



**Kenya Power & Lighting Co Ltd v Okoth (Civil Appeal
E059 of 2023) [2024] KEHC 6887 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E059 OF 2023**

GL NZIOKA, J

JUNE 6, 2024

BETWEEN

KENYA POWER & LIGHTING CO LTD APPLICANT

AND

ALLOISE ODUOR OKOTH RESPONDENT

RULING

1. By a notice of motion application dated October 9, 2023, the applicant is seeking for the following orders against the respondent as here below reproduced: -
 - a. That this Honourable court be pleased to certify this application as urgent, service of the same be dispensed with and heard ex parte in the first instance.
 - b. That this Honourable court be pleased to order stay of any pending, ongoing or further execution proceedings of the decree in or generally in Naivasha CMCC NO. 562 of 2019 pending hearing and determination of this application.
 - c. That this Honourable court be pleased to recall and cancel, set aside and/or revoke the proclamation notice, warrants of attachment and warrants of sale dated October 4, 2023 that were issued to Moran Auctioneers in Naivasha CMCC No 562 of 2019.
 - d. That this Honourable court be pleased to reinstate the appeal in Naivasha HCCA No. E059 of 2023 and have it determined on merit.
 - e. That upon reinstatement of the appeal in Naivasha HCCA No. E059 of 2023 this Honourable court be pleased to order stay of any pending, ongoing or further execution proceedings of the decree in or generally in Naivasha CMCC No. 562 of 2019 pending hearing and determination of the said appeal



- f. That this Honourable court be pleased to direct the applicant to provide security of Kshs 2,138,337. through a bank guarantee or deposit in a joint interest earning account within 45 days pending the hearing and determination of this appeal in Naivasha HCCA No. E059 of 2023.
2. The application is premised on the provisions of Article 48, 50(1) & 159(2)(d) of the Constitution of Kenya, section 1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 22 Rule 22 & 24, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.
3. It is supported by the grounds thereon and an affidavit of Kevin Otieno of the even date. He averred that the appeal emanates from the judgment of Hon. J. Karanja (SPM) delivered on 27th February in Naivasha CMCC No. 562 of 2019 in favour of the respondent.
4. That being aggrieved by the judgment, the applicant appealed against the decision vide High Court Civil Appeal No. E059 of 2023. That, on 21st July, 2023, the parties recorded a consent order adopted on 26th July, 2023, partially reviewing the judgment by reducing the total damages from Kshs. 4,493,970 to Kshs. 2,138,337, all-inclusive and a stay of execution for thirty (30) days granted.
5. That contrary to the adopted consent, the respondent and/or his Advocates instructed Moran Auctioneers to execute against the applicant. Subsequently, on 3rd October, 2023 the Auctioneers served the applicant with warrants of attachment and a proclamation notice dated October 4, 2023, wherein ten (10) Motor vehicles and a multitude of office stationary, furniture and machines belonging to the applicant were proclaimed for an alleged decretal sum of; Kshs. 5,126,185.
6. That, the amount in the warrants of attachment and sale and the proclamation notice are exaggerated and without a basis in law. Further, the court having adopted the consent of 21st July, 2023, the respondent could only execute for a sum of Kshs. 2,138,337 and not the decretal sum of; Kshs. 5,126,185.
7. Mr Otieno further deposed that the applicant had instructed the law firm representing it to appeal against the whole judgment of the trial court, but due to the absence of sufficiency of, and ignorance of material facts, he inadvertently misapprehended the intentions of the applicant and engaged the respondent's Advocate on a post judgment settlement culminating in the execution of the consent dated July 21, 2023.
8. That, the applicant did not give the Advocate any instructions to record the consent and therefore, allowing the consent to remain in force would unconsciously prejudice the applicant to be bound to pay huge damages, and further curtails his access to justice.
9. That, unless the application is allowed as prayed the applicant's operations will be brought to a standstill through the attachment and sale of its critical tools of trade and as a consequence exposing the general public to untold loss, damage, suffering and possibly death due to its inability to supply electricity and maintain the electricity infrastructure in private homes, health institutions, public institution among others.
10. Further, the respondent will not be prejudiced if the application is allowed as he can be compensated by way of an award of damages. As such, it is in the interest of justice that the application is allowed.
11. The application was further supported by the affidavit of an even date sworn by Michael Ochieng an Insurance Service Officer of the applicant, who reiterated the averments by Mr. Otieno.



