



**Kam Transporters Sacco Ltd & another v Wandate (Civil Appeal
E351 of 2020) [2024] KEHC 8401 (KLR) (Civ) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E351 OF 2020

CW MEOLI, J

JUNE 20, 2024

BETWEEN

KAM TRANSPORTERS SACCO LTD 1ST APPLICANT

STEPHEN MUSYOKI MUTUA 2ND APPLICANT

AND

GRACE WAIRIMU WANDATE RESPONDENT

RULING

1. For determination is the Notice of Motion dated 26th July, 2023 (the Motion) brought by Kam Transporters Sacco Ltd and Stephen Musyoki Mutua (hereafter the 1st and 2nd Applicants) primarily seeking the reinstatement of the appeal. The Motion is premised on the provisions of sections 1A,1B,3A and 95 of the *Civil Procedure Act*; Order 45 Rule 1, Order 42 Rules 6 and 21, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*. And is based on grounds on its face and amplified in the supporting affidavit sworn by the Applicants' advocate, Victor Ng'ang'a. Stating that when the parties attended court on 15th December, 2022 the Applicants were directed to file their record of appeal within strict timelines of 60 days failing which the appeal would stand dismissed. The advocate stated that unfortunately, the Applicants were unable to comply due to unavailability of the typed proceedings, resulting in the automatic dismissal of the appeal.
2. It was the advocate's further averment that Grace Wairimu Wandate (hereafter the Respondent) had commenced execution of the decree against the Applicants and allegedly illegally sold the motor vehicle registration number KCB 780J (the subject motor vehicle), despite the Applicants having furnished security which is still being held in court. The advocate asserted that unless the order sought is granted, the Applicants who have since filed their record of appeal would be severely prejudiced. Consequently, the advocate prayed that the court exercises its discretion in favour of the Applicants.



3. In opposing the Motion, the Respondent relied on the replying affidavit sworn by her advocate Kisiang'ani Diana, on 13th November, 2023. Therein, the advocate deposed that the Motion is untenable and incurably defective, by virtue of the fact that the parties entered into a consent in clear terms and hence the threshold for setting aside the consent order has not been met. The advocate further deposed that there has been an inordinate and unexplained delay in bringing the Motion, hence she viewed the Motion as being an afterthought.
4. She proceeded to state that in any event the Motion has been overtaken by events, since the Respondent has already partially executed the decree and taxed her Bill of Costs. It was her assertion that if the order sought is granted, the Respondent will suffer grave prejudice as she will be hindered from enjoying the fruits of her judgment, and thereby denied justice. Besides, this court having rendered its decision arising from the consent of 5th December, 2022, is now functus officio in the matter.
5. The court had directed that the Motion be canvassed by way of written submissions. However, at the time of writing this ruling, the court noted that the Applicants had not complied with the directions requiring them to file their submissions by close of business on 22nd April, 2024. That being the position, the court will proceed to consider the submissions of the Respondent that are on record.
6. The Respondent's counsel relied on the decisions rendered in *SMN v ZMS & 3 others* [2017] eKLR and *Kenya Commercial Bank Ltd V Specialized Engineering* [1982] eKLR where the Court of Appeal reiterated the seriousness of orders entered recorded by consent of the parties and/or their advocates. Counsel therefore proceeded to submit that the consent order which preceded the dismissal of the present appeal was valid and could not be set aside or varied, save in certain special circumstances which have not been established here. On those grounds, counsel reiterated that the Motion is unmerited, incompetent and deserving of dismissal with costs.
7. The court has considered the rival affidavit material and the submissions on record together with the authorities cited therein, in respect of the Motion. From a reading thereof, it is evident that the sole substantive order sought is the reinstatement of the appeal.
8. The grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of *Shah v Mbogo and Another* [1967] E.A 116:

“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
9. In that regard, Section 3A of the *Civil Procedure Act* (CPA) reserves the inherent power of the court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court.” The Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated thus:

“Also cited was Section 3A of the Civil Procedure Act which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of



the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated *inter alia*, that, by “inherent power” it means that

“Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”

