REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 39 OF 2016

JOHN MUKIRI MUGI ……. 1ST APPELLANT

EDDIE WARUIRU NJUGUNA ……..……. 2ND APPELLANT

KENNEDY KARANJA MURIMI …….. 3RD APPELLANT

VERSUS

DANIEL MBIRI MUGI ……. RESPONDENT

JUDGMENT

1. The Respondent herein, Daniel Mbiri Mugi, approached the Githunguri Principal Magistrate's Court vide a Plaint dated 30/11/2015 in a suit against the three Appellants in their capacity as officials of Githunguri Social Club. He sought both equitable (injunctive) orders against the withdrawal and distribution of certain funds realized as proceeds from the sale of three parcels of land owned by the Githunguri Social Club as well as liquidated damages against the Appellants respecting the liquidation of his one share in the Club.

2. Simultaneously with the Plaint, the Respondent filed a Notice of Motion Application asking for certain interim reliefs.

3. The Respondent's claim was straightforward. He had become a member of the Social Club on various dates between 2005 and 2010 after purchasing four shares from previous shareholders. He was awarded Membership Certificates for these four shares.

4. Later, by resolution, the Social Club's members resolved to sell various properties owned by the Social Club and distribute the proceeds proportionally per shares owned. It is in this regard that the Social Club sold the properties known as Githunguri/Githunguri/T.791; Githunguri/Githunguri/T.792; and Githunguri/Githunguri/T.793.

5. The Respondent complained that though he owned four share, he was apprehensive that the Appellants were in the process of paying out all the shareholders yet he had not been credited with the money for the share he owned. He was therefore apprehensive that all the assets of the Social Club will be dissipated without the Social Club first paying off the debt it owed to him.

6. The Appellants entered appearance through Ogessa & Co. Advocates and filed a Replying Affidavit in opposition to the Notice of Motion Application. However, no Statement of Defence was ever filed. Instead, over a series of appearances in Court, the Advocates on record informed the Court that the Appellants were intent on mediating the matter. True to their word, on 18/12/2015, the advocates for the

Respondent, Gachoka & Co. Advocates, filed a Consent dated 17/12/2015 and duly signed by advocates for both sides compromising the suit.

7. The Consent provided as follows:

> *a. BY CONSENT, judgment be and is hereby entered for the Plaintiff against the Defendants jointly and severally forKshs. 4,400,000/- (Kenya shillings Four Million and Four Hundred only) all inclusive payable within seven (7) days from the date of this order.*
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> *b. THAT Bank of Africa, River Road Branch, Nairobi be and is hereby ordered to pay Kshs. 4,400,000/- (Kenya shillings Four Million and Four Hundred only) from account number [particulars withheld] in the name of the Githunguri Social Club to the Plaintiff's Advocates for onward transmission to the Plaintiff.*
>
> *c. THAT the matter be marked as settled upon compliance with orders 1 and 2 above.*

8. The parties' advocates appeared before the Court on 04/01/2016 to record the consent. However, the Presiding Officer of the Court at the time, the Learned M. Ochieng, Senior Resident Magistrate, noted that she did not have the requisite pecuniary jurisdiction. As a result, the parties consented to send the file and the consent to the Kiambu Chief Magistrate's Court so that the consent could be recorded before a Magistrate with requisite pecuniary jurisdiction. Consequently, the Honourable J. Kituku, Principal Magistrate, adopted the Consent drawn by the parties' advocates as the order of the Court, through a Court order dated 11/01/2016. Both Mr. Gachoka representing the firm of Gachoka & Co. Advocates for the Respondent and Mr. Mitiambo who was holding brief for the firm of Ogessa & Co. Advocates on record for the Appellants signed the handwritten Court record to confirm the consent order.

9. Ordinarily, this would have settled the matter. Not in this case. Instead, on 05/02/2016, a Notice of Motion dated 04/02/2016 was filed by the law firm of Sena & Co. Advocates under Certificate of Urgency. That Application was drawn on behalf of the Appellants and sought two main prayers:

> a. It sought for orders that the firm of Sena & Co. Advocates be allowed to come on record for the Defendants in lieu of Ogessa & Co. Advocates who were then on record;
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> b. It also prayed for orders that the Consent order recorded in the matter and adopted by the Court should be set aside or vacated.

