**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**HIGH COURT CIVIL CASE NO. 391 OF 2017**

**(Coram: Odunga, J)**

**BETWEEN**

**JANET MORAA T/A JANNETTES CATERERS.....PLAINTIFF**

**VERSUS**

**HELMA INTIMATES EPZ LTD.....DEFENDANT**

**RULING**

**Introduction**

1. These proceedings were instituted by way of a plaint dated 21st September, 2017. According to the Plaintiff, she was contracted by the Defendant to offer staff canteen services for the Defendant's personnel at the Defendant's Athi River factory. Pursuant to the said agreement the Plaintiff undertook to set up a kitchen factory and engaged the services of various contractors to undertake renovations of the available space and improvements thereon so as to meet the required standards of food handling services. She then commenced the provision of the said services and for one year she was receiving payments in respect thereof. According to the Plaintiff, as a result of the need to meet the requisite demands, the Plaintiff increased her staff and contracted a number of suppliers.

2. However, the Defendant vide a letter dated 8th September, 2017 sought to unprocedurally terminate the Plaintiff's services in under 14 days, an action which the Plaintiff contended was humanly impossible considering the investments put in by the Plaintiff and the supplies pending payment.

3. It was contended that this was in violation of the terms of the agreement which provided for at least six months' notice. The Plaintiff then particularized the loss it stood to suffer in the event that the Defendant proceeded with the said action and sought a declaration that the said service agreement was valid and enforceable; an order restraining the Defendant from terminating the said agreement; an order for specific performance of the said agreement, special and general damages and any other relief deemed fit and just.

4. On 7th June, 2018, the court recorded a consent by which it was ordered that:

> 1. The plaintiff would continue offering the Defendant catering services on the latter's suit premises till 30th November, 2018.
>
> 2. The Plaintiff would be allowed one (1) month from 1st December, 2018 to 31st December, 2018 to remove all the equipment and give notice to her catering staff from the Defendant's premises.
>
> 3. That all costs associated with the removal of the equipment as well as issuance of the notices/termination of the catering staff contracts would be met by the Plaintiff.
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> 4. That if the parties so desire, they would freely negotiate and enter into a fresh contract at any time to be properly negotiated and correctly signed before its implementation.
>
> 5. That unless such a fresh contract was entered into, if the plaintiff would not have moved out of the Defendant's premises together with her staff and equipment by 31st December, 2018, the Defendant would be at liberty to evict the Plaintiff with the help of police officers.

6. That this case was marked as settled with each party bearing own costs.

5. By a Notice of Motion dated 11th December, 2018, the subject of this ruling, the Plaintiff now seeks that the said consent judgement and decree be set aside and that the matter do proceed to full hearing.

6. According to the plaintiff, her erstwhile advocates informed her on the proposal to adopt a consent judgement and she instructed her said advocates on her terms thereof amongst which was the renewal of her staff canteen services agreement for another four years in order to allow her recover the amount she invested in renovating the said kitchen and purchasing and installing kitchen equipment or the refund of the costs incurred therein. According to her the Defendant's advocates through their advocates offered a new proposal to cater for her expenses in purchasing and installing the said equipment which was never taken into consideration by her advocates during the adoption of the consent judgement. In her view, she has not benefited in any manner from the said consent judgement as all her interests have been overlooked. The plaintiff further lamented that her said advocates did not take into consideration the amount of Kshs 39,810,000.00 owed to her by the Defendants but adopted a detrimental consent evicting her from the premises upon the expiry of the contract. In the alternative, the plaintiff contended that the Defendant was to pay her the amount incurred in purchasing and installation the equipment, and the balance from the reduced meal prices by the Defendant from the initial contractual amount per plate.

7. The Plaintiff therefore averred that she was never agreeable to the terms of the consent adopted as the judgement of the court and that she was never involved by her advocate in ensuring the consent judgement was in accordance with her terms. According to the Plaintiff, her said advocates adopted the said consent upon receipt of a letter from the Defendant's advocates threatening that in the event that the same was not signed the Defendants would proceed and evict the Plaintiff immediately.

