



International Air Transport Association & another v Gitonga & 2 others (Civil Suit E361 of 2017) [2025] KEHC 1948 (KLR) (Commercial and Tax) (20 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1948 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E361 OF 2017
JWW MONG'ARE, J
FEBRUARY 20, 2025**

BETWEEN

INTERNATIONAL AIR TRANSPORT ASSOCIATION 1ST PLAINTIFF

SAHAM ASSURANCE KENYA LTD 2ND PLAINTIFF

AND

JAMES MUTUMA GITONGA 1ST DEFENDANT

BRIGHTWAYS TRAVEL AND TOURS LTD 2ND DEFENDANT

NANCY NTINYARI GITONGA 3RD DEFENDANT

RULING

1. This court has been moved by the 3rd Defendant by a Notice of Motion application dated 9th February 2024 seeking the following orders:-
 1. Spent
 2. That leave be granted to the firm of M/S Onyango Odhiambo & Company Advocates to come on record for the 3rd Defendant/Applicant.
 3. That the Honourable Court be pleased to stay the execution of the Judgment of the resultant mediation agreement dated 8th May 2018 together with the resultant Decree issued on 13th November 2018 and all other consequential orders herein pending the Hearing and Determination of this Application.
 4. That the Honourable Court be pleased to set aside and or review the Judgment of the resultant mediation agreement dated 8th May 2018 together with the resultant Decree issued on 13th November 2018 and all other consequential orders herein.



5. That the Defendant/Judgment Debtor be allowed to defend the suit herein and be granted unfettered leave to file his defence out of the prescribed time.
 6. That costs of this Application be provided for.
2. The Application is supported by the grounds set on its face and the supporting affidavit of James Mutuma Gitonga sworn on 9/2/2024. The 2nd Defendant filed an affidavit in support of the application. The same is opposed and the Plaintiff has filed grounds of opposition and a replying affidavit sworn by Jacqueline Tindi Mumoki, the legal counsel representing the Plaintiffs in the present suit. The 2nd Defendant, Nancy Ntinyari Gitonga, by an affidavit sworn 21/6/2023 supports the 3rd Defendant's application.

Analysis and Determination

3. I have carefully perused, considered and analyzed the pleadings before me together with the affidavits in support and the grounds of opposition and the replying affidavits therein. Interestingly, I note that the first limb of this application seeks that the court does allow the firm of M/S Onyango Odhiambo & Co. Advocates to come on record in this matter on behalf of the 3rd Defendant. I have perused the record herein and note that the firm of M/S Onyango Odhiambo & Co. Advocates have on various occasions appeared in this matter purporting to represent the 3rd Defendant. Specifically, on 3/3/2022 when the matter was listed for hearing before Hon. C Wanyama, Mr. Odhiambo Advocate is recorded as having come on record for the 3rd Defendant and made submissions before the said court. Again on 23/3/2022 and 21/4/2022 the said Advocate is marked as being present for the 3rd Defendant. Mr. Odhiambo was present on 7/11/2022 and again on 8/2/2023 before Hon. Justice Mabeya still appearing to represent the 3rd Defendant. When the matter was referred to this court, Mr. Odhiambo has always been present for the 3rd Defendant. I find it therefore perplexing and mischievous that after so many appearances before court by Mr. Odhiambo, the said Advocate only moved the Court to be placed on record vide this application filed on 9th February 2024. I do not grasp the purpose of the said prayer as the said counsel has been on record and for the 3rd Defendant all along when this matter has actively been litigated before various courts. This therefore means that I find no merit in respect of this limb of the application and dismiss the same.
4. The second limb of the application before this court seeks to stay the execution of the judgment of resultant mediation agreement herein dated 8th May 2018 together with the resultant decree issued on 13th November 2018 and all other consequential orders issued herein. The Application further seeks to set aside and/or review the said judgment and the resultant decree and all other consequential orders emanating from the said judgment.
5. The Applicant argues that he was never served with summons to enter appearance and never participated in the mediation settlement agreement that resulted in the impugned judgment and that as a result his right to a fair trial under Article 50 of *the Constitution* has been infringed. He further argues that he has since resigned from the directorship of the 1st Defendant and was never a beneficial owner nor was he actively involved in the day to day operations of the 1st Defendant and in fact, he was a passive participant in the affairs of the 1st Defendant that was solely run and in full control of the 2nd Defendant. He contends that he was never made aware of this case and the judgment resulting from the mediation settlement should not therefore be binding on him.
6. In a surprising twist of events, the 2nd Defendant who represented the 1st Defendant and herself at the mediation negotiations and executed the resultant agreement has sworn an affidavit in support of the application herein. She confirms that she was the Managing Director of the 1st Defendant and



was served with the court documents in this matter but chose to leave out the 3rd Defendant from the subsequent mediation which resulted in the judgment that the 3rd Defendant now wishes to have this court vacate and set aside. She confirms that, subsequent to the entry of the said judgment, part of the decretal amounts have been paid in satisfaction therein, but a substantive amount remains outstanding.

