



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 12 OF 2017

JUSTUS NZAU MUNYWOKI.....APPLICANT

VERSUS

1. BEATRICE MBULA MUTILU

2. STEPHEN NDOLO WAMBUA.....RESPONDENTS

RULING

1. The applicant filed a notice of motion application dated 28th August, 2017 seeking stay of execution of the consent entered on 25th May, 2017. In his supporting affidavit, the applicant stated that he filed a counterclaim against the respondents and obtained judgment against the two in **Tawa SRMCC No. 87 of 2013** for KShs. 700,000/=. He thereafter commenced execution but the 2nd respondent moved court and obtained interim orders of stay of execution and the 2nd respondent's application was set down for inter parte hearing on 28th December, 2016. The application was heard and dismissed on 26th January, 2017 which paved way for him to proceed with execution. The 2nd respondent filed an appeal against the said ruling. He contended that without his instructions, his then advocate entered into a consent with the 2nd respondent which consent is adverse to his interest since it was premised on misapprehension of the pleadings. That he in Tawa SRMCC No. 87 of 2013 had requested for judgment against the appellant and 1st respondent jointly and severally.

2. There are no responses to the application on record. The motion was canvassed by way of written submissions. The applicant's submission was a reiteration of his averments in the supporting affidavit. The 2nd respondent placed reliance on **Board of Trustees National Social Security Fund v. Michael Mwalo (2015) eKLR**, **Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd (1982) KLR 485** and **Samuel Mbugua Ikumbu v. Barclays Bank of Kenya Limited (2015) eKLR** and submitted that the applicant has not demonstrated fraud, collusion, misrepresentation nor illegality in coming up and recording the consent before court therefore the threshold of setting aside the consent was not met.

3. The consent sought to be set aside was in the following terms:

“ ...

1. The judgment entered against the appellant herein on 23.11.2016 in Tawa SRMCC No. 87 of 2013 be and hereby set aside.

2. That the 2nd respondent herein be at liberty to execute the said judgment in Tawa SRMCC No. 87 of 2013 together with costs therein against the 1st respondent herein.

3. That there be no orders to costs.”

4. The applicant's gravamen is that the consent left out the 2nd respondent herein from execution yet in his pleading, he had sought judgment against both respondents herein. It is well settled that a consent judgment can only be varied on grounds that would allow for a contract to be vitiated thus among others fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. See: **Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625** where it was stated at page 626 that:

"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."

In **Brooke Bond Liebig v. Mallya 1975 E.A. 266** it was held thus:

“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.”

In **Hirani v. Kassam (1952), 19EACA 131**, it was held that:

“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.”

The extent of such authority was discussed in **Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd (1982) KLR P. 485** where it was 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...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”.

4. I have given due consideration to the disposition by both parties, other than merely stating that he did not give instructions to his advocate, the applicant has not in any manner established that the consent was entered into by a person other than his advocate on record and that the same was done fraudulently, or by collusion or misrepresentation. The Applicant's then Advocate had full authority to represent him in the matter and even to go as far as comprising the suit if he felt that that same suited his client (Applicant). No evidence has been shown by Applicant that he is not likely to obtain the sums from the 1st Respondent. In the circumstances, I find no merit in the application and it is hereby dismissed with costs to the 2nd Respondent.

Orders accordingly.

Dated and Delivered at MACHAKOS this 31st day of July, 2018.

D. K. KEMEI

JUDGE

In the presence of:

Justus Nzau Munywoki - the Appellant

Mulei - for the Respondent

.Josephine - Court Assistant