



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS'
CIVIL APPEAL NO. 155 OF 2009

ALI SABATIA ALI.
APPELLANT

VERSUS

FLORENCE ISAHO BASHIR.
RESPONDENT

(From the Ruling and Orders of W Mokaya, Ag. Principal Magistrate in Milimani CMCC No. 4917 of 2008)

J U D G M E N T

Ali Sabatia Ali, the Appellant, filed at the lower court an application by a Notice of Motion dated 18th February, 2009 seeking mainly, that the court sets aside, varies or vacates or reviews a consent judgment order which had been entered by counsel for both parties on 15th January, 2009. The main ground upon which the application was based was that the applicant's previous advocates, had entered the said consent judgment without the knowledge or/and authority or consent of the appellant herein. Appellant also averred that he had a good defence.

In her ruling, the learned trial magistrate, after having considered the application, decided that the application had no merit. She found that the order to be reviewed, which mandatorily required to be annexed, was not annexed, and said that that alone would lead to the striking out of the application.

On merit, the learned magistrate ruled that the judgment sought to be set aside, varied, vacated or reviewed, was a consent judgment deliberately entered by counsel of both parties, during the prosecution of an application seeking the striking out of the Appellant's defence for lack of reasonable defence. She said that the orders sought might be granted only if fraud was proved by the applicant. She had examined the grounds of the application and the supporting affidavit and had seen no proof of fraud on the part of the Applicant/Appellants advocate. She further said that the Appellant's advocate acted for and on behalf of the Appellant, and indeed appeared to act with full instructions and authority of the Appellant. She noted the principle of law applied in **Civil Case No. 276 of 1997, Kenya Commercial Bank Ltd Vs Benjoh Amalgamated Limited** and observed that an advocate properly acting in a case, had power and authority to enter such a judgment. In that case, the Court of Appeal had indeed upheld the principle that an advocate has a general authority to compromise a suit on behalf of his client if he acts bona fides and not contrary to express negative instructions, a situation which has to be proved.

The learned trial magistrate also noted that the Applicant had not in the application, alleged *malafides* on

the part of his previous advocate nor had he demonstrated that there was express negative direction from the Appellant not to compromise the suit.

The learned magistrate, in addition, noted that the Applicant/Appellant, had in his defence basically admitted owing the sum claimed. That the issue of contention was the mode of payment towards settling the amount of the claim in respect of which the Appellant had offered two additional sums for costs incurred in the filing of the claim in court. She, therefore, in the exercise of her discretion to grant or refuse the application, rejected the application, expressing in addition, her opinion, that the application was intended to delay the settlement of the case. That is what provoked this appeal.

In the Memorandum of Appeal the Appellant raised several grounds which can be summarized as follows: -

- 1. That the learned trial magistrate erred in law and fact in failing to appreciate that the consent judgment had been entered without the knowledge, instructions and authority of the Appellant.***
- 2. That the learned trial magistrate erred in law by exercising her discretion to allow or refuse the application, wrongly, capriciously and injudiciously.***
- 3. That the trial magistrate erred in law in not appreciating and/or setting aside the consent judgment since the same would not prejudice the Respondent in any way.***

The Appellant argued all the seven grounds of appeal together. Looking at the said grounds, it is clear that the Appellant found them almost similar and, therefore, found it difficult to argue them separately, without repeating the relevant arguments. It would also be easier and more convenient for me to handle the said grounds of appeal together.

The first comment the court wishes to make is that the said grounds of appeal have not raised known principles under which consent judgment can be set aside. The Appellant has treated the judgment as merely an ordinary ex parte judgment which would be set aside on the basis that the applicant did not enter defence or did not attend court on the day set down for hearing. Hence he argues, inter alia, that he had a good defence and that he would be condemned without being heard or being given a chance to be heard. Indeed, even the application by the Appellant whose ruling triggered this appeal, was filed as one merely aimed to ordinarily set aside an ex parte judgment. That is why in my opinion, the applicant/Appellant used words like “set aside”, “vary”, “vacate” or “review”.

