



REPUBLIC OF KENYA



KENYA LAW
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**Hill v Criticos (Civil Suit 226 of 2015) [2023] KEHC 20009 (KLR)
(Commercial and Tax) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 226 OF 2015
FG MUGAMBI, J
JULY 14, 2023**

BETWEEN

VICTORIA ANNA HILL PLAINTIFF

AND

HON. BASIL CRITICOS DEFENDANT

RULING

1. The applicant filed the application dated 17th November 2022 under section 5(1) of the *Judicature Act*, sections 1A, 3A and 63e of the *Civil Procedure Act*, Articles 40 and 159 of *the Constitution*, Order 51 rule 1 of the *Civil Procedure rules* and all enabling provisions of the law.
2. The application seeks orders that;
 - i. The Honourable Court be pleased to issue orders compelling Victoria Anna Hill, the plaintiff/respondent herein, to personally appear in Court and show cause why she should not be held in contempt of court and punished for failing to comply with court orders issued by the Honourable Court on 12th June 2018.
 - ii. Victoria Anna Hill, the plaintiff/respondent herein, be detained in prison for a term not exceeding six months for blatantly disobeying court orders issued on 12th June 2018.
 - iii. This Honourable Court be pleased to deny the plaintiff/respondent audience in this matter until and unless she purges the contempt of court committed herein.
 - iv. The plaintiff/ respondent be ordered to pay for the cost of this application immediately and upon determination of the application.



3. The application is premised on the grounds on the face of it, the supporting affidavit sworn by Basil Criticos on 17th November 2022 and written submissions dated 16th February 2023.
4. In summary, the applicant faults the respondent for willfully disobeying the orders of the court issued on 12th June 2018 which arose from a consent entered into by the parties and adopted by the court. The respondent was directed by that court order to release to the applicant all his movable items held in a storage room at Kitengela. The applicant confirmed that he had complied with the court orders and settled the storage charges as well as the auctioneer's fees, upon which the court had directed that the goods be released.
5. In response to the application, the respondent filed Grounds of Opposition dated 30th November 2022 and on even date also filed a Notice of Preliminary Objection. The objection was premised on the following grounds;
 - i. That the applicant's/defendant's application dated 17th November, 2022 is bad in law, misconceived, incompetent and fatally defective as it contravenes the provisions of Order 9 Rule 9 (a) (b) and Order 9 Rule 10 of the *Civil Procedure Rules*, 2010 Laws of Kenya.
 - ii. That the entire application against the plaintiff/respondent herein is a gross and blatant abuse of the Court process and the same should be struck out with costs to the plaintiff/respondent and the consequential orders/directions on the application vacated.
6. The preliminary objection was canvassed by way of written submissions filed by the respondent and applicant on 8th February and 16th February respectively. By the very nature of a preliminary objection, it follows that I must accord priority to the objection.
7. The gist of the submissions by the respondent is that the consent recorded between the parties and adopted as an order of the Court on 19th December 2019 was in effect a judgment as it had determined all the issues between the parties. That being the case, since the applicant had previously been represented by M/S Avedi & Co. Advocates during the recording of the consent, Counsel ought to have sought leave of the Court to come on record before filing a Notice of Change of Advocate. Having not sought leave, the application filed by Counsel was defective and should be expunged for being in contravention of Order 9 rule 9.
8. The applicant opposed the preliminary objection firstly on the ground that no consent judgment had been entered in the matter as averred by the respondent. This being an issue of fact and not law meant that the preliminary objection was not a proper preliminary objection.
9. Secondly, the applicant submitted that the consent dated 19th December 2019 could not be referred to as a judgment as it had not dealt with all the issues in dispute including the release of the applicant's movable items, the land out of which the 100 acres of land was to be transferred to the plaintiff and the issue of costs which the respondent acknowledges in written submissions. The consent also fixed a hearing date for an application and gave directions on the said application and as such was not a final determination of the issues.
10. According to the respondent, there were a number of consent orders in the matter but no consent judgment had been entered. In order to counter the argument that the matter had been settled to finality, the respondent submits that the respondent had communicated her refusal to accept the defendant's offer to transfer to her property L.R. No. Kimorigo/kitobo Block 1/2145. For these reasons it is submitted that the provisions of Order 9 rule 9 were not applicable.