8. The Plaintiff therefor urged that unless the application is allowed, she stands to suffer immense and untold prejudices as she shall have been condemned unheard as opposed to the Defendant who stands to suffer no prejudice if the application is allowed.

9. In response to the application, the Defendant averred that although at the beginning of the year 2016, the Defendant and the Plaintiff commenced negotiations with a view to the latter providing catering services to the Defendant's staff on agreed terms and conditions, the parties did not agree on all the said terms of engagement particularly, the question of contract termination notice as well as the exit clauses which were never incorporated in the agreement. Nevertheless, due to the time the conclusion of the agreement was taking coupled with the fact that the Defendant had undertaken to its staff to provide them with meals, the Plaintiff was allowed to proceed with the said services albeit without the execution of the said contract by the parties. However, owing to the poor services offered by the plaintiff and lack of compliance with the mandatory requirements, as advised from time to time, the Defendant sought to terminate the existing relationship in an amicable and non-confrontational way. The Plaintiff on the other hand instituted these proceedings.

10. When the mater came up before the court, the parties were advised to consider pursuing an expedited out of court settlement. Pursuant therefore, the Plaintiff's advocates vide a letter dated 2nd October 2017 proposed a meeting on certain dates and it was agreed that the parties be first allowed to directly engage with the involvement of their counsel. In the meantime, the Defendant filed its pleadings. On 6th March, 2018 a partial consent was recorded by which the parties agreed to forego the pending application and to complete the pre-trial procedures and the hearing was set for 9th and 11th October, 2018. An order for maintenance of status quo was made and parties were encouraged to continue with their negotiations.

11. According to the Defendant the Plaintiff's proposal for the purchase of some of the equipment was conditional upon the recording of the consent in court on 6th March, 2018 as well as the Plaintiff's immediate departure from the suit premises. By a letter dated 31st may, 2018, the parties were able to reach an agreement and on 7th June, 2018, the day of the scheduled case management, conference, the parties appeared in court and requested that the said consent be adopted as an order of the court which was done.

12. According to the Defendant, it has since negotiated and entered into an agreement with another caterer by the name of Bonvivant Professional Caterers Limited vide a contract made on 6th December, 2018 which entity had begun mobilizing for the purposes of commencing services in January, 2019. It was therefore the Defendant's case that staying or setting aside the decree obtained herein will cause a lot of disruption as it will have the effect of annulling the contract entered into between the Defendant and the said Third Party Caterer and expose the former to legal liability running into millions of shillings. It was the Defendant's position that no useful purpose would be served by setting aside or staying the decree since the subject contract was due to expire on 31st December, 2018.

13. It was contended that the Plaintiff cannot accept and reject the consent at the same time by enjoying the extension of her time in providing catering services to the Defendant and at the same time seek to set it aside.

14. It was the Defendant's case that if the Plaintiff is aggrieved by the consequences of the consent order, she has a right to pursue an action against her former advocates on record personally. Since the consent was entered into on 7th June, 2018, the Plaintiff was well aware of its terms and conditions and if the same was unfavourable to her she had ample time to object and request for a full trial.

15. The Defendant therefore prayed that the application be dismissed with costs.

16. Suffice to state that the averments made by the Defendant were refuted by the Plaintiff in further affidavits while the Defendant, not to be left behind similarly filed a further affidavit.

17. Based on various authorities, it was submitted by the Plaintiff that the impugned consent was arrived at outside express instructions on the terms of the consent and did not take into account material considerations. These grounds, it was submitted falls within the four corners of the jurisprudence set out in the aid authorities. While appreciating that a duly instructed counsel has a general authority to compromise a suit on behalf of his client if he acts bona fide and not contrary to the express negative directions, such authority cannot be upheld where counsel consents to orders which are diametrically opposed to the express instructions given by the client. According to the Plaintiff, the

latter position applied to the present case.

