



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muriuki v Inanga (Civil Appeal 112 of 2021)  
[2023] KEHC 19092 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19092 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 112 OF 2021**

**TA ODERA, J  
JUNE 21, 2023**

**BETWEEN**

**AGNES WANJIKU MURIUKI ..... APPELLANT**

**AND**

**PETER IKATWA INANGA ..... RESPONDENT**

*(An Appeal from the Ruling of Hon. Limo B. Benjamin -  
SRM in Nakuru CMCC 684 OF 2019 dated 24/9/2021)*

**JUDGMENT**

1. The Appellant filed the instant Appeal seeking that;
  - a. The instant appeal be allowed.
  - b. The ruling of the trial magistrate Hon B. Benjamin Limo Resident Magistrate) in Nakuru dated 24.9.2021 be vacated, set side or varied.
  - c. The respondent be condemned to pay costs of the appeal.
2. The appeal is based on the 10 grounds listed in the memorandum of appeal dated 13.10.21 which I have condensed to 7 grounds to wit ;
  - i. That the trial magistrate erred in law and fact by failing to find that the application dated 10.2.21 was not merited despite evidence to the same.
  - ii. The trial magistrate erred in filing to find that there was clear evidence of fraud collusion and misrepresentation.
  - iii. The trial magistrate erred in holding that the horse had already bolted and failed to find that the cheques were received without prejudice.



- iv. Learned trial Magistrate erred in failing to make finding that there was an earlier order pursuant to an application dated 11.12.2019 where the court had ordered the respondent to pay the decretal sum by monthly installments of Kshs.250,000/= .
  - v. The trial magistrate erred in law and fact by relying more on the submission by counsel for respondent while disregarding submissions by appellant.
  - vi. The trial magistrate misapprehended the law and facts and arrived at an erroneous conclusion.
  - vii. The trial magistrate went on frolic of his own disregarding the pleadings, evidence and submissions and as a result arrived at an erroneous conclusion.
3. The facts of the case are that both counsel for the appellant and the respondent signed a consent dated 17.1.2020, the same was filed in court on 20.1.20 and endorsed on 21.1.20 it was in the following terms;
    - a. That there be a stay of execution of the decree in this case as the defendant settles the decretal sum of Kshs.6,000,000/= in instalments of Kshs.250,000/= per month by issuing cheques of 31.1.20, 29.2.20 and 31.3.20 and thereafter monthly instalments of Kshs.300,000/= per month by issuing cheques for 30.4.20, 31.5.20 and 30.6.20.
    - b. That the balance of Kshs.4,350,000/= shall be paid and shall be settled in such a manner as shall be agreed upon between the parties herein on 30.6.20.
    - c. That in the event that the defendant defaults in terms hereof the plaintiff shall be free to execute the decree for recovery of entire unpaid sum.
  4. This is the consent that the appellant moved the trial court to set aside vide application dated 10.2.21. The application was heard and determined by Hon B. Limo(SRM) and he held that “in the matrix of this matter and from the record, the applicant has been drawing and collecting postdated cheques or payments from the defendant/respondent after parties entered into the subject consent. In all respects, the horse has bolted. The available remedy is the taking of accounts between the parties to enable them know the amount due and owing to the applicant as against the defendant. ”
  5. The appellant submitted that the issues for determination are;
    - a. Whether the learned Trial Magistrate erred in law and fact by making a finding that the application dated 10.2.21 did not have merit?
    - b. Whether the Learned Trial Magistrate erred in law and fact by holding that the horse had already bolted?
  6. On whether the learned Trial Magistrate erred in law and fact by making ta finding that the application dated 10.2.21 did not have merit, it was submitted that the initial decree was for Kshs.14,972,000/= plus costs of Kshs.92,700/= which totaled to Kshs.15,365,366/=. On 24.10.19 the parties entered into a consent for payment of Kshs.8,000,000/= out of which the respondent paid Kshs.1,000,000/= only. He later applied to court to vary the terms of the said consent and this was allowed and respondent was ordered to liquidate the debt in monthly instalments of Kshs.250,000/= per month till the delays were sorted out. The position did not change and the appellant took out a notice to show cause against the respondent who challenged the same for being unconstitutional and succeeded. The appellant then alerted her counsel on then record M/s Githui & co advocates that the respondent had defaulted and not deposited the title deed for land parcel no. LR No. 12573 /26 and asked him to get an order requiring him to pay the balance of Kshs.12,800,000/=. The then advocate advised her that respondent had drawn cheques for Kshs.250,000/= the first one being dated 31.1.2020. Counsel



submitted that the appellant said she was not aware of the consent dated 17.1.20 and she received the payments on belief that she was complying with the order in the application dated 11.12.19. Further that the appellant deponed in her further affidavit in response to the application dated 10.2.2021 that she became aware of the consent in November 2020 after cheque for October 2020 bounced and that this was an advocates breach of fiduciary duties contrary to rule 4 of the 1998 Advocates (Practise) Rules. It was submitted that a consent entered into by an advocate fraudulently and without express instructions of his client can be set aside. Also that the consent herein is invalid. He cited the case of Republic vs District land registrar Nandi and another Exparte Kiprono Tegerei and another (2005 ) eKLR to support this point. Counsel also cited the case of Erick Gakunya mwathaita vs Maganjo Joshua Kago (2017)eKLR where the court held that in the case of Brooke Bond Liebig Ltd v Mallya [1975] EA 266: It was held :- The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs kassam (1952)19 EACA 131 where the following passage from Seton On Judgm,ents and Orders 7<sup>th</sup> Edittion Vol 1 Page 124 was approved :

“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 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” It also submitted that failure by the advocate to follow instructions and entering into a consent without her knowledge is contrary to public policy and the administration of justice and also undermines the integrity of the court system.

7. On whether the trial court erred in holding that the horse had already bolted, the case of Peter Mwangi Macharia vs Alphaxard Warotho Komu & 2 others (2019 ) eKLR where the court stated “see the case of Gedion Mose Onchwati vs Kenya Oil Company Limited & ano (2017)eKLR cited the case of Shah vs Mbogo and Ongwom vs Owota where it was held that a litigant ought not to bear consequences of default by an advocate unless the litigant was also in default. It was submitted that the learned magistrate erred in dismissing the application dated 10.2.21 since she has not given instructions to her former counsel to enter into the consent.
8. Respondent submitted that the trial magistrate did not err in law or fact in dismissing the application dated 10.2.21 because the consent was validly executed and that the magistrate acted within the law and without fault. Respondent cited a number of cases in support of his contention among them Hirani vs Kassam (1952) 19 EACA 131, where the East African Court of Appeal held that “it is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside , or if certain conditions remain to be fulfilled which are not carried out: see the decision of this court in J.M Mwakio vs Kenya Commercial Bank Limited civ apps 28 of 1982 and 69 of 1983. In Purcell vs Fc Trifigal Ltd (1973 All ER 671 Winn Lj said at 676” it seems to me that where a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of contract ‘ entered into with the knowledge of material matters by legally competent persons and I see no suggestion here that any matter here that occurred would justify the setting aside or rectification of this order looked at as a contract ”. Also SMN vs ZMS & 3 others 2017 eKLR where it was held “ the onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity is slightly higher than on a balance of probability but perhaps not beyond reasonable doubt. An allegation made against an advocate of the High court of Kenya that he was involved in fraud or colluded with another advocate or person to pervert the cause of justice in a matter pending in court is certainly one of utmost



gravity . It destroys the advocates honour and respect. It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed, there must be cogent and truthful evidence of such charges.