12. He avers that, the applicant's Advocate did not seek for instruction on compromising the appeal through a post-judgment settlement nor did it consent to the partial consent dated July 21, 2023. That, it only learnt of the consent when its Advocate asked it to make payment of; Kshs. 2,138,337.
13. That the Advocate was bound to obtain its express instruction before entering into the consent as it binds the applicant and therefore it should be set aside.
14. However, the application was opposed vide a replying affidavit dated October 16, 2023, sworn by Theophilus Kamwaro Gitau, an Advocate of High Court. He joined issue with the applicant on the consent dated July 21, 2023 and adopted on July 26, 2023. That as per the terms of the consent, the applicant was to pay Kshs. 2,138,337 within a period of thirty (30) days.
15. That on 26th July, 2023, he sent an email to the applicant's Advocates with bank account details where the decretal amount was to be paid. Further, on August 23, 2023 he wrote to the applicant's Advocates informing them that the decretal sum was yet to be paid. Further, on 24th August, 2023 he had a conversation with Mr. Obiero from the applicant's Advocate law firm who asked for certain documents to facilitate payment of the decretal sum but did not pay.
16. Subsequently, he wrote further letters dated, 29th August and September 20, 2023 informing the applicant's Advocate that the decretal amount was yet to be paid and that he would instruct auctioneers to execute the decree, however, the applicant did not pay the decretal sum and he was left with no option but to execute.
17. That as the consent dated July 21, 2023 was adopted in a miscellaneous file, it was not possible to extract the decree and therefore opted to extract the decree in the trial court.
18. That, Mr. Otieno is being dishonest by indicating that he misapprehended the intentions of the applicant as he has not attached any communication with the applicant that he misunderstood. That, a lot of negotiations had taken place before the consent was entered into.
19. Further, if indeed the firm of Kinyanjui Njuguna did not receive instructions to enter into the subject consent, it should be ordered to pay the decretal amount as per the consent.
20. Furthermore, that Mr. Ochieng has not attached any evidence of employment with the applicant nor has he annexed any communication with the applicant's Advocate requesting for the payment of Kshs. 2,138,337, or any other instructions pertaining to the appeal.
21. That, the applicant has failed to establish grounds to entitle the court to vacate and/or set aside of the consent order. That in any event, if the consent is set aside the consent the applicant is required to pay the whole decretal sum or deposit the in interest earning account in the name of counsels for both parties.
22. Further the application was brought after two months from the date the consent was recorded and was only prompted by the attempt of the respondent to execute. That it is brought in bad faith and amount to contempt of court. Furthermore, litigation must come to an end and allowing the application would amount to the applicant having his cake and eating it.
23. The appeal was disposed of vide filing of submissions. The applicant's submissions are dated November 1, 2023 and the respondent's submission dated November 24, 2023.
24. The applicant submitted that, the warrants of execution by Moran Auctioneers are irregular and ought to be cancelled and/or revoked as they are based on the decretal amount of Kshs. 5,126,185 from Naivasha Chief Magistrate Civil Case No. 562 of 2019.