18. On the other hand, it was submitted on behalf of the Defendant, based on the averments contained in its affidavits that the Plaintiff failed to prove the conditions necessary for setting aside consent orders particularly since there was no affidavit sworn by the Plaintiff's former advocates confirming the averments made by the Plaintiff.

**Determinations**

19. I have considered the foregoing. The consent order that is sought to be set aside in these proceedings was, no doubt, entered into by counsel who were duly instructed to act in the matter generally for their respective clients. In such circumstances the general rule was laid down by the Court of Appeal **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another Civil Appeal No. 276 of 1997** in where it was held that:

> **"A solicitor has a general authority to compromise on behalf of a client, if *bona fide* and not contrary to express negative direction; and it would seem that a solicitor acting as an agent for the principal solicitor has the same power. No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice…A consent order can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be settled which are not carried out."**

20. The locus classicus in applications for setting aside consent orders or judgements is the Court of Appeal decision in **Flora N. Wasike vs. Destimo Wamboko [1988] KLR 429; [1982-88] 1 KAR 625.** In that case the Court expressed itself as hereunder:

> **"It is well-settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons…Prima facie a consent 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement...A court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties…In the instant case, while the Judge did not in terms record the parties' 'or their advocates' consent to the consent judgement he entered, nevertheless the original record shows that both parties were represented by advocates and that the consent judgement was recorded in their presence. The universal practice is to record that a judgement or order is by consent, if that be the case, and it is difficult to believe unless demonstrably shown otherwise that the court would so head the judgement if it were not the case, at least so far as the Judge was aware. Furthermore, a solicitor or counsel would ordinarily have ostensible authority to compromise suit so far as the opponent is concerned…But it would be no mean task for a party to a decree by consent to prove that the decree is invalid on the grounds referred. It is abundantly clear that the appellant was a ready and willing party to the material judgement by consent and that the terms and consequences of the judgement were explained to her."**

21. The East African Court of Appeal on its part in **Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266** noted that:

> **"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 give rise to the setting aside of a consent agreement existed."**

22. However, as was held by the Court of Appeal in **J M Mwakio vs. Kenya Commercial Bank [1987] KLR 513:**

> **"To have contractual, that is to say, binding effect, there must be a concluded agreement, with all the terms in it settled and ascertained, with nothing remaining to be done."**

23. It is clear that the client has the right to repudiate a consent purportedly entered or to be entered on his behalf where he has not given such instructions. This clearly comes out in **Stephen Kasozi and 2 Others vs. People's Transport Service [1990-1994] EA 162** in which it was held that:

> **"If the parties before the Court admit that one of the events has happened which gives the court jurisdiction, and there is no reason to doubt the bona fides of the admission, the Court is under no obligation to make further inquiry as to the question of fact: but apart from such admission the court cannot give effect to an agreement, whether by way of compromise or otherwise, inconsistent with the provisions of the Act…As a pure statement of principle a judge may interview when a compromise is put forward to him, but that does not entirely describe the whole position…The Court may intervene if, for instance, the authority of one of the advocates is withheld by the client to enter into the compromise. It may be that the client himself objects in court, when he discovers what has happened. It would obviously be invidious for the Court to make any order arising out of that kind of misunderstanding. But there is clearly a limit to the Court's intervention…It is not generally for the Court to impose its idea of what is best for the parties. On the one hand the early despatch of the litigation may be of great benefit to the parties, and on the other hand, the Court may well not be aware of all the circumstances of the parties, which if known, would incline the Court to accept the compromise. The one matter of which the Court must be sure, is that the parties entered into the agreement of compromise, and that that compromise was what they thought best suited**

**themselves. It is therefore wise for the Court, to test the acceptance of the compromise, if that is possible, and there are many authorities relating to the precautions, which should be taken, when a consent judgement is entered…After a compromise has been put forward, the Judge ought not to think that his duty lies in examining the evidence because he had not recorded all the evidence. If the learned Judge had decided to intervene rightly or wrongly, in principle she should have said so at once, and rejected the compromise. The appellants might then have called further evidence to support their case, and the respondent could have offered its defence. Having apparently accepted the compromise, the parties could only have expected that judgement for the appellants would have been entered and the damages assessed. It was not right to take them by surprise and judge the matter on part of the evidence, without intervening to reject the compromise."**

