



REPUBLIC OF KENYA



KENYA LAW

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**Gulf African Bank Limited v Realtek (K) Limited & 5 others (Civil Case E101 of 2018)
[2025] KEHC 2689 (KLR) (Commercial and Tax) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2689 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E101 OF 2018
JWW MONG'ARE, J
MARCH 6, 2025**

BETWEEN

GULF AFRICAN BANK LIMITED APPLICANT

AND

REALTEK (K) LIMITED 1ST DEFENDANT

ARDIRAHMAN MOHAMMED AHMED 2ND DEFENDANT

FARDOWSA MOHAMMED IBRAHIM 3RD DEFENDANT

YUNIS MOHAMMED OMAR 4TH DEFENDANT

NIA MOJA BUSINESS SOLUTIONS(K) LIMITED 5TH DEFENDANT

ADAWA INVESTMENTS COMPANY LIMITED 6TH DEFENDANT

RULING

1. Before court is the application dated 5/6/2024 brought under Article 50 of *the Constitution* of Kenya 2010, sections 1A, 1B, 3A and 3B of the *Civil Procedure Act* CAP 21 Laws of Kenya, Order 10 rule 11, Order 45 Rule 1& Order 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.
2. The application seeks the following orders:-
 1. Spent
 2. Spent



3. That this Honourable court be pleased to issue orders of stay of execution of the decree issued against the 1st to 5th Defendants/Applicants pending the hearing and determination of the suit in this matter.
 4. That this Honourable court be pleased to set aside the consent judgment and any other subsequent orders thereof as against 1st to 5th Defendants/Applicant.
 5. That this Honourable court does set down this matter for hearing in the main suit.
 6. That costs of this application be borne by the Plaintiff/Respondent herein.
3. The application is supported by the grounds on the face of the motion and the supporting affidavit sworn by Mohamed Yunison 5/6/2024. Mr. Mohamed stated that his previous advocates, the firm of Muthama & Associates, entered into a consent judgment against the 1st to 5th Defendants for a sum of Kshs.65,000,000/= without their authorization.
 4. The Applicants stated that they only became aware of the judgment upon perusing the court file to ascertain the status of the case, as they had not received any updates from their legal representatives.
 5. The Applicants averred that they had lodged a complaint with the Law Society of Kenya against the firm of Muthama & Associates, citing professional misconduct. They contended that the judgment entered against them was irregular, as they were neither consulted nor did they appear in court. They further argued that mistakes of counsel should not be visited upon the client and expressed concern over the imminent risk of the Plaintiff attaching and selling their property. The Applicants asserted that the consent judgment against the company was fraudulently, illegally, and unlawfully obtained through the concealment of material facts.
 6. The Respondent in opposition to the application filed a replying affidavit sworn by the legal officer of the Respondent Mr. Lawi Satoon 8/7/2024. He deposed that the application before court was an affront of Order 9 Rule 1 of the Civil Procedure Rules. It was the Respondent's position that the Applicants willfully engaged the firm of Muthama & Associates thus giving them the right to act and represent them. That the consent was arrived at following meetings between the Plaintiff and the 4th Defendant, a director of the 1st and 4th Defendant and through negotiations between the Bank lawyers as well as the firm of Muthama & Associates advocates for the Applicants.
 7. He additionally deposed that the Respondent sought for a meeting with the Applicants via a letter dated 15/10/2020 and a response was given by the firm of Muthama & Associates in a letter dated 21/10/2020 agreeing to the meeting and amicable settlement. That a meeting was held at the Bank where himself, the Bank's deputy chief executive officer, Ms. Amina Bashir and the 4th Defendant were in attendance. Following the meeting the Applicants proposed a settlement of Kshs.20,000,000/= payable within a period of 6 years which position was declined by the Bank which indicated that it was amenable to a payment of the principal amount and the profit and damages were to be waived.
 8. He stated that the parties attended court and confirmed that they were negotiating a settlement and thereafter a consent was duly signed on 22/10/2021 which was adopted in court on 25/10/2021.
 9. The Respondent stated that they started execution of the decretal sum when the Applicants failed to honour the judgment and the allegation that they have reported the firm of Muthama & Associates to Law Society of Kenya was a further ploy to evade settling of the debt.
 10. The application was canvassed by way of written submissions which I have considered.



11. The Applicants submitted that the variation of a consent judgment could only be on the grounds that would allow for a contract to be vitiated. Counsel submitted that consent judgment against the Applicants for the sum of Kshs.65,000,000/= was fraudulently obtained through concealment of facts. It was the Applicant's submissions that their former advocates did not act in their interest when they entered the consent and thus were in breach of their professional duty. As a result, the Applicants lodged a complaint at the Law Society of Kenya for professional misconduct and negligence. Counsel submitted that mistakes of counsel should not be visited on the client.
12. As to whether the matter should be set down for hearing, counsel submitted that the Applicants were denied their rights under Article 50 of *the Constitution* together with the principles of natural justice. The Respondent submitted that the Plaintiff's advocate did not seek leave of court to present the application in line with Order 9 Rule 9 of the Civil Procedure Rules, thus making the application incompetent. It was the Respondent's submissions that the Applicants failed to produce evidence to demonstrate that the firm of Muthama & Associates failed to record a consent.