9. The duty of this appellate court is to re-evaluate the evidence and arrive at its own conclusion as was held in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR. Where it was held "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."
10. I have carefully re-evaluated the evidence on record and the ruling dated 24.9.21.
11. The issues arising for determination are:-
  - a. Whether a consent entered into by an advocate on behalf of his client can be set aside?
  - b. Whether the trial magistrate erred in refusing to set aside the consent dated 17.1.21.
12. On whether a consent entered into by an advocate on behalf of a client can be set aside?
13. The appellant told this court that M/s Githui & Co Advocates were on record for him at 17.1.21 when the consent was executed. In her supporting affidavit to the application dated 10.2.21 she told the court that she did not instruct her said counsel to enter into the said consent and that she learned of the same when one of the cheques issued by the respondent bounced. Further that Kshs.6 million consented to was much lower than the sum of Kshs.12,800,000/= owed to her by the respondent. She said that the said consent was fraudulent and against the policy of the court and thus ought to be set aside. I have seen the authorities cited by both parties on whether a consent entered into by counsel who is on record can be set aside at the instance of one party. The respondent cited the court of appeal's decision in the case of *SMN vs ZMS & 3 others* 2017 eKLR where in dealing with a similar issue the court held
  18. We may highlight a few of the authorities to illustrate the approach attendant to the issue at hand:-

In *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR this 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 vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.*"

In *Purcell vs 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..".

See also *Hirani vs Kassam* (1952) 19 EACA 131, at Page 134; *Brooke Bond Liebig Ltd vs Mallya* [1975] EA 266 at 269 and *Seaton on Judgments and Orders* (7th Edn), Vol 1, at Page 124.



19. In *Kenya Commercial Bank Ltd vs 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.”

20. In *Kenya Commercial Bank Limited vs Benjob Amalgamated Limited & 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 pp 817,818; *Little vs 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.”

21. Finally in the Ugandan case of *Lenina Kemigisha Mbabazi Star Fish Ltd* (supra) the Court stated:

“ 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 not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”

14. The law on setting aside consent judgment is well settled in Kenya. A consent judgment can only be set aside on the grounds that would justify setting aside of a contract.
15. It thus follows that a consent judgment or order can only be set aside if it is proved that there was fraud, misrepresentation, coercion or it is against public policy.
16. In case of a consent entered into by an advocate the law is clear that an advocate on record for a client has authority to enter into contract on behalf of his said client provided he acts in good faith and such a consent can only be set side if it has been proved that the agreement was entered into by fraud, or by an agreement against the policy of the court , if it was given without sufficient reasons or in misapprehension of facts as was held in the case of *Kenya Commercial Bank Limited vs Specialised Engineering co ltd* (1982 ) KLR 485. I find at a consent entered into by an advocate on behalf of his client can be set aside on proof of the foregoing grounds.



17. In this case the appellant argued that she never gave instructions to the advocate to enter into the consent and said she used to instruct her counsel instructions via email but no such emails were produced. The allegations are also criminal in nature and she submitted that she reported the case to OCS but no document was produced to show the same. There is also no complaint against the said advocate made to the advocates complaints commission and his response if any .There is also evidence by the respondent that appellant's former advocate received cheques of Kshs 6,000,000/= from respondent and the same were honoured.
18. The appellant admitted receiving part of that money. The said former advocate is not a party herein and it appears that the communication between appellant and them was verbal and thus it would be difficult for this court to decipher whether counsel had no instructions to enter into the consent.
19. I agree with the trial court that in the circumstances of this case the horse had indeed bolted as the threshold for setting aside the consent entered into by the advocate on behalf of the appellant was not met.

In any event, Section 67 (2) of the [civil procedure Act](#) provides that;

67.

- (1) .
- (2) No appeal shall lie from a decree passed by the court with the consent of parties.

20. I find no merit in the appeal and I proceed to dismiss it with costs to the respondent.

**T. A. ODERA - JUDGE**

**21.6.2023**

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;**

Gatei for Appellant,

Karanja Mbugua for Respondent &

Court Assisntant; Bor

**T. A. ODERA - JUDGE**

**21.6.2023**

