REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL CASE NO. 186 OF 2009

P K M (Suing on own behalf and as next friend

of A J B)…….....……1st PLAINTIFF

G S M …….....…….....…….. 2ND PLAINTIFF

VERSUS

NAIROBI WOMEN HOSPITAL ……...…..……1ST DEFENANT

DR. MUTINDA ……...……2ND DEFENDANT

RULING

This case is part heard. Three witnesses for the plaintiff have completed their evidence while the 4th witness was stepped down in the course of giving evidence in chief. Thereafter a consent judgment was entered between the parties on liability.

Before the parties addressed the issue of quantum, counsel for the 1st defendant who had come onto record, filed an application seeking to stay the proceedings pending the determination of the application which sought the substantive order that the consent dated 24th July, 2015 is set aside.

The application is based on the grounds that the said consent was entered into without the knowledge of the 1st defendant, and that if it is not set aside the 1st defendant is likely to suffer irreparable loss and damage. The application is supported by an affidavit sworn by one Reuben Waweru,the Chief Finance Officer of the 1st defendant.

The application if opposed and grounds of opposition have been filed stating that, the applicant has not shown the consent was entered into without authority of the duly appointed advocate or through fraud, mistake, undue influence, non disclosure or lack of capacity at the time the order was made. It is also stated the application is intended to delay the hearing of the case which has dragged for 8 years. It will be unjust to re -open matters that have been closed by dint of the consent fairly reached. Further, that the court cannot be called upon to adjudicate internal arrangements between the 1st defendant and its advocates. Additionally, it is stated the application is not grounded on law, as it has not met the threshold of setting aside the consent and is therefore incompetent.

In attempting and encouraging settlement of the matter out of court, the parties and the court were duly guided by the provisions of Article 159 (2) (a), (c) and (d) of the Constitution. Counsel for the plaintiffs and the 1st defendant have filed submissions and cited several authorities which I have noted.

Before I address the application further, it is necessary to give a brief overview leading to the said consent order. When the counsel for the plaintiff applied to step down the 4th witness, he applied for leave to file a supplementary list of documents which was not opposed by counsel for the 1st defendant, and the court gave leave accordingly. A further hearing date was set for 15th June, 2015.

On 15th June, 2015 this court indicated it was ready for the hearing. However, the learned counsel for the plaintiff addressed the court in the following terms.

> **"Mr. Mogeni. Parties are trying to negotiate and are asking to mention the matter in a month's time."**

The counsel for the 1st defendant replied as follows,

> **"Mr. Munyalo. Yes we met with our clients and are trying to settle the matter out of court. I have received a proposal from my learned friend – last week – and we need 30 days to take instructions."**

The court then recorded the following,

> **"Order. By consent matter taken out and SO to 21st July, 2015 to record possible settlement.**
>
> **Signed**
>
> **15.6.2015."**

On 21st July, 2015 which was set by the consent order above, both counsel appeared before the court and addressed the court in the following manner,

> "**Mr. Mogeni. We have a partial consent to record.**
>
> **Mr. Munyalo. That is so.**
>
> **Order. By consent**
>
> **1. Judgment to be entered for the plaintiff against the defendant on liability at 90% (ninety percent).**
>
> **2. There be a mention on 16.9.2015 to record consent on quantum or in the absence of such consent a hearing date be taken for assessment of damages.**
>
> **Signed**
>
> **21.7.15."**

Both learned counsel for the parties endorsed the consent. On 16th September, 2015 which was set to record consent on quantum, Mr. Mogeni appeared for the plaintiff while Mr. Rono was holding brief for Mr. Munyalo for the 1st defendant. Mr. Mogeni informed the court that his client had been referred for another assessment and asked for a mention date which was agreed to be 30th September, 2015. As at that date a report had not been received but on 21st October, 2015 the report had been received and counsel agreed that the medical reports be put in by consent.

Several other mentions followed resting with the proceedings of 20th April, 2016 relating to this application.

It is trite law that a consent orders is binding on the parties and cannot be set aside unless it was obtained by fraud or collusion or by an agreement contrary to the policy of the court. Reported cases have expanded some of those grounds to cover mis representation, mistake or undue influence, and the fact that such grounds should be sufficient so as to be relied upon for setting aside a contract.

It is also established law that counsel on record and holding instructions on behalf of a party has ostensible authority to compromise an action. **In Civil Appeal No. 276 of 1997 Kenya Commercial Bank Limited Vs. Benjoh Amalgamated Limited & Another.** The Court of Appeal citing the case of **Brook Bond Liebig (T) Limited Vs. Mallya [1975] EA 266** stated,

> "***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 mis-apprehension or in ignorance of material fact, or in general for a reason which would enable the court to set aside an agreement."**

In the same judgment the Court of Appeal cited the judgment of Hancox JA (as he then was) in the case of **Flora Wasike Vs. Destimo Wamboko (1988) 1 KAR 625 at page 626** as follows,

> **"it is now settled law that a consent judgment 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."**

The extent of authority of an advocate on record to compromise a suit is set out in the Supreme Court Practice 1976 (Vol 2) paragraph 2013 page 620 and cited in the **Kenya Commercial Bank case** as follows,

> **"Authority of Solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts *bona fide* and not contrary to express negative direction; and it would seem that a solicitor acting as 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."**

In the recent case of **Board of Trustees of NSSF Vs. Michael Mwalo (2015) eKLR at page 35** it was held,

> **"1. A consent order entered into by consent is binding on all parties to the proceedings and cannot be set aside or varried 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, fact or mis apprehension or ignorance of such facts in general for a reason which would enable a court to set aside an agreement.**
>
> **2. 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."**

In the entire record presented before me, there is no suggestion whatosover that the counsel for the 1st defendant was moved by fraud, mis-representation, mistake or any other reason to enter into that consent which he duly endorsed. Indeed, on 15th June, 2015 going by the record I have set out hereinabove, the learned counsel for the 1st defendant clearly committed himself by stating that he needed 30 days to take instructions.

Subsequently the consent judgment was recorded. It would appear that the 1st defendant is more concerned about the quantum which is likely to be beyond its insurance cover. That is something that the court is not able to address in an application of this nature.

Before I end this ruling I must address an issue that has been raised in a letter dated 22nd May, 2015 by the then advocate for the 1st defendant to their client. He states that this court urged the parties to consider settling the matter out of court owing to the nature of the case and the clear liability of the 1st defendant in the matter, and the medical board's recommendation that the parties go into arbitration.

This has been picked in the submissions made on the behalf of the 1st defendant implying that the consent may have been arrived at as a result of the observation made by the court. Nothing can be further from the truth. It is not the practice of this court to enter into the arena of conflict. Other than observing that this matter may be settled out of court, the court did not delve into the evidence of the 1st defendant and the medical board which in any case had not been received by the court.

However, I have a mandate conferred by law in this case the Constitution, to suggest and or guide parties to resolve disputes using other means as set out therein. This is also to be found in Order 11 of the Civil Procedure Rules. I shall continue to do so in the discharge of my duties.

The end result is that this application is dismissed and the suit shall proceed to hearing. The plaintiff shall have the costs of this application.

Dated, signed and delivered at Nairobi this 9th Day of June, 2016.

A MBOGHOLI MSAGHA

JUDGE