



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. 40 OF 2002**

BEN JUMA MASIKA APPELLANT

VS

MOSES MAKOKHA WANGA RESPONDENT

J U D G M E N T

The appellant applied to set aside a consent order recorded on 14th September 2001. The learned Senior Resident Magistrate dismissed the summons on the ground that it had no merit. Being dissatisfied with the aforesaid decision he now appeals to this court.

The appellant put forward six grounds of appeal. However when the appeal came up for hearing the appellant chose to argue only three grounds namely:

First, that the trial senior resident magistrate did not consider the fact that there was fraud when entering the consent order.

Secondly, that the senior resident magistrate failed to consider the fact that the consent order was recorded without his approval.

Thirdly, that the senior resident magistrate did not consider the fact that the consent order was recorded in the absence of the respondent and appellant.

At the hearing of this appeal Mrs Onyando appeared for the Respondent. She pointed out that the Respondent was not privy to the consent order hence the appeal is misplaced and directed at the wrong party. The appellant conceded that the Respondent was not a party to the consent. It was pointed out that the consent was between the appellant and M/s Kuronya Auctioneers.

The record reveals that on the 14th day of September 2001, that Mr. Onchiri the appellant's advocate recorded a consent with Mr. Wanyama, the Auctioneers's advocate in which the dispute between the auctioneer and the defendant (now appellant) was marked as settled.

It would appear also that the parties were also present at the time of recording the consent.

The application which came up for hearing before the senior resident magistrate is a chamber summons dated 16th October 2001 in which the appellant sought to set aside the consent order recorded on 14.9.2001. The main contention by the appellant before the learned senior resident magistrate was that his advocate recorded the consent without his approval hence it was in his view that the consent was null and

void. I have already mentioned that the learned senior resident magistrate dismissed the application by stating that the appellant was fully represented by his advocate.

This being the first appellate court I am enjoined to consider and reevaluate the evidence presented before the trial court. It is clear that the parties were present in court as per the record compiled by the appellant. The appellant denies this fact. It is only unfortunate that the record reveals the contrary. In fact the appellant's affidavit sworn on 16th October 2001 does not disclose that he was absent in court when the consent was being recorded. The fact of his absence before the learned senior resident magistrate is only mentioned on appeal. I am not convinced that the appellant was absent from court. The record has not been challenged or faulted.

What remains for me to consider is whether learned Senior Resident Magistrate applied the correct principles in dismissing the appellant's application. I can only discern from his ruling that he dismissed the application because he was of the view that the consent was properly recorded by the appellant's advocate who had full instructions from the appellant. The grounds raised by the appellant before the trial Senior

Resident Magistrate did not include a ground on fraud which is now being raised on appeal. This ground has not been properly founded by the appellant on appeal. The essential ingredients have not been canvassed before me.

The principles of setting aside consent orders or Judgments are well settled. There are ample authorities on the subject. The principles were restated by the court of appeal of Kenya in the case of **KENYA COMMERCIAL BANK LTD VS SPECIALISED ENGINEERING CO. LTD (1982) K.L.R. 485.**

It was held inter alia

(i) 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 or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

(ii) That the making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.

The learned Senior Resident Magistrate did not consider these principles when making his decision. But none theless he arrived at the correct decision. The appellant did not give good reasons to enable the court below set aside the consent order. I am not impressed either with the appellant's arguments on appeal. Upon considering the merits of this appeal I have come to the conclusion the same must fail.

It is admitted by the appellant that M/s Kuronya Auctioneers is not a party to this appeal. They were not joined. It is also admitted that the Respondent was not a party to the consent order. There is no relevant Respondent. But even if M/s Kuronya Auctioneers had been joined as a party it would not have changed my decision in any respect.

The upshot therefore is that this appeal is ordered dismissed with costs to the Respondent.

DATED AND DELIVERED THIS 9th DAY OF March 2004.

J.K. SERGON

JUDGE

