Wanjiru & another v Mutune (Civil Appeal E026 of 2023)
[2025] KEHC 12701 (KLR) (9 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12701 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E026 OF 2023

FN MUCHEMI, J

SEPTEMBER 9, 2025

BETWEEN

GLADYS WANJIRU ..... 1ST APPELLANT

PETER MATHENGE MUIRU ..... 2ND APPELLANT

AND

JOSEPH MBITHI MUTUNE ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. V. A. Ogutu (RM/Adjudicator) delivered on 16th March 2023 in Thika Small Claims Court SCCCOMM No. E923 of 2022)

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Thika Principal Magistrate in CMCC No. E099 of 2022 whereby the court below dismissed the appellant's application dated 27th January 2023 and held that the consent entered by the parties on liability was binding.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in law and in fact in failing to appreciate the unrebutted evidence on record thereby dismissing the appellants' application dated 27th January 2023 which decision is untenable, not supported by evidence and manifestly unjust to the appellants.

3. Parties put in written submissions.

The Appellants' Submissions.

4. The appellants submit that their insurers' legal manager gave reasons why it became necessary to conduct investigations into the subject accident. The appellants submit that the insurer genuinely believed that the respondent was involved in the subject accident. It is only after several other demands were received that the insurer became suspicious and deemed it necessary to conduct investigations which established that neither the new claimants nor the respondent were involved in the subject accident. It was further established that the police abstract relied on by the respondent was a forgery. The same was endorsed as such and countersigned by the SOT Juja Traffic Base using his official rubber stamp.

5. The appellants rely on the case of Brooke Bond Liebig vs Mally (1975) EA 266 and submit that the subject claim is fraudulent. The appellants submit that the learned magistrate held that the defendant's insurer should have upon being served with the claim, sent an investigator to visit the police station and verify the police abstract against the occurrence book or police file as a preliminary step to confirm that the respondent was involved in the accident. The trial court further held that there was no official communication from the OCS Juja Police Station that the stamp impression and signature were a forgery. Furthermore, there was no investigation report filed by the SOT Juja Police Station that they established that the said police abstract was obtained fraudulently.

6. The appellants argue that the learned magistrate is precluded from prescribing to an insurer how to handle its claim. It is an insurer that decides when to investigate claims or not. The appellants further argue that the averments of fraud on the respondent were not rebutted considering the judgment was for a substantial amount of money.

7. The appellants submit that the standard of proof set by the trial court was very high in the application. Such evidence would more appropriately be adduced at trial where the documents relied upon would be produced by their makers and tested by way of cross examination. The appellants argue that the affidavit evidence adduced during the setting aside of the consent was sufficient proof that the new evidence was not available to them at the time of recording the consent judgment even after the exercise of due diligence. Furthermore, the contention that the claim is tainted with fraud was not disputed as the application was unopposed. The police abstract endorsed by the SOT Juja Traffic Base as a forgery, countersigned and rubberstamped is sufficient evidence of the fraud. Thus the learned magistrate erred by holding that they should have adduced more evidence to prove fraud.

The Respondent's Submissions.

8. The respondent relies on Order 45 Rule 1 of the Civil Procedure Rules and submits that the learned magistrate rightly held that the appellant's insurer had a duty to conduct due diligence upon being served with the statutory notice in order to establish whether there was any liability on the part of the appellants. Further, the appellants' insurer had an obligation to conduct investigations prior to entering a consent judgment on liability. Relying on the case of Chumba vs Equity Bank (Kenya) Limited & 2 Others (Civil Case 15 of 2022), the respondent submits that the appellants' admission of liability created a legitimate expectation on him and he is entitled to enjoy the fruits of his judgment.

9. The respondent relies on the case of Ushago Diani Investment Limited vs Jabeen Manan (no citation given) and submits that the appellants seek to appeal the judgment by the trial court but has couched the grounds in the memorandum of appeal in the form of a review.

10. The respondent further relies on the case of Kinyanjui vs Kinyanjui & Another (Civil Appeal E201 of 2022) [2024] KEHC 11217 (KLR) and submits that the appellants failed to produce an investigation

report to support their contentions that the police abstract was a forgery and in the absence of such investigation report, it was difficult to establish whether the cancellations made in the police abstract and the signature belonged to the SOT Juja Police Station as alleged by the appellants. The mere cancellation and indication of forgery on the police abstract was not sufficient evidentiary evidence to demonstrate fraud. The respondent further relies on the cases of Orieny & Another vs National Bank of Kenya (Civil Appeal E016 of 2023) [2024] KEHC 6002 (KLR) (20 May 2024) (Judgment) and Ndolo vs Ndolo [2008] 1 KLR 742 and submits that the burden of proof in allegations of fraud is higher than that required in civil cases which the appellants have failed to meet.