Analysis And Determination:-

13. I have considered carefully the pleadings, submissions, and authorities cited. I note that the two issues that arise for determination by the Court are: first, whether the application is incompetent, and second, whether the Applicants have established sufficient grounds for setting aside the consent judgment.
14. On the first issue, the Respondent challenged the competency of the application, arguing that it violates Order 9 Rule 9 of the Civil Procedure Rules as the Applicants failed to seek leave of the court or obtain consent from their previous advocate before filing the application.
15. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:-

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —

 - a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”
16. In view of the foregoing provision, when there is a change of advocate after judgment has been entered, the new advocate must either obtain leave of the court or enter into a consent with the outgoing advocate. The purpose of Order 9 Rule 9 Civil Procedure Rules, 2010, was aptly discussed in the case of *Serah Wanjiru Kung'u v Peter Munyua Kimani* [2021] eKLR where the Court struck out an application by Advocates who were not properly on record. the court stated that:-

- “ 13. The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt...”



17. Additionally, in the case of *Jackline Wakesho v Aroma Cafe* [2014] eKLR the Court held as follows:-

“Although the foregoing objection appears like a technical procedural issue, this Court finds that the default by the Applicant goes to the jurisdiction of the Court to entertain the motion. The reason for the foregoing reasoning is that the Court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack locus standi. The Court has been asked to invoke the oxygen principle under Section 1A and 1B of the *Civil Procedure Act* and entertain the Motion. The Court will not however do that. The reason for the foregoing is twofold. Firstly, there are several judicial pronouncements cited by the claimant which show that Courts have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9...”

18. Similarly, the Court of Appeal dismissed an application for failing to comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules in the case of *Symposia Consult Limited v George Gikere Kaburu & 2 others* [2019] eKLR where it held that:-

“It was contended, and this was not denied that the Applicant was represented by another counsel, other than Mr. Mwaniki Njuguna at the High Court. In order for Mr. Mwaniki Njuguna to come on record, he needed to comply with the provisions of O.9 r.9 of the CPR. Mr. Mwaniki Njuguna has failed to comply with the provisions of O. 9 r. 9 as afore stated. He is therefore improperly before me and I have no option but to dismiss the motion with costs to the Respondent.”

19. Applying the foregoing principles to the circumstances of this case, it is well established that non-compliance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules is fatal to an application. In this case, the Applicant filed a Notice of Change of Advocates dated 30/5/2024; however, no supporting document has been filed to demonstrate that consent was obtained from the Applicant’s former advocates. Furthermore, there is no record indicating that leave was sought from the court to come on record. It is therefore evident that the Applicant has failed to meet the mandatory requirements set out under Order 9 Rule 9 of the Civil Procedure Rules, rendering the application procedurally defective.

20. Although this is sufficient reason to dismiss the application, I will however also consider the substantive prayers in the application.

21. The second issue is to determine whether the Applicants have established sufficient grounds for setting aside the consent judgment. The legal principles of setting aside the consent were well laid down in the case of *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485, Harris, J correctly held, inter alia, that –

- “1. 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 collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. 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."

22. Further in *Flora N. Wasike v Destimo Wamboko* [1988] eKLR the Court stated:-

"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 to be fulfilled, which are not carried out: see the decision of this Court in *J.M. Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.*"

23. In view of the above, 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 Applicants in this case seeking to set aside the consent judgment are that their former advocates did not seek their instruction before the consent was entered.

24. The court of appeal in the case of *Guzzini & another v Tinga & 7 others (Civil Appeal E047 of 2021)* [2024] KECA 493 (KLR) (26 April 2024) (Judgment) stated that:-

"It is not in dispute that learned counsel for the appellants had been duly instructed to conduct the proceedings in the trial court on their behalf. Those instructions had not been withdrawn as at the time the consent orders were recorded as an order of the court. We find nothing on record to suggest that circumstances had changed in any way so as to call into question the propriety of those orders, except for the appellants' allegation that they were not informed of its contents. But that is a matter between client and counsel. Be that as it may, we hasten to observe that a court is not obligated to inquire into the terms on which counsel is instructed by their client in judicial proceedings. Neither can the court take upon itself to inquire into the conduct of negotiations between learned counsel leading to such consent orders. In the absence of fraud, mistake or misrepresentation, such orders stand (see *Frank Phipps & Pearl Phipps v Harold Morrison SCCA 86 of 2008*; and *Kinch v Walcott and Others* [1929] A.C. 482)."

25. Similarly, in *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited & Another* [1998] eKLR the court noted with approval a passage in *The Supreme Court Practice 1976 (Vol. 2)* paragraph 2013 page 620 where it stated that:-

"Authority of Solicitor - a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (*Re Newen*, [1903] 1 Ch pp 817,818; *Little v Spreadbury*, [1910] 2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice - see *Welsh vs Roe* [1918 - 9] All E.R Rep 620."

26. Drawing guidance from the foregoing dicta, where a party instructs counsel to act on its behalf, the advocate is presumed to have the authority to compromise or enter into consent orders unless there is clear evidence of fraud, collusion, mistake, or misrepresentation. The Applicants herein cannot therefore challenge the consent judgment because they were not consulted. Any dispute between a client and the court would amount to professional misconduct and the same ought to be addressed by the relevant bodies.



27. Accordingly, I find that the Applicants have not met the threshold for setting aside a consent judgment. I find therefore that the application is without merit and the same is dismissed forthwith with costs to the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF MARCH 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Wafula for the Plaintiff.

Mr. Kimathi for the 1st - 5th Defendants.

Mr. Ikua for the 6th Defendant.

Amos - Court Assistant