10. The Respondent responded with a Notice of Preliminary Objection dated 12/02/2016 and a Replying Affidavit by the Respondent. Meanwhile, Mr. Anthony Ogesa of the firm of Ogesa & Co. Advocates filed a Replying Affidavit on 15/02/2016 remarkably opposing the Application.

11. On 17/03/2016, three members of the Githunguri Social Club filed an Application seeking to be enjoined as Interested Parties in the suit. The gist of their Application was that they were apprehensive that funds belonging to the Social Club would be dissipated through this litigation and that, as members, they had a legitimate interest in participating in the litigation to protect their interests.

12. On 09/03/2016, the Respondent's counsel filed another Application of even date seeking orders that monies held in various accounts at Bank of Africa Ltd, as a Garnishee, be attached to clear the decretal amount.

13. On 24/03/2016, the Respondent's counsel filed another Application of even date seeking orders that monies held in various accounts at Bank of Africa Ltd, as a Garnishee, be attached to clear the decretal amount.

14. The Learned Trial Magistrate, Charles Kutwa, SPM, directed that the three Applications on record should all be heard together and that they be canvassed by way of Written Submissions. After all the parties – including the Garnishee – filed their Written Submissions, the Learned Magistrate read his

ruling dated 15/09/2016 which is the subject of this Appeal.

15. In his ruling, the Learned Magistrate found that there was nothing left to rule on regarding the Respondent's Application dated 24/03/2016 since the substantive prayer had been allowed on 24/03/2016.

16. Turning to the Application dated 17/03/2016 by Proposed Interested Parties, the Learned Magistrate found that if indeed the proposed Interested Parties were members of the Githunguri Social Club, then their interests were, in law, protected by the three Appellants who were the registered officials of the Social Club. As such, finding that the three Proposed Interested Parties had nothing protectable in the suit beyond their membership in the Social Club which was protected through the registered officials of the Club, the Learned Magistrate dismissed their Application seeking to be enjoined in the suit.

17. Lastly, the Learned Magistrate turned to the main Application – that of the Appellants – the Learned Magistrate similarly dismissed it finding it meritless. In pertinent part, the Learned Magistrate found as follows:

> *There is overwhelming evidence on record to show that the firm of Mitiambo & Company Advocates had a valid practising certificate for the year and was therefore legally allowed to practice law. Further, Mr. Ogesa, in his Replying Affidavit, demonstrated that he had instructions from the defendants to enter into a consent. The said advocate intimated to Court that he had instructions to negotiate. Thereafter, a Consent Judgment was recorded in Court. There is a letter dated 15/12/2015 to the Plaintiff's advocates. The Plaintiff confirmed that he held a meeting with the Defendants that culminated in the consent dated 17/12/2015.*
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> *From the foregoing therefore, the Defendants have not placed any evidence to show illegality or fraud in the consents giving rise to the judgments. These are mere allegations that are hardly credible. The Defendants' application is bereft of merit. The consent judgment remains in force. The Defendants' application is therefore dismissed. The upshot of my ruling is that the Plaintiff's Application dated 24/03/2016 is allowed. Since the Garnishee was served with the Court Order, it should proceed to pay the sums set out in the order issued by the Court on 29/03/2016 and dated 24/03/2016 forthwith*.

18. The Appellants are dissatisfied with this Ruling and the orders emanating from it. In their Memorandum of Appeal, the Appellants have enumerated twelve grounds of Appeal as follows:

19. The Appeal was argued by way of Written Submissions.

20. In their Written Submissions, the Appellant's Counsel abandoned Grounds 3 and 8 in the Memorandum of Appeal. He then grouped the remaining grounds into five.

21. The Appellants argued Grounds 1, 9 and 10 together. As I understand it, the Appellants' argument is that the orders by the Learned Magistrate offends the provisions of Order 23 Rules 1 and 4 because the effect of the Learned Magistrate's orders was to order the attachment of all the funds held in Account No. 05029040016 which contains more funds than the decretal amount. Instead, they argue, what should have been attached is specifically the decretal sum from the total amount held by the Garnishee.

22. On Ground 2, the Appellants argue that the Learned Magistrate failed to pronounce himself on the issue of enforceability of the Consent Judgment. Their argument is that the Consent Judgment provided quite specifically that the funds were to be drawn from Account No. [Particulars withheld]. Yet, the Appellants argue, that account has no funds to satisfy the judgment. This renders, they insist, the Consent Judgment unenforceable. The Consent could only have been enforceable using Garnishee proceedings if it had been left open-ended; now that it has mentioned a specific account, it could not be enforced.