Analysis

11. I have carefully considered the pleadings and the rival submissions filed by the parties in support of their respective cases. The main issue for determination is whether the preliminary objection herein is sustainable. The legal ambit of what constitutes a preliminary objection was set out in the celebrated case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors* where it was held that

“...a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.
12. The required threshold for distinguishing between questions of law and fact for purposes of sustaining a preliminary objection as is also a point that is well crystalized. In the case of *George Oraro v Babak Eston Mbaja [2005]* eKLR the court held that: -

“ A preliminary objection is ... declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...”
13. The essence of the preliminary objection raised by the respondent touches on the locus standi of an advocate to represent a client after delivery of judgment. The relevant legal provisions are outlined in Order 9 rules 5 and 9 of the *Civil Procedure Rules*. Without a doubt, this is a question of law and is the basis of the preliminary objection. I do not agree with the applicant that the objection relates to whether or not there is a judgment on record. I do however accept that the objection is predicated on whether the consent orders adopted by the court amounted to a judgment of the court.
14. It is not unusual for a consent order to operate as a final judgment of the court. Going by the decision of the Supreme Court in the case of *Richard Nyagaka Tong’i v. Chris Munga N. Bichage & 2 others SC Petition No. 17 of 2014; [2015]* eKLR, the Court held that:-

“ From the foundation of current case law, we would hold that a ‘Judgment’ is a determination or decision of a Court, that finally determines the rights and obligations of the parties to a case, and includes any decree, order, sentence, or essential direction for the execution of the intent of the Court.”
15. Likewise, in *Edward Acholla v. Sogea Satom Kenya Branch & 2 others Cause No. 1518 of 2013; [2014]* eKLR, the Court again disabused the idea that a consent cannot be a judgment when it held that:

“ A consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out.”
16. I am particularly keen on the issue of a judgment being a determination that finally determines the rights and obligations of the parties to a case. A consideration of the plaint filed in this matter dated 8th May 2015 indicates that the respondent sought three main prayers:
 - a. Sums due from the defendant/applicant to the plaintiff/ respondent of Kshs. 25,000,000/=;



- b. An order compelling the defendant/applicant to hand over to the plaintiff/respondent her possessions as listed in the attached schedule of assets including motor vehicle registration KWA 697;
 - c. Costs of the suit
17. None of the parties have attached the consent of 12th June 2018 or 19th December 2019 to their submissions although the applicant has listed the contents, which do not appear to be controverted. It is evident that the consent of 12th June 2018 addressed the question of the payment of storage charges, monthly charges and release of the movable items to the defendant. The subsequent consent of 19th December 2019 addressed the amount payable by the plaintiff to the defendant, mode of payment, transfer of a portion of the land and the return of the items belonging to the plaintiff.
 18. I have taken the liberty to peruse the court file so as to ascertain the facts that are being stated to the court. The consent provided for directions on the hearing of the application of 14th November 2018. This was an application for amendment of the defence. What none of the parties have disclosed is that the application was heard and dismissed with costs on 8th July 2022.
 19. The record shows that the consent order was adopted as an order of the court on 22nd November 2022 by which time the application had been dispensed with. The court also noted that an intended counterclaim had been overtaken by events. Technically therefore there was nothing more for the court to determine as between the parties.
 20. The respondent argues that the consent orders did not deal with the issue of costs. It must be stated that a consent order is a compromise to the suit by parties on their terms. Parties did not agree on the issue of costs in their consent. This does not make the consent any less of a final judgment.
 21. Whilst the general rule is that the court will order the unsuccessful party to pay the costs of theth June 2018 and 19th December 2019 become judgments of the court once they were adopted as such.
if it thinks it appropriate to do so including not awarding costs altogether. Since parties do not appear to have agreed on the issue of costs and no submissions were raised on the issue, I will steer off and make no finding on the issue of costs. I therefore find no difficulty holding that the consent orders of 12 successful party, this is only a starting point and the court can make a different order for costs
 22. Having determined that the two consents amount to the final judgement of the Court, I now turn to look at the impugned provisions of the law. A close look at Order 9 rule 9 of the *Civil Procedure Rules* clearly shows that the provision is couched in mandatory terms. Compliance is what gives an advocate the locus standi to address the court on behalf of his client and gives the court jurisdiction to address the matters raised by the advocate. (See *Ernest Kevin Luchidio v Attorney General & 2 others [2015]* eKLR and *Paul Kiplangat Keter v John Koech [2021]* eKLR).
 23. The purpose of Order 9 rule 9 *Civil Procedure Rules* was aptly discussed in the case of *Serah Wanjiru Kung'u v Peter Munyua Kimani [2021]* eKLR where the Court struck out an application by Advocates who were not properly on record stating that:

“The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of



effecting change of advocates post-judgment...The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt...”

24. In the case of *Jackeline Wakesho v Aroma Cafe [2014]* eKLR the Court held as follows; -

”Although the foregoing objection appears like a technical procedural issue, this Court finds that the default by the Applicant goes to the jurisdiction of the Court to entertain the motion. The reason for the foregoing reasoning is that the Court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack locus standi. The Court has been asked to invoke the oxygen principle under Section 1A and 1B of the *Civil Procedure Act* and entertain the Motion. The Court will not however do that. The reason for the foregoing is twofold. Firstly, there are several judicial pronouncements cited by the claimant which show that Courts have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9....”

Determination and orders

25. Consequently, it is my finding that the applicant was bound by the provisions of Order 9 rule 9. Having not complied, this court finds that the preliminary objection is merited and the application dated 17th November 2022 is struck out with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 14th DAY OF JULY 2023

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

