



**United Millers Limited v B.N Kortechea and Sons Limited (Civil Suit
38 of 2015) [2023] KEHC 19403 (KLR) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT 38 OF 2015**

JN KAMAU, J

JUNE 26, 2023

BETWEEN

UNITED MILLERS LIMITED PLAINTIFF

AND

B.N KORTECHA AND SONS LIMITED DEFENDANT

RULING

Introduction

1. In its Notice of Motion dated 28th March 2022 and filed on 30th March 2022, the Defendant sought for orders that this court be pleased to set aside the Consent Judgment that was issued on 31st March 2017 and consequential orders thereof as executed between the Plaintiff and itself. It also sought that the Plaintiff be ordered to pay back the sum of Kshs 38,950,000/= that had already been paid out under the impugned Consent Judgment and pay interest at court rates on the decretal sum paid out as a result of the said order until payment in full.
2. Harshil Kishore Kotecha, a co-director and a shareholder of the Defendant swore an Affidavit in support of the said application. The Defendant averred that by a Plaint dated 12th October 2015, the Plaintiff instituted the suit herein for breach of contract for failing to deliver sugar that the Plaintiff had purchased from it.
3. It stated that as a result of the breach, the Plaintiff had claimed a refund of its principal sum of Kshs 124,106,600/= together with interest at the prevailing commercial rates as well as special damages for the sum of Kshs 79,471,000/= together with interest being compensation for loss of business.
4. It pointed out that the court entered Judgment in default on the general damages and awarded the Plaintiff the sum of Kshs 124,106,600/= which it had fully settled. It added that the claim for special damages was based on Local Purchase Orders (hereinafter referred to as the “LPOs”) that were produced in court by the Plaintiff.



5. It was its case that thereafter, the Plaintiff's agents initiated a move through coercion, undue influence and blackmail and caused it to enter into a consent where the Plaintiff agreed to reduce the special damages amount of Kshs 79,471,000 to Kshs 50,000,000/= which it was required to pay in instalments of Kshs 5,000,000/= per month. It asserted that the said consent was then recorded in court and adopted as an order of court on 31st March 2017.
6. It contended that it repaid the aforesaid amount but that due to the delay in affecting the balance due to cash flow issues occasioned by poor market trends and harsh business environment, the Plaintiff instituted insolvency proceedings vide Kisumu Insolvency Cause No 1 of 2018 with a view of forcing it to offset the balance of the amount. It asserted that it came to the realisation that the sums for the loss of business were unreasonable and hence carried out due diligence and decided to investigate the authenticity of the LPOs that formed part of the Plaintiff's List of documents and which was used as basis in computing the special damages.
7. It stated that to that end, it engaged the services of KPMG (hereinafter referred to as "the Audit firm") to assist it in establishing the authenticity or otherwise of the LPOs. It pointed out that vide a Report by the said firm, it was established that some LPOs the Plaintiff presented were not validly issued by the entities which it purported to have issued and that some orders that the Plaintiff claimed to have delivered LPOs were never delivered.
8. It added that following the aforesaid Report, it wrote to the Directorate of Criminal Investigations (hereinafter referred to as "DCI") vide letter dated 26th October 2018 requesting for its assistance in carrying out investigations to ascertain if indeed the respective companies issued the LPOs presented by the Plaintiff in support of their claim in court and determine through records available with Kenya Revenue Authority (hereinafter referred to as "KRA") if the companies had the capacity to accommodate such kind of business.
9. It asserted that in a letter dated 9th May 2019, the DCI informed it that the investigations were complete and that the file had been forwarded to the Office of the Director of Public Prosecutions (ODPP) for further legal advice. It further stated that vide a charge sheet dated 27th April 2021, the Plaintiff, its directors and two(2) of its employees were charged with conspiracy to defraud contrary to Section 317 of the Penal Code, Conspiracy to defeat the course of justice contrary to Section 117(a) of the Penal Code, Forgery contrary to Section 345 as read with Section 349 of the Penal Code and Uttering a false document contrary to Section 353 of the Penal Code in the MCCR E528 OF 2021 Republic vs Sunil Narshi Shah & 4 Others.
10. It further contended that the aforesaid suit was heard and finally determined and that the accused persons were found guilty of some of the charges and counts and they were sentenced to non-custodial sentence and placed on probation for two (2) years each on condition that the 5th Accused who was the Plaintiff herein compensated the complainant therein.
11. It therefore argued that the foregoing demonstrated that the Consent order was vitiated by fraud, misrepresentation and forgery offences of which the Plaintiff and its directors had been convicted of. It added that the agreement that they had entered into leading to the consent order was contrary to public policy and the policy of the court as was founded on fraud and forgery and that the Plaintiff was grossly and unjustly enriched.
12. It was categorical that as at 30th August 2018, it had paid out a total sum of Kshs 38,950,000/= to the Plaintiff which amount continued to earn interest from the time the first sum of Kshs 1,800,000/= was paid out on 28th September 2017. It contended that it was trite law that for a consent judgment and/or order to have a contractual effect and be binding on the parties, there had to be consensus ad