It is possible to explain the moment when it began to rain on Appellant. Apparently, when the Appellant failed to pay back the borrowed sums of Ksh.330,000/-, even after two dead lines were renegotiated, the Respondent filed the claim in court, seeking recovery of the sum. A third time request and negotiation followed, this time led by the Plaintiff/Respondent's sister, who also happened to be the Appellant's wife. She appears to have obtained an agreement under which the Appellant would by two cheques, would settle the loan together with some extra costs of Ksh.46,005/- arising from the filing of the case. The two cheques sent to the Respondent's advocates, however, included only the loaned sum, without the extra agreed court costs of Ksh.46,000/-.

The cheques were sent back to the Appellant with a request to include the costs. Instead of doing just that, Appellant filed a defence admitting that he had borrowed Ksh.330,000/- which he had contracted to return by two instalments of Ksh.130,000/- and Ksh.200,000/-. He alleged that he had offered to pay by two cheques but the same were rejected by the Respondent. He accordingly asked in the defence for dismissal of the suit after alleging malice and bad faith on the part of the Plaintiff/Respondent.

It is clear from the records that the Plaintiff/Respondent then filed an application to strike out the defence for it showing no reasonable defence. The same was finally, fixed for a hearing on 15th January, 2009 after several postponements. It was on the said date that the Appellant's advocate in her wisdom decided to and compromised the suit. The court by consent of both parties entered judgment for the Plaintiff against the defendant in the same of Ksh.330,000/- with costs and interest from the date of filing the suit

until payment in full.

Thereafter, by an application dated 13th February, 2009 the Appellant changed the advocates who had compromised the suit. He then filed this application dated 18th February, 2009 seeking to set aside, vary, vacate and/or review the judgment. In a ruling dated 19th March 2009, the learned trial magistrate refused the prayer and dismissed the application for the reasons earlier stated. However, for clarity the reasons for the dismissal were: -

- 1. That the ruling or order sought to be set aside, varied, vacated or reviewed, was not annexed.**
- 2. That a consent judgment can only be set aside on account and proof of fraud on the part of the advocate who offered and consented to it, which fraud in this case was not averred or proved.**
- 3. That an advocate, like the one who entered this judgment by consent, indeed even one who might be holding a brief for the instructed advocate, hath general authority to compromise the suit on behalf of his client if he acted bonafides and not contrary to negative directions.**
- 4. That in any case, the Defendants/Appellant, had expressly and substantively admitted the claim in his filed defence and had even attempted settlement by issuing cheques for the full sum borrowed by him, the origin of the claim.**
- 5. That the application to set aside, vary, vacate or review was intended to delay settlement.**

The first conclusion that I arrive at is that the Appellant in his application to set aside, vary, vacate or review the consent judgment, completely failed to appreciate the nature of a consent judgment as compared to an ex parte judgment. He deponed no evidence or material that would prove that his advocate in compromising the suit, had acted dishonestly, or fraudulently. The trial magistrate, therefore, saw no ground upon which she would set aside the judgment.

Much more, the defence which appellant had filed admitted the whole sum of Ksh.330,000/- which the Appellant admitted he had borrowed from the Respondent, his sister in law. This means that the Appellant had no defence and any advocate worth his salt, would find a compromise of the suit, the best course to take, especially considering all other issues like costs, court and parties' time and other aspects in litigation. The appellant's counsel also must have realized that with those facts and circumstances, the court was going to allow the application then being prosecuted before the court, of striking out the defence.

What appears to have been driving the Appellant, even to the extent of filing a sham defence, is the fact that the Respondent/Plaintiff, had contrary to his wish and expectation, filed the claim in court which he saw as a way of increasing his liability. For some reason he did not see that in failing to repay the borrowed funds as contracted, he had also wronged the lender who got entitled to recover the money through court when all else appeared to have failed. He felt that the lender was actuated by malice in filing the court claim while on the contrary, it was him who was blind to the wrongs he was perpetrating against her, even in filing a sham and unreasonable defence which would delay recovery of the loan funds.

