



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 264 of 1993

JOSPHAT WANJOHI KARITE PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA..... DEFENDANT

RULING

An application dated 31st July 2007 seeking that “the consent judgment recorded before this court on the 5th day of July 2007 entering judgment in favour of the plaintiff at Kshs.849,585 all inclusive, be reviewed and set aside, and the matter be then ordered to proceed to trial” came up for hearing before me on 15th October, 2007. The application was based on the grounds on the face of the application to wit:

(a) On the 5th of July 2007, the Plaintiff’s advocates and the Defendant’s previous advocates on record, M/S Mogusu and Company Advocates (“the Advocates”), without the Defendant’s knowledge, consent and instructions, entered into a consent judgment whereby judgment was entered for Plaintiff for Kshs.849,585/= all inclusive and a stay of execution for fourteen days was granted.

(b) Consequently, the Plaintiff on 19th July 2007 served the Defendant with a ‘Notice to Execute’ by which the Plaintiff gave notice to the Defendant that he would execute the Decree should the Defendant fail to have paid the decretal sum within ten days from 19th July 2007. Even before the ten days “Notice to Execute” aforementioned had expired, as the same was to expire on 29th July 2007, the Defendant was, on 25th July 2007, served with a proclamation dated the same day by M/S Galaxy Auctioneers in execution of the Decree in this case. The Auctioneers proclaimed the Defendant’s furniture and any other attachable assets to be found in other offices in the Plaintiff’s head office.

(c) The Auctioneers are poised to seize and take away the proclaimed

(d) goods for sale at any time after Wednesday, the 1st day of August 2007 as stated in the proclamation if the order of stay of execution sought herein is not granted, thereby causing the Defendant, which is a bank, great loss and damage to its reputation.

(e) Alternatively, the Defendant will have to pay to the Plaintiff the sum of Kshs.849,585/= which it may then never be able to recover from the Plaintiff in the event of the Defendant’s success in this application and subsequently in the suit.

(f) The consent aforesaid was entered into by the Advocate without any instructions from the Defendant to enter into any such consent on the Defendant’s behalf.

(g) There was misapprehension of material facts on the part of the advocate as it appears that the advocate did not, when entering into the consent, appreciate that the Plaintiff ceased to be an employee of the Defendant on 1st September 1989. A perusal of the Plaintiff indicates that the Plaintiff would have at best been awarded the arrears on his salary, leave days and house allowance when he alleges he was on half pay, that is, arrears from 17th November 1988 to when he avers in the Plaintiff that his employment was terminated, 1st September 1989. Should he have proved that the Defendant was not justified in summarily terminating his employment, he would then have been entitled to payment in lieu of notice. As the Plaintiff shows that the gross monthly salary was about Kshs.9,000/= , the amount awarded would have been less than a quarter of the amount awarded in the consent. Instead, the advocate agreed to a consent awarding the Plaintiff three months pay in lieu of notice, full salary, increments, allowances, leave allowances and other emoluments for several years after 1st September 1989 – the date of termination of employment up to July 1993, without any legal or factual basis.

(h) The consent is contrary to the policy of the court as the Plaintiff was, as aforesaid thereby grossly unjustly enriched. A perusal of the Plaintiff indicates that the Plaintiff would not have been awarded such an amount if the matter went to trial, or even if the matter had proceeded *ex parte*.

(i) The consent judgment is vitiated by mistake, either mutual or unilaterally on the part of the Advocate, since as aforesaid, the Plaintiff avers that his employment was terminated on 1st September 1989 – yet the consent awards the Plaintiff three months pay in lieu of notice, full salary, increments, allowances, leave allowances and other emoluments from November 1988 to July 1993, without any legal or factual basis.