24. In this case the said consent judgement was adopted by the Court on 7th June, 2018. One of its terms was to grant the Plaintiff permission to continue offering the Defendant catering services on the latter's suit premises till 30th November, 2018 after which the Plaintiff would have a grace period of one (1) month from 1st December, 2018 to 31st December, 2018 to remove all the equipment and give notice to her catering staff from the Defendant's premises. It is therefore clear that the Plaintiff was afforded nearly 5 months of continuing with her business in the Defendant's premises. It was not until the lapse of the said 5 months that the Plaintiff made the present application. The plaintiff has not contended that she was unaware of the said consent and no explanation has been offered by her why she waited for five months to challenge the said consent. In **Diamond Trust Bank of Kenya Ltd vs. Ply & Panels Limited & Others Civil Appeal No. 243 of 2002 [2004] 1 EA 31**, **Omollo, JA** noted that:

**"Where the consent was written on the letterheads of the advocates there cannot have been undue influence by one side over the other and more so where the Respondents came to know of the Judgement almost immediately and yet did not come to court until some 5 months later after the grace period had run out…The burden on a party who alleges that there was in fact no consent or that the consent was invalid is a heavy burden…Advocates have ostensible authority to reach a compromise on behalf of their clients."**

25. On his part **Githinji, JA** stated that:

**"So long as a counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and has apparent authority to compromise all matters connected with the action…The compromise of a disputed claim made *bona fide* is a good consideration and the Court cannot interfere with it unless in the circumstances which would afford a good ground for varying or rescinding a contract between parties…The legal consequences of recoding a compromise under Order 24 Rule 6 of the Civil Procedure Rules is that the decree is passed upon new contract between the parties superseding that original cause of action…The court has jurisdiction to set aside a consent judgement it is shown to have been based on an agreement induced by misrepresentation and the misrepresentation must be shown to have in fact influenced the representee into an agreement. The conduct of the parties since the compromise was recorded is a relevant consideration in an application to set aside a compromise. Excessive delay in making an application to set aside may be construed as an affirmation of the compromise depending on the circumstances of each case. If the representee having discovered the misrepresentation either expressly declares his intention to proceed with the contract, or does some act inconsistent with intention to rescind the contract, he is bound by his affirmation…Where the consent judgement impugned has been executed the Courts are less likely to set aside the consent judgement."**

26. In this case, it is clear that the Plaintiff enjoyed fully the part of the consent that was beneficial to her before seeking to challenge the consent. Whereas, the Plaintiff now claims that her interests were not considered in the consent and that the consent was not beneficial to her at all, it is clear that the part of the consent that permitted her to carry on the business for 5 months was to her benefit. As was held in **Catholic Relief Services Ltd. vs. Transami Uganda Limited Nairobi (Milimani) HCCC No. 428 of 2002:**

**"Sometimes the convenience of one party may be the inconvenience of the other and it is the duty of the Court to ensure that there is parity of convenience for all parties, but not one party alone."**

27. It is therefore clear that the conduct of the applicant subsequent to the entry of a consent is a factor to be considered in determining whether or not the consent was recorded with his/her blessings. To my mind, a party who waits for five months after the recording of a consent while enjoying the part favourable to him/her as the Plaintiff in this case did, only has himself/herself to blame if after exhausting that part he/she realises that the remaining part is not as juicy as the part he/she enjoyed.

28. In the premises, it would clearly be inequitable to allow this application.

29. Consequently, the application dated 11th December, 2018 fails and is dismissed but with no order as to costs as only the Plaintiff complied with the court's directions to furnish soft copies of the pleadings.

30. It is so ordered.

**Ruling read, signed and delivered in open Court at Machakos this 25th day of September, 2019.**

**G. V. ODUNGA**

**JUDGE**

**In the presence of:**

**Miss Mulondu for Manwa for the Applicant**

**CA Geoffrey**