25. The applicant placed reliance on the case of; Samuel *Mbugua Ikumba v Barclays Bank of Kenya Limited* [2015] eKLR where the Court of Appeal the court held that where an Advocate has no authority to enter into a consent judgment, the consent judgment is a nullity.
26. That the appellate court further held that a consent ordered entered by an Advocate is binding on all parties and cannot be set aside unless it is proved it was obtained by fraud, or an agreement contrary to policy of the court, or it was given without sufficient material facts or misapprehension or ignorance of such facts in general for a reason that would enable the court to set it aside.
27. That, the applicant should not be punished for the actions of its Advocate as the applicant is keen on prosecuting the appeal and would not have given instruction to record the consent if it had been consulted. Further the applicant's constitutional right to access justice and be heard should be safeguarded by setting aside the consent dated July 21, 2023 and reinstating the appeal.
28. However, the respondent argued that, the assertions by the applicant that the consent was entered into without its instruction are not supported by the evidence. That, the respondent's Advocate communicated severally with the applicant's Advocate on payment of the decretal sum and at no particular time was it indicated that the consent was entered into without instructions.
29. Further, the applicant did not produce communication with its Advocates and therefore the court cannot determine whether instructions were issued or not. The case of; Succession Cause 2111 of 2001 In the Matter of the Estate of Wanjiku Karunguru was cited where the court stated that, mere word of mouth that an Advocate had no instructions without more cannot discharge the burden that the Advocate had no instruction.
30. The respondent further argued that, the application was only filed after the applicant was threatened with execution, felt it got bad bargain hence the consent be vacated.
31. That, the proposed terms of the consent were emailed to his Advocate on July 13, 2023, accepted on July 19, 2023 and subsequently adopted. That, the court cannot aid parties in their negotiations. The court of; Civil Appeal No. 81 of 1984 *Flora N. Wasike v Destimo Wamboko* was cited where the Court of Appeal stated that a consent judgment or order has a contractual effect and can only be set aside on grounds that would justify setting aside a contract.
32. Further in Civil Suit No. 6623 of 1992 *Charles Muchiri Maina v Felix Ole Nkaru* the court held that, freedom of contract as a principle is far too entrenched to be shaken by the mistake of lawyers especially on the law or negligence.
33. That, the applicant has not met the requirements of setting aside a contract which are; misrepresentation, mistake of fact, fraud, or coercion.
34. The circumstance under which a consent may be set aside were highlighted in the case of; *Housing Finance Company of Kenya Limited & another v Sharok Kher Mohamed Ali Hirji & another* [2021] eKLR where the Supreme Court stated:
 - (17) We are persuaded the High Court's decision in in *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485, where Harris, J 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.”

35. Further, in *Flora N. Wasike v Destimo Wamboko* [1988] eKLR Hancox JA (as he then was) 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 *JM Mwakio v Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983. In *Purcell v F C Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

36. Furthermore, Nyarangi Ag JA (In which case), (as he then was) held:

“There is ample authority that a decree passed by a court with the consent of the parties may in appropriate circumstances be challenged on grounds that it was obtained by fraud or mistake or misrepresentation or on any other reason which would persuade a court to vary or set aside the consent decree: See for example *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185, *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266 and *JM Mwakio v Kenya Commercial Bank Ltd* Civ Apps Nos 28 of 1982 and 69 of 1983 per Hancox JA on p 7. An aggrieved party may apply for review under Ord 44, r 1 of the Civil Procedure Rules.”

37. Additionally, in *Geoffrey M. Asanyo & 3 others v Attorney General* [2018] eKLR the Supreme Court outlined the principles of setting aside a consent as follows:

“(98) In the matter before us, we thus note that neither before this Court nor any of the Superior Courts, was it argued or alleged that the Consent as filed by parties was entered into through coercion, misrepresentation and/or fraud. In essence, the elements/principles for setting aside such a consent were never alleged and/or proved.”

38. At the conclusion of the arguments by the parties, I have considered the application in the light of the materials placed before the court and I find that there is no dispute that, the parties herein were involved in a civil case; Chief Magistrate Civil Case No. 562 of 2019 *Alloise Okoth Oduor v Kenya Power & Lighting Co. Limited*, wherein judgment was entered in favour of the plaintiff in the sum of Kshs 4,493,970.