(i) Several factors suggest that the Advocate may, for reasons other than the best interests of his client, have colluded with the Plaintiff's advocates in entering into the consent as:-

(i) The consent was recorded without any instructions from the Defendant

(ii) The Advocate did not consult the Defendant prior to entering into the consent, neither had he given any opinion or professional advice to the Defendant justifying the consent prior to entering into it

(iii) The advocate entered into a consent which no competent advocate of his experience would have entered into, to the great detriment of the Defendant. Doing so suggests that he was either grossly negligent, or grossly incompetent, or if the rationality of a reasonable person is considered, that he did it deliberately for some form of gain to himself in collusion with the other side.

(iv) The fourteen day stay of execution was inordinately short in the circumstances, suggesting an urgency of the settlement of the decretal sum from both advocates.

(v) The Defendant only came to know of the Consent on 18th July 2007, when the advocate's letter got to it, a mere one day before the fourteen day stay of execution in the consent was due to expire, yet the advocate's offices are situated in the same building, Consolidated Bank House, as the Defendant's Embu branch from which branch the present suit emanated. The advocate did not even bother to exercise the faster ways of communication, such as fax, telephone, e-mail and the like, leaving the no plausible explanation other than he wished to leave the Defendant with no option but to pay.

(vi) Upon recording the consent, the advocate wrote to the Defendant informing it that he had to record the consent as "...there were indications from the Judge that the case should go on as it has been pending in court for too long..." However, the court file proceedings for the 5th of July 2007 clearly show that the advocate never sought an adjournment, but rather that the Plaintiff's advocate informed the court that they had arrived at a consent which the Advocate duly confirmed.

(vii) The Advocate, in order to sell the consent judgment to the Defendant, falsely represented to the Defendant that the Plaintiff had foregone damages for malicious prosecution amounting to Kshs.750,000/=, yet no such damages had been assessed, no such damages were likely to be awarded to

such an extent for malicious prosecution, and the chances of success of the claim for malicious prosecution without joining the Attorney General for the Police were non-existent.

(viii) The consent awarded the Plaintiff sums even greater than what the Plaintiff had prayed in his amended plaint dated 15th June 1994. For instance, the Plaintiff had prayed for Kshs.673,018.05 alleged salary from November 1988 to July 1993, Kshs.63,141.90 being alleged house allowance and Kshs.57,363.45, being alleged leave pay yet the advocate consented to Kshs.688,730.00, Kshs.144,500/= and Kshs.65,382.70 respectively.

(ix) Even after the Defendant wrote to the Advocate informing him that he had no instructions to enter into the consent as he did, the advocate has not taken any steps whatsoever to protect the Defendant's interests or communicated to the Defendant in any way.

(j) In view of the foregoing, there is good and sufficient cause for review and setting aside of the said consent judgment as prayed.

(k) No appeal has been preferred against the consent judgment.

(l) This application has been made without unreasonable and/or undue delay.

(m) In the interests of justice and fairness, the said consent judgment ought to be reviewed and set aside, and the matter proceeds to trial.

In support of the application there was an affidavit sworn by one, Terry Maina, the applicant's head of human resources which essentially expounds and elaborates on the grounds aforesaid. Essentially the applicant is challenging the consent judgment on the grounds that it was contrary to the policy of the court, that it was vitiated by mistake, that there was misapprehension of material facts and finally collusion between their advocate and that of the respondent.