10. That said, from the record, the background facts preceding the dismissal of the appeal are as follows. At the onset, the Applicants filed their memorandum of appeal on 8th December, 2020 challenging the award made by the trial court in Milimani CMCC No. 4744 of 2019 (the suit). Subsequently, the Applicants filed an application dated 18th January, 2021 seeking an order to stay execution of the decree in the sum of Kshs. 543,215/-, arising from the suit pending the hearing and determination of the appeal, and a further order for the unconditional release of the motor vehicle registration number KCE 909R (the first motor vehicle).
11. Upon hearing the parties, Chitembwe, J (as he then was) vide the ruling delivered on 12th March, 2021 allowed the application and ordered that the warrants of proclamation and notification of sale in respect of the first motor vehicle be set aside on the condition that the Applicants deposited the entire decretal sum in a joint interest earning account in the name of the parties’ respective advocates/ firm of advocates within 30 days thereof. The Applicants were further ordered to meet the auctioneer’s charges.
12. Subsequently, the Applicants moved the High Court by way of an application dated 19th April, 2021 seeking to vary the foregoing order to enable them provide security for the decretal amount by way of a bank guarantee. Upon hearing the said application, Chitembwe, J (as he then was) allowed it in his ruling delivered on 6th May, 2021. Consequently, directing the Applicants to deposit the entire decretal sum in court within 30 days thereof, following which the first motor vehicle would be released. The learned judge further ordered that the Applicants to settle the auctioneer’s fees and storage charges to enable the release of the said vehicle.
13. Sometime thereafter, the Respondent herein filed an application dated 11th August, 2022 seeking the dismissal of the appeal for want of prosecution. The said application was placed before this court on 5th December, 2022. The record shows that on the said date, it was agreed by consent of the parties’ respective counsels that the application be compromised on the terms that the record of appeal would be filed within 60 days thereof, failing which the appeal would stand dismissed for want of prosecution. The Applicants did not file their record of appeal within the stipulated timelines but much later, on 9th May, 2023 by which date the appeal stood dismissed by operation of the consent order. The said eventuality prompted the instant Motion.
14. The order made by the court on 5th December, 2022 arose from a consent of the parties through their legal representatives. Therefore, by their Motion, the Applicants are now asking this court to essentially set aside the consent order and upon doing so, to reinstate the appeal for hearing. They gave an explanation for the delay but the Respondent maintained that the consent order in place could not be varied or set aside, in the absence of any special circumstances. That consequently, the Motion is *inter alia*, incompetent and unmerited.



15. It has been a long-standing legal principle that a consent order/judgment constitutes a contract with binding effect, and cannot therefore be set aside save in instances where grounds similar to those applicable in the setting aside of contracts, have been established. Such was the position taken by the Court of Appeal in *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* [2015] eKLR when it held:

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.

Hancox JA (as he then was) in the case of *Flora Wasike v. Destimo Wamboko* (1982 -1988)1 KAR 625, said in his judgment at page 626-

“It is now settled law that a consent judgement 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* Civ. Apps 28 of 1982 and 69 of 1983,

This Court in the case of *Brooke Bond Liebig v. Mallya* 1975 E.A. 266 held:-

“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.”

In *Hirani v. Kassam* (1952), 19EACA 131, this Court with approval quoted the following passage from *Seton on Judgments and Orders*, 7th edition, Vol.1 p.124 as follows:

“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.”

...

As adopted from common law, an Advocate who is duly instructed to act on behalf of his client has authority to act in every single thing that pertains to that matter even, enter consents on his or her behalf.”

16. Furthermore, the Court of Appeal previously held a similar position in the case of *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR P. 485 that :

“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 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.

...



An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.”

17. Upon considering the law as set out in the above-cited binding authorities against the Applicants’ Motion, it is apparent that there is no material in the Motion that demonstrates the existence of any of special circumstances upon which the consent order of 5th December, 2022 could be varied or set aside. The consent order was freely made by the parties’ able counsels in compromising a motion brought by the Respondent for dismissal of the appeal which has binding effect. In the premises, this court cannot step in to vary or rewrite the order in a bid to accommodate the Applicants. Unfortunate as it may seem, they remain bound by the terms of the consent on record.
18. Moreover, the record shows that upon non-compliance on the part of the Applicants resulting in the automatic dismissal of the appeal, the Respondent lodged a party-and-party Bill of Costs dated 24th February, 2023 to recover costs of the appeal, which costs were subsequently awarded by the court on 14th June, 2023. The bill of costs was opposed by the Applicants. The learned taxing officer taxed the Respondent’s Bill of Costs at the sum of Kshs. 52,500/- vide the taxation ruling delivered on 27th July, 2023. There is nothing to indicate that the said ruling has been set aside or otherwise challenged.
19. In view of all the foregoing circumstances, the court finds that the obtaining circumstances do not permit the exercise of the court’s discretionary power in favour of the Applicants. The parties herein are bound by the terms set out in the consent order made on 5th December, 2022.
20. The upshot therefore is that the Notice of Motion dated 26th July, 2023 is without merit and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF JUNE 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Ms. Kalaine

For the Respondent: Mr. Kiptanui

C/A: Erick

