



**K-Rep Bank Limited v Tatiya & another (Civil Suit 315 of 2013)
[2024] KEHC 2020 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 315 OF 2013
FG MUGAMBI, J
MARCH 1, 2024**

BETWEEN

K-REP BANK LIMITED PLAINTIFF

AND

PARIKEN OLE TATIYA 1ST DEFENDANT

SAMUEL KAMAU WAITHAKA 2ND DEFENDANT

RULING

1. This ruling determines the application dated 1st March 2023. It is brought under sections IA, IB and 3A of the *Civil Procedure Act*, Order 51 rule (1) and Order 12 of the Civil Procedure Rules. The 2nd defendant prays to have the order of 6th October 2022 set aside and/or varied. By the said order the plaintiff's application dated 13th July 2021 was allowed and the plaintiff was awarded costs of the suit. The 2nd defendant prays that he be granted leave to defend the said application.
2. In the alternative, the 2nd defendant prays for an order that no costs of the suit are payable to the plaintiff in view of the express terms of the consent order dated 16th March 2018 and filed in court on 21st March 2022.
3. The 2nd defendant further seeks orders compelling the plaintiff to execute and deliver to the 2nd defendant the transfer forms, Land Control Board Consent and all other documents required to successfully transfer title number Keekonokie/Ilkisument/773 to the 2nd defendant. In default of this, that the Deputy Registrar to execute and deliver these documents to the 2nd defendant.
4. The application is supported by the affidavit and further affidavit of JACKLINE NDUNGU the Senior Legal Officer in the 2nd defendant bank. She contends that the origin of this dispute is a suit filed by the plaintiff seeking among others, orders stopping the bank from realizing its statutory power of



sale. Subsequently, on 21st March 2018 the parties signed and filed a consent which compromised the suit, with no orders as to costs, on condition that the suit property was discharged, subdivided and a portion of it transferred to the plaintiff.

5. The 2nd defendant argues that while the process of subdividing the suit property was going on, the plaintiff filed an application dated 13th July 2021 seeking orders to enforce the consent order of 21st March 2018 and also sought costs of the suit. The application came up for hearing and on 6th October 2023 it was allowed, in the absence of the 2nd defendants.
6. Subsequently on 11th November 2022, the plaintiff's Advocates emailed the 2nd defendants' advocates and indicated that their client would not sign the transfer forms for the bank's portion until costs of the suit are paid, which they proposed at Kshs. 500,000/=. It is this order that culminated to the application before the Court.
7. The application is opposed by way of a replying affidavit sworn by Aldrin Ojiambo, a partner in the firm of Acorn Law Advocates LLP which has conducted this matter on behalf of the plaintiff. He asserts that the application dated 13th July 2021 was served on counsel for the 2nd defendants on 30th July 2021 together with the Mention Notice for 28th October 2021. The application was finally heard on 6th October 2022 fourteen (14) months after it was filed and after 6 court attendances where the 2nd defendant's counsel were absent. All through this period, there was no response from the 2nd defendant in opposition to the application.
8. The plaintiff takes issue with the representation of the facts of the consent by the 2nd defendant. As far as the plaintiff is concerned, the suit would only be marked as settled with no order as to costs on condition that the 2nd defendant discharges the charge created over the suit property and a portion of land was excised from the suit property and transferred to the 2nd defendant.
9. The plaintiff argues that the 2nd defendant failed to attend Court and give a progress report on the various times before the Court. The 2nd defendant failed to also inform or keep the advocate for the plaintiff informed of the progress made in the subdivision of the suit property for a whole year. As a result of the delay in finalizing the process and due to the vague and incomplete responses and no tangible responses forthcoming, the plaintiff filed the application dated 13th July 2021 more than three years after the recording of the consent.
10. The 2nd defendant states that there was not time limit imposed for the discharge and subdivision arguing that the delay was justifiable and out of their control. The delay is attributable to both parties and having been fully complied with, no orders of costs should therefore attach since the consent order had not been set aside.

Analysis

11. Pursuant to the directions of this Court issued on 12th June 2023, parties filed their respective skeleton submissions and argued the application on 1st November 2023. Both parties acknowledge that the prayers in the application have been overtaken by events save for prayer 3, 4 and 8 since the consent has already been fully discharged. For the avoidance of doubt, the prayers are as follows:
 - i. That the order of 6th October 2022 allowing the plaintiff's notice of motion dated 13th July 2021 and awarding the plaintiff the costs of the suit be set aside and/or varied and the defendant/applicant be granted leave to defend the said application;