In support of the aforesaid grounds, Mr. Muteithia, learned counsel for the applicant submitted that an application to set aside a consent judgment can be brought under order XLIV rule 1 of the Civil Procedure Rules. For this proposition he relied on the case of Flora Wasike v/s Destimo Wamboko (1982-88) 1 KAR 625. As for the principles applicable to setting aside a consent judgment, counsel referred me to the case of Brook bond Liebig (T) Ltd v/s Mallya (1975) E.A. 266. Counsel faulted the consent judgment for being an all inclusive figure and accordingly the court was not given the basis upon which the figure was arrived at. Counsel submitted further that the amended plaint dated 15th June, 1994 did not disclose sufficient particulars upon which the validity of the consent judgment could be determined. It was counsel's further submission that the respondent's cause of action was based on unlawful termination of employment. He contended that the law on unlawful termination of employment is settled and he referred me to the cases of Rift Valley Textiles Ltd v/s Edward Onyango Oganda, C.A. No. 27 of 1992 (unreported) and Alfred J. Githinji v/s Mumias Sugar Co. Ltd C.A. 194 of 1991 (unreported). Based on these authorities, counsel opined that the respondent would have been entitled to no more than Kshs.77,000/= in damages. Counsel further submitted that the advocate then on record for the applicant had no instructions to enter into the consent judgment. Finally counsel submitted that the behaviour of the said advocate after the entry of the consent judgment suggested that he was fraudulent since he only informed the applicant of the consent judgment on the 13th day yet the order of stay of execution of the decree had been granted for 14 days.

As expected, the application was bound to be opposed. A lengthy replying affidavit was put in by the respondent's advocate. He questioned the averment that the applicant's then advocate had no instructions to enter into a consent judgment. He deposed that the law on setting aside consent judgment is well settled and is the same as the principles governing the setting aside of a contract. That if indeed the allegations of the applicant with regard to its former advocates were true, its remedy lies against its said former advocate and not the respondent. That judicial process would be held up in a perpetual jam if all a litigant had to do is to allege lack of instructions, make innuendoes of fraud and generally discredit an advocate on record in order to successfully overturn a displeasing outcome in a matter. Counsel further

deponed that there was tacit acknowledgement of negotiations that had been entered into between the applicant's counsel and the respondent's counsel in the applicant's own supporting affidavit and it cannot therefore be heard to say that their then advocate on record did not have instructions to negotiate an out of court settlement. Finally counsel deponed that out of court negotiations necessarily mean that an advocate cannot fanatically stick with the figures or amounts in the pleadings. That all they did was to give up some of their prayers and or vary other claims so as to satisfy both sides. To allege that an advocate did not religiously adhere to the pleadings while reaching a settlement, as a basis of alleged collusion was highly insulting and a legal fallacy.

In his oral submissions in opposition to the application, Mr. Karago, learned counsel for the respondent submitted that the authorities cited simply showed how difficult it was to set aside a consent judgment. As for the authorities cited by the applicant on employment, counsel submitted that they were irrelevant. Counsel also submitted that the respondent was a banker whose career had been destroyed by malicious allegations by the applicant that the respondent he had stolen from the applicant. In reaching the consent, this aspect was taken into account. Counsel further submitted that the applicant's former counsel's competence or lack of it was not a ground for setting aside a judgment. Counsel further submitted that if the amounts pleaded in the prayers in the amended plaint were all added up the respondent's total claim would come close to the figure in the consent judgment recorded. There cannot therefore be a claim of fraud or collusion. Finally counsel submitted that there was no evidence that applicant's then counsel was compromised into entering the consent judgment.

I have considered the rival submissions, the facts as are on record and the law. The circumstances in which a consent judgment may be interfered with and be set aside were considered in the case of Brook bond liebeg (supra). Quoting from the case of Hirani v/s Kassam (1952 19 EACA 131, the court of appeal stated thus:-

“..... 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.....”

Dealing with the same issue, the court of appeal in the case of Flora N. Wasike (supra) delivered itself thus:

“..... 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 unfulfilled Further more Wangh v/s HB Clifford & Sons (1982) Ch. 374, is persuasive authority that a solicitor or counsel would ordinarily have ostensible authority to compromise a suit

What emerges in these authorities is that it is extremely difficult to set aside a consent judgment properly entered into. To successfully challenge a consent judgment whoever is seeking to interfere with the same has to show that there was fraud or collusion, or that the agreement was contrary to the policy of the court, or that the consent was given without sufficient material facts. The grounds advanced by the applicant in this case seeking to set aside the consent judgment are:

- (a) That the consent aforesaid was entered into by the advocate without any instructions.
- (b) That there was misapprehension of material facts on the part of the Advocate.
- (c) That the consent is contrary to the policy of the court.
- (d) That the consent judgment is vitiated by mistake, either mutual or unilateral on the part of the advocate.
- (e) That there was collusion between the advocates to the consent judgment.