- idem devoid of misrepresentation, coercion, forgery and/or fraud. It added that equity frowns upon a person benefitting from an illegality.
13. It further averred that the circumstances of this case provided a good and valid ground for setting aside the consent judgment and that allowing it to stand in the presence of the vitiating factors above mentioned would be prejudicial to it and offended good public order and the sanctity of this court as the last temple of justice. It added that this court had the inherent jurisdiction to ensure that the ends of justice were met and urged it to allow the application as prayed.
 14. In opposition to the Defendant's present application, Sunil Narshi Shah, a co-director and shareholder of the Plaintiff swore a Replying Affidavit on 21st November 2022. The same was filed on 23rd November 2022.
 15. The Plaintiff admitted having instituted the suit herein as the Defendant had breached terms of the agreement between them which breach was so glaring that it led to a loss of business and that there was no fraud nor misrepresentation of whatever nature.
 16. It pointed out that it had contracted the Defendant to supply it with sugar worth Kshs 124,106,000/= but the Defendant only supplied sugar to the tune of a portion of it while the other remained unsupplied while the same had been paid for in full. It added that it took LPOs from its wholesalers for the supply of the said sugar once delivered by the Defendant but the same were not honoured for the reasons that the Defendant had not supplied the sugar as a result of which it lost its opportunity to do business.
 17. It asserted that the suit herein was settled vide a consent order dated 31st March 2017 that was willingly entered into by the parties herein marking the same as settled once payment was made in full to the tune of Kshs 50,000,000/=. It added that following the aforesaid consent, the Defendant armed with the LPOs from its wholesalers subjected the same to the DCI alleging that the same were fake and proceeded to institute the Criminal Case No E528 of 2021.
 18. It submitted that the aforesaid case was initiated on the basis of a falsified evidence that originated from a forged and fake KPMG Report. It asserted that the said Report was fabricated and manufactured by complainants to achieve their own ill motives to avoid paying the consented amount that was recorded on 31st March 2017.
 19. It pointed out that in Constitutional Petition No E162 of 2022, it sought its rights under Article 365 of *the Constitution* against KPMG the Advisory Services Limited on the veracity of the Report as filed and produced in Criminal Case No E528 of 2021 and the said KPMG through its Advocates letter dated 11th May 2022 denied any involvement, participation or engagement with the Defendant in any criminal case. It termed the said Report a forgery since the same did not originate from KPMG.
 20. It stated that it appealed against the said Criminal Case No E528 of 2021 in HCCRA No E027 OF 2022 against conviction and sentence and the High Court issued orders therein of stay of the finding, conviction and sentence and the execution of the compensatory order against it that were issued in Criminal Case No E528 of 2021 until the aforesaid appeal was heard and determined.
 21. It further stated that the instant application as drafted sought to fly on the face of Article 50(2)(9) of *the Constitution* of Kenya 2010 and that allowing it while there was an appeal in place would be a violation of the right to fair hearing on its part. It added that the proceedings that led to the recording of the consent were of civil nature and that the Defendant could not drag criminal proceedings into this matter and waive its duty of pleading particulars of coercion, undue influence, blackmail, forgery and fraud as those were the fundamental facts that had to be specifically pleaded to enable it respond