Issue for determination

11. The main issue for determination is whether the appeal has merit.

The Law

12. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

13. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

14. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

    a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

    c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit

15. There is currently a dearth of authorities on the law governing the setting aside of a consent judgment or order. The case of S. M. N vs Z. M. S & 3 Others [2017] eKLR summaries the case law and grounds upon which a consent may be varied or set aside as follows:

    i. Where the consent was obtained fraudulently;

ii. In collusion between affected parties;

iii. Where an agreement is contrary to the policy of the court;

iv. Where the consent is based on insufficient material facts;

v. Where the consent is based on misapprehension or ignorance of material facts;

vi. Any other sufficient reason.

16. Generally, a court will not interfere with a consent judgment except in circumstance such as would provide a good ground for varying or rescinding a contract between parties.

17. In Flora N. Wasike vs Destimo Wamboko [1988] eKLR Hancox JA held the view that:-

> It is now settled law that a consent judgment or order has a 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.

18. The Honourable Judge went further and cited Setton on Judgments & Orders 7th Edition Vol. 1 page 124 and 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.

19. In Kenya Commercial Bank Ltd vs Specialised Engineering Company Ltd [1982] KLR 485, Harris J:

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.

20. In Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another [1998] eKLR this court cited a passage in the Supreme Court Practice 1976 (Vol 2) paragraph 2013 page 620 stating:-

> " 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 pp817, 818; Little vs Spreadbury [1910] 2KB 658. No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice. Welsh vs Roe (1918-9) All ER Rep 620."

21. Similarly in the Ugandan case of Lenina Kemigisha Mbabazi Star Fish Ltd vs Jing Jeng International Trading Ltd (HCT-OO-MA-344-2012):-

> " The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action."

22. Lastly in Brooke Bond Liebig vs Mallya (1975) EA 266 where Mustafa Ag. VP stated:-

> " The compromise agreement 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 circumstance, e.g on grounds of fraud, 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 the 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."

23. Essentially, the above-cited authorities are clear 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 it aside. From the record, parties filed a consent dated 26th July 2022 which provided that judgment be entered for the respondent as against the appellants on liability at the ratio of 80:20 and parties file submissions on quantum. The consent was then adopted as an order of the court on 19th October 2022 and the trial court delivered its judgment on quantum on 17th November 2022. The appellants however argue that upon their insurer conducting investigations, they discovered that the respondent's claim was fictitious. He relied on a police abstract which was said to be a forgery and he urged the court to set aside the said consent. It is noted that although the appellants claim that the police abstract is a forgery, there is no affidavit from the OCS Juja Police Station that the said abstract did not emanate from the said station. Furthermore, the appellants have not presented any evidence to show that the stamp impression and signature on the police abstract are a forgery. The appellants produced a copy of police abstract cancelled in red and allegedly signed by the SOT Juja Police Station with the words forged inscribed on it. Furthermore, the SOT Juja Police Station has not filed any investigation report indicating that they have established that the police abstract was obtained fraudulently. It is trite that the standard of proof on allegations of fraud are higher than in other civil cases. The evidence of SOT Juja Police Station would have been of great help to this court. Appellants failed to produce it. This principle on proof of fraud was enunciated in R.G. Patel vs Lalji Makanji [1957] EA 314 where the former Court of Appeal for East Africa stated as follows:-

> Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

24. On further perusal of the record, it is my considered view that the appellants ought to have exercised due diligence when presented with the claim of the subject accident instead of waiting for the completion of the suit to investigate whether the claim was fictitious. Such information if it was available would

have helped to discover the onset of the case that the claim was a forgery. It has been brought at a late stage and yet it does not fall in the category of newly discovered evidence warranted to set aside or review the orders made by the trial court. He who alleges must prove and it is for the appellants in this case to prove that the consent was entered into fraudulently based on a forged police abstract despite the fact that the respondent did not put in a response to the application dated 27th January 2023. See Ndolo vs Ndolo [2008] 1KLR (G&F) 742 where the court stated:-

> We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

25. It is therefore my considered view that this appeal does not meet the threshold of setting aside the consent entered into by the parties. It has not been shown that due diligence was exercised by the appellant in obtaining the evidence.

26. Accordingly, I find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

27. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9th DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE