsel submitted that pursuant to the provisions of Section 80 of the Civil Procedure Act, a decision could be reviewed on grounds of mistake, discovery of new evidence that was not available upon due diligence or for any sufficient cause. According to counsel, counsel M/s. Martha Mukoya was a newly admitted advocate who had made a mistake. He relied on the persuasive decision of Bakari Shaban Gakere vs Mwana Idd Guchu & 3 others [2022] eKLR where the court held the mistakes of counsel should not be visited on their clients.

Respondent's submissions

15. His counsel, Mr. Ogotu, filed his written submissions on the 4 grounds of appeal.
16. On the 1st ground, counsel submitted in rendering its decision, the trial court relied on decisions from the superior courts including Brooke Bond Liebig vs Mallya (Supra) which had settled the principles of setting aside a consent order; the appellant had not met the threshold. The terms of the consent had been complied, the body of Francis Otieno Odola (deceased) was interred on the suit property and the appellant had amended his plaint. Counsel relied on the case of Eliud Kingwara Adawo vs Philip Achieng John and another [2015] eKLR.
17. On the 2nd, 3rd and 4th grounds, Counsel submitted it was inconsequential whether counsel M/s. Martha Mukoya was a newly admitted advocate; she always had conduct of the matter and had full instructions.



Analysis and determination

18. As this is a first appeal, this court is called upon to re-evaluate, re-examine and reassess the evidence from the lower court and come up with its own deduction. See *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* (1985) EA 898.
19. Having evaluated the grounds of appeal, submissions, notice of motion dated 10/01/2023 and affidavits in support or in opposition thereto and ruling that is the subject of this appeal, it is noted the appellant's grounds of appeal has raised an issue not pleaded, canvassed, raised or succinctly made an issue before the trial; the issue of counsel M/s. Martha Mukoya's admission to the bar.
20. In fact, it was merely mentioned in the appellant's submissions before the trial court dated 26/01/2023 that she was a newly admitted advocate who did not have instructions to enter a consent. Submissions are merely arguments.
21. Further, the appellant contended in his submissions that the consent order contravened the provisions of Section 3 (3) of the Law of Contract Act and Order 25 Rule 5 of the Civil Procedure Rules. Notwithstanding whether or not these portions of his submissions were in support of his 1st ground of appeal, these issues were never pleaded, canvassed, raised or succinctly made an issue before the trial court.
22. The appellant has not sought leave to introduce new evidence on appeal and for that reason, I reject the ground of appeal on counsel M/s. Martha Mukoya's admission status or those new issues that were introduced in his submissions. I place reliance on the Court of Appeal decision of *Kenya Hotels Ltd v Oriental Commercial Bank Ltd* (Formerly known as *The Delphis Bank Limited*) [2019] eKLR which stated: -

“As this Court in *Republic V. Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR emphasised, submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage. I may add that the philosophy behind the appellate system, which save in exceptional cases, restricts the appellate court to consider only those issues that were canvassed before (and perhaps determined) by the trial court. See *North Staffordshire Railway Co. V. Edge* [1920] AC 254). Of course if a matter is raised at the trial and the trial court does not determine it, it may be made the subject of an appeal.”
23. The court has also noted the impugned ruling was rendered on 16/02/2023 and not 17/02/2023. There appears to be an error on the date cited by the appellant. It appears the date was muddled up which is an excusable error that does not go to the root of the issues for determination. I hereby invoke Article 159 (2) (d) of *the Constitution* and consider it a technical error.
24. I will now turn to the thrust of the issue for determination. The grounds of appeal are all corelated and can be condensed into one issue: whether the trial court erred in law and fact in failing to set aside the consent order dated 08/12/2022 despite evidence of mistake and lack of instructions to counsel M/s. Martha Mukoya. I shall be guided by authorities that have been well cited by counsels.
25. From the authorities cited by both counsels and also relied on by the trial court more particularly *Brooke Bond Liebig vs Mallya* (Supra) and *Intercountries Importers and Exporters Limited vs Teleposta Pension Scheme Registered Trustees* (Supra), it is evident the principles for setting aside a consent order is settled and the trial court did not err in law.