In the above circumstances, the learned trial magistrate did not fail to appreciate that the consent judgment was entered without his knowledge or authority. All the facts before her justified her to enter the judgment. If the Appellant had any issues to raise, it was with his advocate he would raise them. Indeed the learned trial magistrate would have no right to refuse to enter a consent judgment dictated by the parties who wanted to settle their case. In the absence of any fraud proved against the advocate for the Appellant, the consent judgment remained sound and proper and the trial court was right in refusing to set aside, vary, vacate or review it.

In addition, the learned trial magistrate who had power and discretion to allow or refuse the Appellant's aforesaid application, correctly and judiciously exercised her such power and discretion. The fact that a

setting aside or varying the consent judgment might not prejudice the Respondent, as Appellant argued, was not adequate reason for doing so. Only proof fraud would justify modification of the magistrate's orders.

On the other hand, it is not true or correct to argue that the varying of the court's orders would not prejudice the Respondent/Plaintiff. This is because the consent judgment gave her a favourable decree to execute and recover her money which otherwise the Appellant was not repaying as agreed. Any alteration of the consent judgment adversely as sought by the Appellant, would definitely prejudice the Respondent. The court, therefore acted justly in refusing to alter the consent order.

Mr. Khaminwa, counsel for the Appellant in his argument before me, appealed to the court to understand that Appellant felt wronged by his sister-in-law, the Respondent. He sought audience so that the Appellant would air his grievances by allowing the appeal so that Appellant would say all he wants to say in a full hearing. He said that there is fury in the larger family which needs to be breathed out. Counsel even quoted articles 48 and 50 of the Constitution which have expanded access to justice which this court should utilize to grant a chance to his client to breathe out his fury. In fact, Mr. Khaminwa advised the court to ignore existing legal authorities over consent judgments and how the same should be set aside or varied or reviewed for the sake of giving his client an opportunity to air his family grievances.

I have considered Mr. Khaminwa's arguments. I must admit, he was impressive in the way he submitted. However, our rules of procedure were promulgated under the Civil Procedure Act, Cap 21. The rules are examined and reviewed to align them with the changing times and circumstances prevailing from time to time so that they will remain resonant and abreast with the law and the Constitution. The rules were last reviewed by the Rules Committee, only in October, 2010 after our present Constitution had been promulgated. They were found to be still current, effective and fair and Mr. Khaminwa though persuasive, did not point out any deficiency in them. In the circumstances, the earlier approach and rules to challenge a consent judgment remain valid and relevant until otherwise legislated.

Finally, supposing the Appellant's advocate acted contrary to his instructions, the court did not and could not be aware of it in the circumstances of this case. The court is not to blame in acting in accordance with the evidence before it and within the law as it stands. On the other hand, the Appellant would have access to the seat of justice against his advocate, if indeed his advocate, acted against his directions.

The trial magistrate also ruled that the application before her to set aside, vary, vacate or review the consent judgment, was in any case fatally defective even without looking at its merits. This was because no certified copies of the impugned ruling or orders were annexed to it. While the magistrate's approach might appear technical, this court would find it difficult to vary, vacate, set aside or review an order whose construction and nature it does not actually see. That is why the order must be annexed lest the court is misled and does a wrong thing. Where a certified copy of the order is, therefore, not annexed, the application is incomplete and is liable for striking out unless the court on request, grants leave to the applicant appoint to file the same. In this case, there is no evidence that the applicant sought for time to rectify the application. The learned magistrate, therefore, rightly decided that the application was, as it stood, incompetent. He rightly ruled so and this court sees no justification to rule otherwise.

The result is that this appeal has no merit. It is dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 16th day of March 2012.

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D A ONYANCHA
JUDGE