23. The Appellants argued Grounds 5 and 6 together. Their arguments on this point are factual. In essence, they argue that the circumstances surrounding the recording of the consent should have alerted the Learned Magistrate that the Consent Judgment was fraudulent and that it was entered into without

instructions from the Appellants. They point out the following seven factors which they say give "irrefutable credence (sic) to the fact that the consent was recorded by their Advocates and purportedly on their behalf in the absence of material disclosure to them, and without their knowledge or authority":

a. "The letter written by Ogesa & Co. Advocates to Gachoka & Co. Advocates dated 15th December, 2015 is bereft of many material details of the envisaged consent e.g. terms purportedly agreed by the parties, the mode of payment, a huge departure from the resultant consent.

b. It is instructive that the said letter is the only document touching on and preceding the actual consent in question.

c. The said letter refers to instructions from Ogesa's client who is not specified from among the three Appellants.

d. In his affidavit in Court, Mr. Ogesa Advocate states that his clients had even met the Respondent's Advocate together with his client prior to his said letter which meeting gave rise to the pact. There is no mention of such a meeting in the Respondent's Replying Affidavit.

e. The letter aforesaid does not outline the lines of agreement and, while the same anticipates a reply consent, none is alluded to nor exhibited. The next stop is the actual recording of the Consent in Court.

f. The prayers contained in the Plaint are highly at variance with the consent as no liquidation is made therein, and one is at a loss when the contents of the said consent crystallized.

g. The parties present in such meeting(s) are not specified."

24. The Appellants argue that the Learned Magistrate "*did not make the necessary interrogation to the above aspects of the consent in question, which was within his purview, and that in arriving at his decision, he misdirected himself, made irrelevant considerations and chose fiction from fact in his analysis*."

25. Lastly, the Appellants argue, in support of Ground 4, that the circumstances of this case clearly fitted the exceptional conditions under which a Consent Judgment can be set aside under our decisional law – including the landmark ***Wasike v Tobiko [1988] 1 KLR 625*** which was cited by both parties and relied on by the Learned Magistrate in his decision.

26. The Appellants argue, relying on ***National Bank of Kenya Ltd v James Orengo [2005] eKLR*** that this was a case where the Court ought to have examined the *bona fides* and propriety of the Advocate in question but that the Learned Magistrate failed to do so. His findings are totally inconsistent with the grain and weight of evidence as submitted. The Appellants also argue that the Learned Magistrate is also guided in his decision by irrelevant considerations and non-factual findings of the law. This, the Appellant says, is grounded on the Appeal at p. 2005 of the decision of the Court. As far as the Appellants are concerned, the case is one of self-determination.

27. For the Respondent, the Advocate, Mr. Gachoka also filed Written Submissions. They mirrored, in argumentation, the structure adopted by the Appellants.

28. On Grounds 1, 9 and 10, the Respondent argues that by the Consent Order, all the decretal sum due to the Respondent was deposited in Court so the issues related to whether the Lower Court ordered more money to be attached are, in his view, moot and misplaced. The point is, the Respondent argues, the Respondent is interested only in the decretal amount and not any other monies in the account of the Githunguri Social Club. The Respondent points out that the Garnishee confirmed in its Replying Affidavit of 22/04/2016 that it had enough monies to pay off the decretal sum in both this case as well as Kiambu Civil Appeal No. 39 of 2016.

29. On Ground 2, The Respondent defends the consent judgment as one entered into by the parties after due deliberations by both parties through their advocates; that the proceedings of the case would show that the parties indicated to the Court that they were exploring settlement. The Respondent insists that the Appellants have not attacked the substance of the consent judgment but only how it was signed and recorded in Court – a matter the Respondent finds to be an "in-house" matter between the Appellants and their lawyer.

30. The Respondent insists that the Learned Trial Magistrate was properly guided by local relevant authorities cited to him in reaching his conclusions and findings. He argues that there is no basis for impugning the bona fides of Mr. Ogesa, an Advocate of the High Court of Kenya who signed an affidavit demonstrating that he had instructions to settle the matter on behalf of the Appellants.

