



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MICS CIVIL APPLICATION NO. 14 OF 2020

IN THE MATTER OF: THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF: TAXATION OF COSTS

BETWEEN

KILONZO & AZIZI COMPANY ADVOCATES.....RESPONDENT

VERSUS

THE COUNTY GOVERNMENT OF KILIFI.....APPLICANT

RULING

1. By this Notice of Motion dated and filed herein on 18th January 2021, the County Government of Kilifi (the Applicant) urges this Court to be pleased to wholly set aside the Certificate of Taxation issued on 2nd November 2020 and dated 3rd November 2020 for the sum of Kshs 31,000,000/-. The Applicant also prays that the Advocate-client Bill of Costs dated 3rd August 2020 and filed in Court on 7th August 2020 as amended on 27th October 2020 and filed in Court on 28th October 2020 be remitted back to the Deputy Registrar for taxation.

2. The application which is supported by an affidavit sworn by the Applicant's County Attorney Michelle Bibi Fondo is premised on the grounds that: -

i) The Respondent- Kilonzo & Aziz Company Advocates obtained a Certificate of Taxation dated 2nd November 2020 signed by the Honourable Deputy Registrar on 3rd November 2020 against the Applicant County Government for the total sum of Kshs 31,000,000/-;

ii) The Certificate of Costs emanated from the Respondent's Advocates/Client Bill of Costs dated 3rd August 2020 as amended in relation to Malindi High Court Petition No. 5 of 2011; Merry Beach Ltd –vs- The Attorney General & 18 Others;

iii) The Bill of Costs was allegedly taxed by consent of the parties on 2nd November 2020. However, the Legal Counsel representing the County Government of Kilifi in the Bill of Costs did not have instructions nor authorization from the County Attorney of the Applicant to enter into the purported consent on behalf of the Applicant;

iv) Consequently, the purported consent was entered into without the knowledge, instructions and prior approval of the Applicant;

v) Given that the purported settlement or consent Judgment was obtained without the knowledge, consent and approval of the County Attorney General, it remains to be legally invalid and of no consequence ab initio. It should therefore be set aside and/or wholly vacated to avoid unjustly enriching the Respondent at the expense of the public who shall be expected to satisfy the consequential Judgment and decree.

3. The application is opposed by the Respondent Law Firm. In a Replying Affidavit sworn by Kelvin Mbura Advocate in conduct of the matter and filed herein on 27th January 2021, the Respondent avers that the application is frivolous, vexatious, unmeritorious and amounts to an abuse of the Court process.

4. The Respondent asserts that the application is incompetent as it has been brought by a firm of advocates which are not properly on record as required under order 9 Rule 9 of the Civil Procedure Rules. The Respondent avers that the Amended Bill of Costs dated 27th October 2020 was taxed by the consent of the parties on 2nd November 2020 after the parties agreed to have the matter settled.

5. The Respondent further avers that the consent was entered into by an advocate who had both express and ostensible authority to enter the same on behalf of the Applicant and the same is hence binding upon the Applicant.

6. In his oral submissions in support of the application, Mr. Ngoya, Learned Counsel for the Applicant urged this Court to find that the consent recorded before the Learned Deputy Registrar of this Court, the Honourable Ivy Wasike on 2nd November 2020 was fraudulent as the Advocate who recorded the same on behalf of the Applicant did not have authorization from the Applicant's County Attorney. Counsel submitted that the said Advocate had only been authorized to attend Court and to secure more time for consideration of the bill and that her remit did not extend to the recording of a consent.

7. In response, Mr. Kilonzo, Learned Counsel for the Respondent submitted that Ms Rehema Wasi Advocate who recorded the consent was the one who had entered appearance and had all along been acting for the Applicant in the proceedings. While admitting that what was involved were public funds, Counsel submitted that through the consent, an amount of Kshs 4 Million had been taxed off his Advocate/Client Bill of Costs and that the Counsel then acting for the Applicant had both express and ostensible authority to deal with the taxation.

8. I have given full consideration to the application, the response thereto and the rival submissions and authorities cited by the Learned Advocates for the parties.

9. The County Government of Kilifi is by this application essentially seeking to have the settlement or consent recorded before the Learned Deputy Registrar of this Court set aside and/or vacated on account that the same was fraudulent as it was arrived upon without its instructions and/or authority.

10. The principles that appertain to setting aside of consent orders are well established in a line of cases including **Brooke Bond Liebig –vs- Mallya (1975) EA 266** where Mustafa Ag. VP stated thus: -

“The compromise agreement was made an order of the Court and was thus a consent Judgment. It is well settled that a consent Judgment can be set aside only in certain circumstances, eg on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a Court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

11. In **Flora N. Wasike –vs- Destimo Wamboko (1988) eKLR**, Hancox JA citing Setton on Judgments and Orders (7th Edition) Vol. 1 page 124, reiterated that: -

“Any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action, and 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 the consent was given without sufficient material facts, or in general for a reason which would enable a Court set aside an agreement.”

12. Arising from the foregoing, it was clear to me that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a Court to set aside a contract.

13. In their submissions before me, the Applicants have asserted that the settlement was reached without its authority and that hence the same was fraudulent. In this respect, this Court takes note of the definition given of the word “fraud” in Black’s Law Dictionary which describes it as: -

“Knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment. Fraud is usu(ally) a tort, but in some cases especially) when the conduct is willful) it may be a crime.”

14. That same dictionary defines misrepresentation as: -

“1. The act or an instance of making a false or misleading assertion about something, usu(ally) with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.