On the first ground I think that there is sufficient material before me to let me believe that the counsel for the applicant had instructions. I do not think that the said lawyer was not prudent enough to seek the applicant's consent to a negotiated settlement before embarking on negotiation with the respondent's counsel with a view to having the matter settled out of court. Indeed there is a tacit acknowledgement by the applicant regarding a negotiated settlement in its supporting affidavit at paragraph 4 when it states that it wanted the matter adjourned on 5th July 2007 to enable the parties to negotiate an out of court settlement. Based on the foregoing, counsel for the respondent has posed a question and rightly so in my view in the terms following "..... How did the applicant expect an adjournment on such a ground if negotiation had not been going on between the respective advocates since the year 2005? I am of the firm view that the applicant is not being candid when it alleges that its then lawyer had no instructions to enter into any consent. It is quite apparent to me that the lawyer had those instructions. Further even if he did not, that would not be a ground enough to justify the setting aside of the consent judgment. I say so because as stated in the case of Flora Wasike (supra) a counsel ordinarily has ostensible authority to compromise a suit on behalf of his client. In this case Messrs Mogusu & Co. Advocates had those instructions. Whenever counsel is instructed in a matter, I believe he acts in the best interest of his client. I know of no strict requirement that stipulates that before a counsel can record a consent judgment, he must seek and obtain his client's consent to do so. Since the advocate is deemed to have ostensible authority to compromise a suit on behalf of his client and also to have the best interest of his client at heart, his actions can only be deemed to advance the client's cause. Accordingly the negotiations entered into and the resultant consent judgment could have only been informed from the position of what the then counsel for the applicant deemed was in the best interest of the applicant. I do not discern any collusion in the transaction. Finally on this issue I would say that if indeed the then counsel for the applicant acted without instructions, then that is a matter purely and entirely between the applicant and his then advocates. The applicant's remedy against his then counsel lies elsewhere. I have not been told by the applicant whether any sanctions having been undertaken against Mogusu & Co. Advocates by the applicant if at all he colluded with counsel for the respondent to enter into a consent judgment without authority of the applicant, assuming that indeed the allegation is true. It will be a sad day indeed if every time a consent judgment is recorded, the court recording such consent judgment has to insist on seeing authority from the respective parties to the suit to their counsel allowing them to compromise the suit and on what terms. A consent judgment should never be set aside on baseless innuendoes on the part of a litigant who feels done in by the consent judgment that its then advocate on record did not have instructions to act fully and bindingly on his behalf. For me I am satisfied that indeed the applicant had given instructions to its then counsel to enter into negotiation with a view to settling the dispute out of court.

The applicant also states that there was a misapprehension of material facts on the part of the advocate as it appears that the advocate did not, when entering into the consent judgment, appreciate that the plaintiff ceased to be an employee of the applicant on 1st September 1989 yet the advocate agreed to a consent judgment awarding the plaintiff full salary increments, allowances, leave allowances and other emoluments for several years upto 1993. To my mind the issues raised in this submission and indeed what is deponed to in paragraph 13 of the supporting affidavit is really a question of evidence and does not at all demonstrate the misapprehension of material facts on the part of the advocates. It cannot be discerned from the consent judgment. The consent judgment complained of was worded in the following terms:

"..... By consent judgment be entered against the defendant and in favour of the Plaintiff in the sum of Kshs.849,585/= all inclusive. There be stay of execution for fourteen (14) days from the date hereof...."