- substantively. It asserted that to that extent, the Defendant had failed to satisfy the ground upon which a consent order may be set aside.
22. It was its contention that the Defendant's application was an afterthought and the same was meant to harass and vex it as it was actuated by malice, vendetta and lacked good faith.
 23. Harshil Kishore Kotecha, swore a Supplementary Affidavit on 19th December 2022 in response to the Plaintiff's Replying Affidavit. The same was filed on 21st December 2022.
 24. The Defendant reiterated its averments in the Supporting Affidavit and further averred that the criminal investigative agencies did not rely on the Report from KPMG but initiated fresh and independent investigations devoid of the reliance of the said Report. It added that there had never been a finding by any court of law to the effect that the said Report was falsified or even a forgery and that this court had never been seized with an opportunity to interrogate the said Report to ascertain its truthfulness or otherwise and that it lacked the criminal jurisdiction to look into the authenticity or otherwise of the said Report.
 25. It further asserted that it was not a party to the Constitutional Petition No E162 of 2022 alluded to by the Plaintiff and could not therefore comment on it. It pointed out that the appellants in HCCRA No E027 OF 2022 were appealing against the sentencing and not against conviction and that the Plaintiff's averments were therefore misrepresentations. It contended that the basis of this application was the finding of the trial court in Criminal Case No E528 of 2021 which had not been set aside and that what was stayed by the High Court was the execution of the compensatory order directed at the 5th accused person.
 26. It averred that this court was neither seized of the HCCRA No E027 OF 2022 nor did it sit as a criminal court. It stated that the right to be heard was unilateral and should be enjoyed by all parties to a suit. It added that it was trite law that the existence of criminal proceedings in a criminal court with regards to a subject matter before a civil court did not render the proceedings in the civil court a nullity and therefore the two (2) could proceed concurrently. It was emphatic that the issue of coercion, undue influence, blackmail, forgery and fraud sprang up after the pleadings were closed and during the moulding of the consent and its subsequent recording.
 27. It was categorical that the Plaintiff's averments were misguided and misconceived factual pre-supposition which it intended to use as a spring board to persuade the court to disregard its application. It therefore urged the court to disregard the same.
 28. The Defendant's Written Submissions were dated 19th December 2022 and filed on 21st December 2022 while those of the Plaintiff were dated 20th January 2023 and filed on 30th January 2023. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

29. The Defendant submitted that a variation of a consent judgment could only be on grounds that would allow for a contract to be vitiated. It pointed out that the said grounds included but were 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.
30. In this regard, it placed reliance on several cases among them the case of *Flora Wasike vs Destimo Wamboko* (1982-1988) 1 KAR 625 as cited in the case of *Paul Kiplangat Keter vs John Koech* [2021]eKLR, *Brooke Bond Liebig vs Mallya* 1975 EA 266, *Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd* (1982) KLR 485 and *Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Limited* [2015]eKLR where the common thread was that a consent judgment could only be set aside for fraud,



collusion, given without sufficient material facts or misapprehension and in general for a reason which would enable the court to set aside an agreement.