- ii. That in the alternative to (3) above, there be an order that no costs of the suit are payable to the plaintiff in view of the express terms of the consent order dated 16th March 2018 and filed in court on 21st March 2022;
 - iii. Costs of this application be provided for.
12. The consent dated 16th March 2018 between the parties is acknowledged by all the parties. It is signed by both parties. Without regurgitating the contents of the consent, paragraph 4 of the said consent provides that upon performance of (1) and (2) above, the suit be marked as settled with no order as to costs. At this point I would wish to reiterate the principles established as to the nature and effect of a consent order or judgment.
 13. Hancox JA (as he then was) in the case of *Flora Wasike v Destimo Wamboko*, (1982 -1988)1 KAR 625, held that a consent is of a contractual effect in the following words:

“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.”
 14. On the instances when a consent may be set aside, the Court of Appeal in the case of *Brooke Bond Liebig v Mallya*, 1975 E.A. 266 held that:

“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the Court to set aside an agreement.”
 15. This position was buttressed further in *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd*, (1982) KLR P. 485. In *Hirani v Kassam*, (1952), 19 EACA 131, the Court quoted the following passage from *Seton on Judgments and Orders*, 7th edition, Vol.1 p.124:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on 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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”
 16. The thread running through all these judicial decisions is the Courts' profound deference to the sanctity of contractual agreements mutually and in good faith entered into by the parties. This reverence for contractual agreements underscores a foundational principle of contract law: the assurance of the binding nature of consensual agreements.
 17. In my view, if a party were permitted to unilaterally seek judicial alteration of a mutually agreed upon consent, it would fundamentally undermine the reliability and enforceability of such agreements. Hence, this judicial approach reinforces the imperative that consents, once forged in good faith, stand as inviolable pacts, thereby preserving the integrity of contractual obligations and the predictability of legal outcomes.
 18. That said, it is clear from the consent that the parties herein, who were well aware of their circumstance, did not deem it fit to give any timelines for the discharge of the consent. As to whether this Court should intervene and impose measures thereafter, the decisions that I have cited are clear on this point.



19. In my view, seeking an ex parte order for one party to pay costs when there's a consent order explicitly stating there would be no order for costs represents a significant deviation from the agreed terms of the consent. That is not to say that the plaintiff's frustration over the delay is unwarranted.
20. I have considered all the correspondence on record between the plaintiff's and 2nd defendant's advocates. It is observed that there was a considerable delay exceeding three years in discharging the terms of the consent. This delay is attributed primarily to actions, or inactions, of the 2nd defendant. However, it is pertinent to note that the plaintiff also played a role in this delay, through an injunction that had been placed on the suit property and which had to be discharged so as to allow the discharge and sub division of the parcel.
21. The process was further impeded by the misplacement of the original title deed. It is my view that while the 2nd defendant bears a significant portion of the responsibility, the contributory actions of the plaintiff and unforeseen complications like the loss of the original title have collectively resulted in the extended duration required to settle the terms of the consent.
22. An examination of the correspondence further reveals a palpable sense of frustration on the part of the plaintiff. It is evident from the communications that there were numerous grievances aired against the 2nd defendant, particularly regarding the lack of regular updates provided to both the plaintiff and the court about the progression of the matter at hand. This deficiency in communication led to a scenario where the plaintiff was compelled to seek information directly from the surveyor involved in the process.
23. The second defendant's apparent neglect in maintaining open and consistent lines of communication not only exacerbated the plaintiff's frustration but also likely contributed to the overall delay and confusion surrounding the discharge and subdivision of the parcel.
24. Having said all this, I return to the question, what was the proper remedy for the plaintiff? Perhaps an application for enforcement of the consent order like that dated 13th July 2022. I note that the application sought to enforce the consent and did not depart in any way from the consent save for the prayer on costs. It is not denied that the application was served by email on 30th July 2021. It is true that the 2nd defendants were not in attendance on the day that the application was allowed.
25. I have reviewed the Court record. What the plaintiffs did not indicate to the Court is their grievance that warranted the setting aside of a term of the consent judgment and that the prayers that they were seeking with respect to costs were contrary to what the parties had agreed and would have varied the terms of the consent order. At the very least the plaintiff should have sought to set aside the consent judgment. This would have allowed the Court an opportunity to enquire into the allegations and decide as to whether costs ought to be paid.
26. The *Civil Procedure Act* and Rules provides mechanisms through which a court can set aside or review its orders so as to ensure justice and fairness in judicial proceedings. These provisions are crucial for correcting errors, addressing oversights, or revisiting decisions made due to new evidence or legal interpretations.
27. In my view, the plaintiff's misled this Court by not disclosing the tenure and effect of the orders for costs sought in the application of 13th July 2021.

Determination

28. The long and short of this is that the application dated 1st March 2023 is successful. Consequently, the order of 6th October 2022 allowing the plaintiff's notice of motion dated 13th July 2021 and awarding



the plaintiff the costs of the suit is hereby set aside. Instead, this Court finds that no costs of the suit are payable to the plaintiff in view of the express terms of the consent order dated 16th March 2018. There shall equally be no orders to costs on this application

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 1ST DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