7. Black's Law Dictionary, 1 Edition, defines a Consent judgment as follow:-

“a consent judgment is a judgment entered by a court with the explicit agreement of all parties involved, meaning it's a result of a settlement or compromise rather than a full trial or hearing. Definition: A consent judgment, also known as a stipulated judgment, is a court order or judgment entered with the express agreement of all parties involved in a lawsuit. Nature:

It's essentially a legal agreement that is formalized by the court, meaning the parties have reached a resolution and the court is simply recording that agreement.

Purpose:

Consent judgments are used to resolve disputes efficiently and avoid the costs and time associated with a full trial.

Enforcement:

Once entered by the court, a consent judgment is as binding and enforceable as any other judgment, meaning the parties are obligated to comply with its terms.”

8. The [Civil Procedure Act](#) section 59B mandates the court in line with Article 159 of [the Constitution](#) to refer cases to mediation. The said section provides as follows:-

“S.59B. Reference of cases to mediation

- (1) The Court may—
 - (a) on the request of the parties concerned; or
 - (b) where it deems it appropriate to do so; or
 - (c) where the law so requires, direct that any dispute presented before it be referred to mediation.
- (2) Where a dispute is referred to mediation under subsection (1), the parties thereto shall select for that purpose a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee.
- (3) A mediation under this Part shall be conducted in accordance with the mediation rules.
- (4) An agreement between the parties to a dispute as a result of a process of mediation under this Part shall be recorded in writing and registered with the Court giving the direction under subsection (1), and shall be enforceable as if it were a judgment of that Court.



(5) No appeal shall lie against an agreement referred to in subsection (4).

9. Arising from the above provisions of the *Civil Procedure Act*, it is clear that the mode of determination of the suit therein was by mediation chosen by the parties and therefore one that is recognized by law. Subsequently and as has been held by the court, the consent judgment emanating from the mediation settlement agreement was, once adopted by the court, a judgment of this court. The said judgment can only be vacated or set aside under very stringent and special circumstances where fraud, mistake or misrepresentation is proved by the party seeking to set it aside.
10. This fact was reinforced in the decision of the Court of Appeal in *Brooke Bond Liebig Ltd V Mallya* [1975] EA 266 at 269 in which Law Ag P said: “A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.” Again in the case of *Kenya Commercial Bank Ltd V. Benjoh Amalgamated Ltd, Githinji J*, (as he then was) considered the circumstances under which a consent Judgment can be set aside and referred to and relied on the decision in *Hirani V. Kassam* [1952] 19 EACA 131 and held as follows; “It is now well 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:”
11. Suffice it to say that the judgment that parties entered into herein pursuant to the mediation agreement is a valid judgment that binds the parties to it. As specifically set out under section 67(2) of the Civil Procedure, such judgment cannot be appealed against.

“S. Appeal from original decree

67.

- (1) An appeal may lie from an original decree passed ex parte.
- (2) No appeal shall lie from a decree passed by the court with the consent of parties.”

12. I am aware that the present application seeks to set the said judgment in its entirety on the basis that the Applicant, being the 3rd Defendant herein was not served with summons to enter appearance and therefore did not participate in the mediation negotiations and discussions that resulted in the said judgment and decree by the court. I also note that the 2nd Defendant while supporting the application herein confirms that she was at all material times the Managing Director and in control of the 1st Defendant and confirms having participated fully in the negotiations before the court appointed administrator. At that material time, the 3rd Defendant was a director of the 1st Defendant and only resigned from the said position in 2020 long after the judgment was entered. I am also aware that the *Companies Act* envisages a body corporate such as the 1st Defendant to be managed by the directors therein with resolutions approving their every action including, one to enter into a negotiation and settle disputes arising from actions or omissions of the company.
13. It is therefore baffling to imagine that the 3rd Defendant was kept away from such an important action by his co-director that resulted in a judgment of a sum in excess of Kshs. 20 million. The 3rd Defendant confirms that he indeed issued a guarantee and indemnity in respect of the debt herein in 2015.
14. As mention earlier in this ruling, the 3rd Defendant has since 2022 participated actively and with legal counsel in these proceedings. I note that the 3rd Defendant when he appeared before the court for the committal proceedings offered to participate in the settlement of the decretal amount by making a payment of Kshs. 5 million, which sadly is yet to be achieved, and only to later and 2 years thereafter



move the court with the present application seeking to set aside and or vacate the judgment of this court.

15. I am therefore not persuaded that the present application is merited. The same reeks of malafides and connivance by the Defendants' parties to defeat the ends of justice. The 3rd Defendant has all along been an active participant in the present suit and has by his actions demonstrated knowledge of the happenings in the matter but chose not to timely file a defence, if he had any, to the suit. I find therefore that the present application is without and it is indeed an abuse of the court process brought solely to delay the execution of the decree herein and intended to keep the Plaintiffs away from the fruits of the judgment in their favour. The application is therefore dismissed with costs to the Plaintiff. Any interim orders issued herein before are vacated and discharged forthwith. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF FEBRUARY 2025

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J.W.W. MONGARE

JUDGE

In the Presence of:-

1. Mrs. Ochieng holding brief for Ms. Tindi for the Plaintiff/Respondent.
2. Ms. Kalinga for the 1sts and 2nd Defendant/Respondent.
3. Mr. Odhiambo for the 3rd Defendant/Applicant.
4. Amos - Court Assistant