39. That, subsequently the defendant filed a memorandum of appeal herein but thereafter, on the 31st July 2023, the parties recorded a consent judgment in the following terms:

- a. The judgment delivered by Hon. J Kamau (Mr.) Senior Principal Magistrate on 27th February 2023 in Chief Magistrate’s Court at Naivasha civil suit No. 562 of 2019 *Alloise Okoth Oduor v Kenya Power & Lighting Co. Limited* be partially reviewed as follows:



- i. Pain and suffering Kshs. 50,000
 - ii. Loss of expectation of life Kshs. 100,000
 - iii. Loss of dependency Kshs. 1,803,312
 - iv. Special damages Kshs. 23,970
 - v. Costs of the suit Kshs. 161,055
- Total Kshs. 2,138,337
- b. The subject application be marked as settled with the respondent having been paid the sum of Kshs. 15,000 as throw away costs.
 - c. High Court at Naivasha Civil Appeal No. E059 of 2023 *Kenya Power & Lighting Co. Limited v Alloise Okoth Oduor* be marked as withdrawn with no orders as to costs.
 - d. There be a stay of execution for a period of 30 days from the date of adoption of this consent.
40. The matter herein rests on whether the afore consent was executed by the applicant's counsel with instructions from the applicant or not. Further whether the applicant has met grounds for setting aside a consent order or judgment.
41. The applicant denies giving instructions to the learned counsel Mr Kevin Otieno, and the counsel admits lack of instruction but the applicant has not availed evidence of any action taken against Mr Otieno for executing a consent without. Further, there is no explanation how the said counsel gave himself instructions to execute the consent.
42. Furthermore, the argument by the applicant that a mistake of a counsel should not be visited on his client is not tenable in that the mistake also affects the decree holder as it denies him enjoyment of the fruit of this judgment. Indeed, justice delayed is justice denied.
43. The court holds the view that, if the subject consent is to be set aside, then the interest of the respondent too must be taken into account so that, the scale of justice is balanced.
44. I further note from the correspondence annexed to the replying affidavit that the applicant was reminded on several occasion to honour the terms of the consent and did not respond. Equity assists the vigilant and not indolent.
45. It is the indolence and/or failure by the applicant to respond to the subject letters that necessitated instructions to the Auctioneers. The only mistake the respondent did was to extract a decree that was not in terms of judgment of the consent order.
46. In that regard the provisions of Order 21 Rule (8) of the *Civil Procedure Rules* and the decision of the court in the case of; *Ecobank Kenya Limited v Afrikon Limited* [2017] eKLR refers. In that matter the court stated as follows: -
- “8. The rationale for above provisions cannot be difficult to surmise. A decree is often at a tail-end of proceedings and would usually set out the rights and obligations of the parties that the Judgment would have declared or ordered. A decree must accurately and faithfully reflect the Orders or Judgement of the Court”.



47. Similarly, in the case of *Florence Cherugut v Cheptum Murei Annah* [2022] eKLR the court stated as follows: -

“17. My understanding of the provision is that where a party drafts a decree containing errors of omission or inclusion of non-existent orders in a judgment, that is to say, where the decree does not tally with a judgment, then the Deputy Registrar would reject it and order the parties to make the necessary rectification or submissions as to the correct version. The import of the above mentioned provision is to cure any defect in the decree. However, where the decree is free from any defect, then it is executed as it is; provided it does not contravene the orders contained in the judgment. Where such defect arises as it may at times, the provision comes to the aid of the affected party.”

48. Taking into account that the applicant are authors of their own circumstances and the respondent extracted a decree with wrong information, the hold the view that it is in the interest of justice to make the following orders:

- a. The consent order adopted on 26th July, 2023 herein be and is hereby set aside.
- b. The judgment in the CMCC No. 562 of 2019 is reinstated
- c. There shall be stay of execution of execution of the afore judgment on condition that the applicant deposits the entire decretal sum of; Kshs 4,493,970 in an interest earning account in the names of counsels of both parties within 30 days of the date of this order. In default execution to proceed.
- d. The auctioneer fees (if any) shall be borne by the applicant, due to delay to respond to several letters from the respondent counsel after consent was recorded.
- e. The costs of this application are awarded to the respondent
- f. Record of appeal be filed within 30 days of date of this order, failure of which the appeal will stand dismissed without reference to court.

49. It is so ordered

DATED, DELIVERED AND SIGNED ON THE 6TH DAY OF JUNE 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Alol for the applicant.

Mr. Kamwaro for the respondent.

Ms Ogutu: Court assistant