From the foregoing, how can it be said that the learned counsel for the applicant misapprehended the facts. The consent was global in nature and there was no telling as to what was taken into account by both parties in arriving at the global figure. The court need not to be told what the parties took into account before arriving at the consent judgment. What the applicant is now advancing in support of this ground is really a question of evidence. There is no evidence to suggest that merely because the respondent was paid emoluments upto 1993, then the advocates concerned must have misapprehended material facts. There must have been a basis for such award and I do not think that it is right for the applicant to resile from the consent judgment on that ground. It was not open to this court to investigate

the nitty gritty of the terms of the consent judgment and be satisfied with them before entering the consent judgment. Courts always proceed on the basis that counsel appearing before them always act in good faith. So that even if in good faith counsel misapprehends some facts, it cannot be the basis of setting aside a consent judgment

It is also alleged that the consent judgment is vitiated by mistake since the respondent's employment was terminated on 1st September, 1989 yet the consent judgment awards him full salary, increments, allowances, leave allowances and other emoluments from November, 1988 to July, 1993. Once again and as I have already stated, this is a matter of evidence which was not available nor required at the time the consent was recorded. It was not necessary for this court to go behind and investigate the terms of the consent. Mr. Karago, counsel for the respondent in answer to the allegation submitted that the Respondent was a banker whose career had been destroyed by malicious allegations that he had stolen from the applicant. In reaching the consent, that aspect was taken into account. If that be true and Mr. Muteithia, counsel for the applicant did not seriously dispute that fact, I do not see how then the consent judgment can be said to have been reached by mistake. I have looked at the plaint and noted that there were various prayers. I do not see any prayer which one can claim is premised on apparent mistake.

The applicant also alleged that the consent judgment was contrary to the policy of the court as the respondent was grossly and unjustly enriched by the consent judgment. Counsel for the applicant maintained that a perusal of the plaint indicates that the plaintiff would not have been awarded such an amount if the matter went to full trial, or even if the matter had proceeded *ex parte*. I do not think that Mr. Muteithia is right in his submissions. It is purely speculative. Further if the prayers in the amended plaint were to be considered carefully the final figure would not be far from what was recorded in the consent judgment. Mark you the consent judgment was all inclusive meaning that even the costs incurred by the respondent in the prosecution of the suit were included. I do not think that the respondent was thereby justly enriched.

Mr. Mogusu, may have acted funny after the entry of judgment. However that is being judgmental. He may have delayed communicating the terms of the consent judgment to his then client in time though they are in the same building, he may have told his client about the court's determination to proceed with the case if no consent is reached, he may as well have misinterpreted or misrepresented to the applicant certain facts. However, not all advocates behave in the same manner. Not all advocates are efficient such that immediately they come from court, they are able to relay to their client immediately what transpired. Not all of them are endowed with modern communication gadgets. Not all of them act with alacrity. I am not therefore prepared to hold that merely because Mr. Mogusu did not communicate the terms of the consent judgment to his client immediately then that *ipso facto* is evidence of collusion or fraud. There could be other valid reasons. He might not be as efficient as other counsels. However that cannot be held against him.

All in all, I am satisfied that the applicant has not made out a case to warrant the setting aside of the consent judgment. I do not agree that the applicant's counsel then, acted without instructions. Nor do I smell any fraud or collusion in the whole transaction. All material facts were known to the parties, who consented to compromise the suit in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. I agree entirely with Karago when he states and I quote

“..... That indeed, if litigants are allowed to get rid of unfavourable outcomes in a suit on the ground that their advocates did not have instructions or allegedly colluded with a adverse party, the entire fabric of our judicial process would fall apart as litigants would take advantage of such a loophole to ensure that litigation never came to an end; all you have to do is hire a new advocate and make spurious allegations against the previous one

Accordingly this application stands dismissed with costs to the respondent.

Dated and delivered at Nyeri this 5th day of November 2007

M. S. A. MAKHANDIA

JUDGE