31. Mr. Gachoka submitted that the assertion that the Appellants only came to know of the existence of the consent judgment when they were so informed by the bank as wholly inaccurate as their Advocate, Mr. Ogesa deponed under the pain of perjury that his firm was under instructions to enter into the consent. He insisted that no evidence beyond the "spurious" claims made by the Appellants was tendered in Court or by way of affidavit to prove the claims that the consent was fraudulently entered.

32. Mr. Gachoka claims that the Appellants are only challenging the consent judgment in a bid to defeat or delay justice since they were arrested and charged in Kiambu Chief Magistrates Court Criminal Case No. 215 of 2017 with three counts which include making a document without authority, conspiracy to defraud and stealing by directors.

33. Mr. Gachoka relied on the ***Flora Wasike Case*** (supra); ***Purcell v FC Trigal Ltd (1970) All ER 671***; ***Hirani v Kassam (1952) 19 EACA 131***; ***Brooke Bond Liebig Ltd v Mallya (1975) EA 266***; and ***Diamond Trust Bank of Kenya Ltd v Ply and Panel Limited & Another (2004) EA 31***.

34. I have carefully read all the authorities cited to me by both sides as well as the submissions by the parties. I have also, as I am required to do, carefully read the record from the lower Court.

35. I will address the grounds of appeal as raised by the Appellants.

36. First, the Appellants argue that the appeal should be allowed because there was no proper order nisi and that the provisions of provisions of Order 23 Rules 1 and 4 were violated because the effect of the Learned Magistrate's orders was to order the attachment of all the funds held in Account No. [particulars withheld] which contains more funds than the decretal amount. Instead, they argue, what should have been attached is specifically the decretal sum from the total amount held by the Garnishee. The Appellants are technically correct – but our jurisprudence is way past the mechanical jurisprudence of technicalities: the point of the matter is that notwithstanding any inelegance in drafting the prayers sought, the Respondent sought to attach the decretal amount – and that was the amount ordered attached by the Court and actually deposited in a joint account of the advocates as part of a consent to stay execution. I find the arguments raised in this regard totally unpersuasive.

37. The Appellant's complaint that the decision should be reversed simply because the Account Number specifically cited in the prayer by the Respondent is the wrong account number meets similar fate. The bottom line is, as the Garnishee confirmed, there were two accounts it held for the Social Club and they had sufficient funds to settle the decretal amount.

38. The gravamen of the appeal is found in Grounds 4, 5 and 6. In these grounds, the Appellants attack the consent judgment as fraudulent, as they had done in the Court below. They argue that had the Learned Trial Magistrate taken into account the circumstances under which the consent judgment was entered into, he would have concluded that it was a product of fraud and that the advocate was not acting in good faith in representing his clients.

39. Our jurisprudence on setting aside of consent judgments is settled. Indeed, both parties cited the same cases. A consent judgment can only be set aside or varied on grounds that would allow for a contract to be

vitiated. These grounds include but are not 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. Hence in the celebrated ***Flora Wasike Case***, Hancox, JA remarked:

> *It is now settled law that a consent judgement 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.*

40. Earlier on, the Court of Appeal had similarly stated, in ***Brooke Bond Liebig v. Mallya*** **1975 E.A. 266** that:-

> *A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.*

41. In ***Hirani v. Kassam*** **(1952)**, **19EACA 131**, the Court quoted with approval the following passage from **Seton on Judgments and Orders, 7th edition, 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 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.*

42. Along the same vein, the Court of Appeal adopted the judgment of Harris J. R in ***Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd*** **(1982) KLR P. 485** and 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.*

43. In the same case the Court further held the following regarding compromise of cases by advocates:

> *An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.*

44. Applying these principles to the present case seems quite straightforward. I have carefully read the affidavits filed in the lower Court as well as the Court records. I have not been able to find any tale-tell signs of collusion, fraud or conspiracy as the Appellants allege. No evidence whatsoever was tendered to persuade either the Learned Trial Magistrate or myself that the consent was a product of fraud. No attempt was made to call the lawyer for the Appellants who entered into the consent to be cross-examined. No criminal complaint was made against him. Indeed, the opposite is true: a criminal complaint has been made against the Appellants for uttering forged documents.

45. In my view there is nothing much to litigate here. A valid consent judgment was entered. It was affirmed by the Learned Trial Magistrate. I affirm it again it today. The matter should be let to rest. The appeal is dismissed with costs.

46. Orders accordingly.

Dated and delivered at Kiambu this 29th day of January, 2018.

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JOEL NGUGI

JUDGE