31. It argued that the consent judgment was vitiated by illegalities most notably fraud as the underlying facts upon which the consent was secured was through fraudulent documentation. It reiterated that the LPOs that were used to prove the claim for the award of special damages that eventually led to the recording of the consent were pure forgeries.
32. It contended that it had discharged the burden and standard of proof required in granting the orders of varying the consent order and that courts were temples of justice which should not sanction what was illegal. To buttress its case, it placed reliance on the case of *Mohamed vs Attorney General* (1990) KLR 146 where it was held that no court ought to enforce an illegal contract or allow itself to be made instrument of reinforcing obligations alleged to arise out of illegal contracts.
33. It further contended that a contract that was illegal was not enforceable and was a nullity or void ab initio and that upon setting it aside, the guilty party ought not benefit from such illegality. To further support its argument, it placed reliance on the case of *Root Capital Incorporated vs Tekangu Farmers Co-operative Society Ltd & Another* [2016] eKLR where it was held that a person should not be allowed to profit from his own wrongdoing. It urged the court to compel the Plaintiff to pay back the sum of Kshs 38,950,000/= that was paid pursuant to an irregular consent order before the illegalities were discovered and a criminal case instituted.
34. On its part, the Plaintiff submitted that Order 2 Rule 10 (sic) required that every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence. It pointed out that neither the Defendant's defence nor the current application for setting aside the consent pleaded a single particular of fraud as alleged.
35. It asserted that a party could not benefit from what he or she had not pleaded. In this respect, it relied on the case of *Abdul Rehman vs Fredrich Delfer & Another* C.A No 112 of 1992 (eKLR citation not given) where it was held that the burden of proving fraud especially against an advocate was very heavy and fraud had to be specifically pleaded and proved strictly.
36. It was categorical that there was no fraud in the consent that was recorded on 31st March 2017 and that the parties voluntarily recorded the same without coercion and/or fraudulent misrepresentation. It pointed out that the Defendant had not demonstrated that the advocates therein entered into the consent fraudulently.
37. It referred this court to the case of *SMN vs ZMS & 3 Others* [1982] KLR 485 where it was held that a consent order entered into by counsel was binding on all parties to the proceedings and could not be set aside or varied unless it was proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts for a reason which would enable the court set aside an agreement.
38. It admitted that indeed there was a finding in Criminal Case No E528 of 2021 that the LPOs were forgery but that the same was appealed against and the finding, conviction and sentence was suspended pursuant to court order dated 8th June 2022. It argued that the aforesaid criminal case was stage managed and instituted with a view of raising substantial reasons sufficient to set aside the said consent order. It asserted that that meant there was no fraud but that if there was any, then the same would have been pleaded and dealt with in the suit herein instead of warranting a criminal case to find that there was fraud.



39. It was emphatic that the finding of the Trial Court was not available for use by the Defendant as a ground and basis for setting aside the consent judgment pending the hearing and determination of the appeal herein.
40. It is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract. These grounds are coercion, duress, fraud, mistake or misrepresentation as was held in the case of *Flora Wasike vs Destimo Wamboko* (Supra).
41. Notably, in the instant case, the basis of the particulars of fraud relied upon by the Defendant was the finding in Criminal Case No E528 of 2021. It was not in dispute that the Judgment in the aforesaid case was appealed in the High Court at Milimani Criminal Division in HCCRA No E027 OF 2022.
42. What was in contention was whether the appellants therein appealed the whole decision or in part. This court noted that the Plaintiff averred that it had appealed against both conviction and the sentence whereas the Defendant in its rebuttal averred that the appeal was against the sentencing only and that conviction had not been challenged.
43. Be that as it may, none of the parties annexed the Memorandum of Appeal in HCCRA No E027 OF 2022 to their affidavit evidence to prove their allegations as far as this issue was concerned and/or to guide the court into making its determination.
44. As it is trite law that parties were bound by their pleadings, this court could not therefore make a determination on non-existent facts. As the criminal appeal was still pending in court, it was only prudent that this application be stayed pending the outcome of the said appeal to avoid a multiplicity of decisions from courts of equal jurisdiction.

Disposition

45. For the foregoing reasons, the upshot of this court's decision was that the Defendant's application was premature and the same be and is hereby stayed pending the hearing and determination of the appeal in HCCRA No E027 OF 2022.
46. It is hereby directed that this matter be mentioned on 10th July 2023 before the DR High Court Kisumu with a view to giving a date before the judge who will have been allocated to take over this matter to give further orders and/or directions.
47. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF JUNE 2023

J. KAMAU

JUDGE