2. The assertion so made; an incorrect, unfair or false statement; an assertion that does not accord with the facts.”

15. In the matter before me, it is apparent that by an Advocate/Client Bill of Costs dated 3rd August 2020 as later amended on 27th October 2020, the Respondent sought to be awarded costs in the sum of Kshs 35,073,905/-. When that bill came up for taxation on 2nd November 2020, it was taxed by consent in the sum of Kshs 31,000,000/-. At paragraphs 4 to 7 of the Supporting Affidavit, the County Attorney disputes the authority of the Counsel representing the Applicant to enter into the consent and avers as follows:

“4. That from Court records available to us, it has emerged that the Respondent’s Advocate/Client Bill of Costs was allegedly

taxed by consent of all parties on 02-11-2020. Upon further investigation, I have also established that a Legal Counsel in my office appeared before the Deputy Registrar in this matter and recorded the alleged settlement or consent Judgment.”

5. That I wish to state to this Court that I am the only person, in my capacity as the County Attorney of the County Government of Kilifi, authorized by law and the County Government of Kilifi to make binding decisions in respect of legal matters affecting and/or involving the County Government and in furtherance thereof, to issue instructions regarding all legal matters to internal or external legal Counsel who are handling the said matters on behalf of the County Government of Kilifi;

6. That I did not instruct the said legal Counsel from my office to record a settlement or consent in this matter. In particular, I did not instruct the said Counsel to proceed and record a settlement or consent order taxing the Applicants/Respondents Advocate-Client Bill of Costs by consent at the sum of Kshs 31,000,000/- or any other amount;

7. That to the extent that the said legal Counsel purported to appear before the Deputy Registrar to record a Settlement or consent order awarding the Respondent Kshs 31,000,000/-in taxed costs against the County Government the said Counsel acted without my knowledge, without my consent, without my instructions and without my prior written authorization.”

16. I have considered those averments and the submissions on want of authorization. From the record, it is evident that upon being served with the Respondent’s Bill of Costs, the Applicant filed a Memorandum of Appearance dated 4th September 2020. That Memorandum of Appearance filed in Court on the same day is signed on behalf of the Applicant by one Rehema Wasi described therein as the Litigation Counsel, County Law Office, County Government of Kilifi.

17. It is the same Ms Wasi who executed the impugned consent some two months after she came on record for the Applicant. As it were, there is no allegation of fraud or coercion made by the Applicant against the said Advocate. Nor has the said Ms. Wasi herself filed any affidavit herein alleging that she was misled or coerced into entering the consent.

18. Having filed the Memorandum of Appearance on behalf of the Applicant, there was no doubt that Ms Wasi was on record for the Applicant. There was nothing to imply even remotely or otherwise that the said Counsel on record would require authority from the County Attorney before taking any course or direction in the matter before the Court. As Harris J stated in **Kenya Commercial Bank Ltd –vs- Specialised Engineering Company Ltd (1982) KLR 485: -**

“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.”

19. Considering a similar matter in **Kuwinda Rurinja Company Ltd –vs- Andikuwinda Holdings Ltd & 13 Others (2019) eKLR**, the Court of Appeal quoting the decision of the Supreme Court of South Africa in **Stand 242 Hendrik Potgieter Road Ruimsig Pty –vs- Gobel (No 246/10) (2011) ZASCA 105 (June 2011)** observed that: -

“The rule, in essence, is that a person dealing with a company in good faith is entitled to assume that the company has complied with its internal procedures and formalities.”

20. The same Court in the Kuwinda Rurinja Case (Supra) further cited with approval the dictum of Lord Hatherly in **Mohoney –vs- East Holyford Mining Company (1875) LR. 7HL 869** where His Lordship had stated thus: -

“When there are persons conducting the affairs of a company in a manner which appears to be perfectly consonant with the articles of association, then those dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company.”

21. Similarly, in the matter before me, I did not think there was any obligation upon the Respondent and by extension, the Court to find out from the Applicant’s Advocate on record if indeed she had authority to compromise the matter in the manner that she did. I was not persuaded that Ms Wasi Advocate had no authority to negotiate and compromise the matter on behalf of the Applicant. From the record, the allegation of fraud remains purely that, an allegation, as no effort was made by the Applicant to advance the argument and or to prove the same.

22. When called upon to set aside a consent Judgment in similar circumstances in **National Bank of Kenya Ltd –vs- Otieno Ragot & Company Advocates (2020) eKLR**, the Court of Appeal delivered itself as follows: -

“As regards whether this Court can set aside a consent Judgment, the Advocates Act provides the procedure for the recovery of advocates costs after taxation of bill of costs and a Certificate of taxation issued. All that a party is required to do is to seek entry of Judgment based on the certificate of costs after which a decree is issued for execution. Section 51(2) of the Advocates Act provides that: -

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that Judgment be entered for the sum certified to be due with costs”.

Consent Judgment has contractual effect and can only be set aside on such grounds as would obtain in a contract. By lodging this appeal, the appellant is basically asking this Court to set aside orders which it consented to and were adopted as orders of the

Court and a decree issued.....”

23. Similarly, it is clear to me that by this application the Applicant wants this Court to set aside a consent Judgment to which it had consented and which were adopted by the Honourable Deputy Registrar as orders of this Court. The circumstances upon which such a Judgment can be set aside do not obtain in the matter herein, as there was no proof of fraud, collusion or misapprehension of facts on the part of either party.

24. In the premises, I find no merit in the Motion dated 18th January 2021. I dismiss the same with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF APRIL, 2021.

J.O. OLOLA

JUDGE