- 26. From the decisions, it can be deducted a consent order can only be set aside on grounds that would allow for a contract to be vitiated which includes but are limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.
- 27. It is evident the appellant’s ground to set aside the consent order was because counsel M/s. Martha Mukoya entered the consent order without his express instructions. Which according to him, amounted to a mistake.
- 28. In defining “mistake”, the Court of Appeal in the case of Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees (Supra) referred to Black’s law dictionary which defined it as follows: -
 - “ 1. An error, misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (1) the parties to a contract did not mean the same thing, or (2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable.”
- 29. The terms of the consent were entered in the following terms in part: -
 - “ 1. That the respondent be and is hereby allowed to burry (sic) Francis Otieno Odola (deceased) in the suit parcel Siaya/Memba/2803.
 - 2. That the plaintiff to amend the plaint if need be.
 - 3
 - 4
- 30. From my deduction of the definition of mistake and averments of paragraph 10 of the appellant’s supporting affidavit before the trial court which was that counsel M/s. Martha Mukoya had been instructed to address the court in respect of Kisumu HCCA No.70 of 1986 and 82 of 1987 between John Okara vs Ishmael Owuor Molo & 2 Others and not otherwise, my understanding of this was that counsel had been given a separate set of instructions but went on a frolic of her own and recorded her own consent. In other words, there was a misunderstanding between the appellant and counsel M/s. Martha Mukoya.
- 31. The onus was on the appellant to proffer such a mistake by tendering an express instruction to his then counsel on the terms of the consent and demonstrate that the consent order differed with it; which he did not. In the absence of proving mistake, his argument collapsed. From the record, counsel M/s. Martha Mukoya had always been on record for the appellant, was privy to the case, at no time did she hold any other counsel’s brief including Mr. Odinga’s and no evidence was tendered to show she acted in error in recording the consent order without instructions.
- 32. From the record, both parties complied with the consent order. In terms of the consent, the appellant amended his plaint on 20/12/2022 in which he sought for exhumation of the body of Francis Otieno Odola (deceased) from the suit property and swore a verifying affidavit affirming the contents of the amended plaint.
- 33. All these were indicative of the terms of the consent his counsel recorded and had no qualms in complying with it and it is preposterous for him to raise the issue of setting aside the consent when the horse had bolted. I agree with the trial court that the appellant did not satisfy the threshold to warrant

setting aside the consent order. I fully agree with the final disposal order of the trial court and have no reason to disturb it.

34. I am also satisfied counsel M/s. Martha Mukoya had instructions to compromise the suit and I rely on the Court of Appeal decision of *Specialized Engineering Company Ltd v Kenya Commercial Bank Ltd* [1988] eKLR which stated :-

“The latter appealed against this refusal to set aside the consent order, and this court dismissed the appeal. It held that the advocate had had both implied and ostensible general authority to bind the bank “in effecting the compromise,” and this Court adopted the judgment of Harris, J”

35. This court is alive that the matter is partly heard and despite Madiany Law Courts recently being gazetted with jurisdiction to hear and determine the suit that was the subject of the appeal, for purposes of expeditious disposal of this matter, it would be in the interests of justice if the matter proceeds to conclusion at Bondo Law Courts.

36. The upshot of the foregoing is that the appeal fails and I hereby dismiss it. It is trite law costs follow the event. I hereby award the respondent costs which shall be borne by the appellant.

37. It is so ordered

DELIVERED AND DATED AT SIAYA THIS 28TH DAY OF SEPTEMBER 2023.

HON. A. Y. KOROSS

JUDGE

28/09/2023

Judgment delivered virtually through Microsoft Teams Video

