



REPUBLIC OF KENYA



**Multiple Hauliers E. A Ltd v Avic Jac Motors E. A Ltd (Civil Appeal
E021 of 2022) [2023] KEHC 23568 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E021 OF 2022
TM MATHEKA, J
SEPTEMBER 22, 2023**

BETWEEN

MULTIPLE HAULIERS E. A LTD APPELLANT

AND

AVIC JAC MOTORS E. A LTD RESPONDENT

*(Being an Appeal from the Ruling of Hon. E.M Muiru (PM) in the Principal Magistrate's
Court at Kilungu, Civil Case No. E065 of 2020, delivered on 10th March 2022)*

JUDGMENT

1. The respondent filed Kilungu PMCC NO E065 OF 2020 seeking special damages, of kshs1,670,786/=, for extensive damage to its motor vehicle registration No. KCM 896A. It averred that on 12th November 2017, while its driver was lawfully driving along Mombasa-Nairobi road at Konza area, the appellant's driver drove motor vehicle registration No. KBA 517P/ZD 5634 so negligently that it rammmed onto the rear of motor vehicle KCM 896A.
2. During the course of proceedings, the parties entered into negotiations and on 14th October 2021 the recorded a consent on liability in the ratio of 60:40 in favour of the respondent. The claim was agreed to be Ksh 1,670,786 less 40% (668, 314) leaving as payable Ksh 1,200,472/= . It was agreed that judgment be entered in the sum of Ksh 1,200,472 plus costs and interest from the date of judgment. The defendant was given 30 days to execute.
3. Vide a Notice of Motion dated 29th November 2021 and filed on 30th November 2021 the plaintiff / appellant sought to have the consent set aside on grounds that there was high probability of a fraud having been perpetuated in the suit and that the mistake of failing to detect the said anomaly in good time was inadvertent and ought not to be visited on it. The application sought in the alternative that an order be issued re opening the suit for hearing and determination on merit.



4. The application was canvassed by way of written submissions. The learned trial magistrate dismissed the application with costs.
5. Aggrieved by that ruling, the appellant filed this appeal on the following grounds;
 - a. That the learned magistrate misdirected herself in law and fact in finding that the appellant's Notice of Motion Application dated 29/11/2021 raised no substantial ground to warrant the court to set aside the consent entered.
 - b. That the learned magistrate misdirected herself in law and fact by failing to take due regard of the evidence on record cited by the appellant on the existence of a fraud that was perpetuated against the appellant that goes to the root of the suit and consequently needed redress of the honorable court and its just intervention.
 - c. That the learned magistrate misdirected herself by failing to appreciate that its enshrined in the 2010 Constitution of Kenya that nobody should be condemned unheard and that cases should be determined without undue regard to technicalities hence the strict application by the magistrate of the definition of fraud as per Black's Law Dictionary being unjust in the pertaining circumstances of the case.
 - d. That the learned magistrate erred in law and fact by failing to totally or at all appreciate the issues raised by the appellant's submissions and case law cited dated 22/12/2021.
 - e. That the learned magistrate erred in law and fact by failing to totally or at all appreciate that the facts at the scene of the accident did not support the evidence presented /filed in court by the respondent and which fact was well documented and pointed out in the applicant's Notice of Motion Application dated 29/11/2021.
 - f. That the learned magistrate erred in law and fact by failing to appreciate that in any event, the mistakes/errors of advocates should not be visited on an innocent litigant hence arriving at an erroneous finding.
6. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellant's Submissions

7. The appellant submits that in its application before the trial court, it exhibited documents marked 'WAP3' which show that the damage on motor vehicle KCM 896A (the vehicle) was limited to its front part yet paragraph 5 of the plaint averred that the vehicle was hit from the rear.
8. The appellant agrees that the parties exchanged documents but contends that it only discovered the fraud after recording consent on liability. That after perusing the response carefully, it can now confirm without a shadow of doubt that fraud was committed by the plaintiff since it has failed to render a plausible explanation as to why the vehicle never sustained any damage to its rear. That the trial court erred by failing to exercise its discretion to set aside the consent judgment on those grounds and have the matter heard on merit so that the truth could be established. The fact that the consent was entered into voluntarily, it submits, does not vitiate the fraud discovered and which needs an explanation to avoid causing the applicant injustice and loss.
9. It submits that the trial magistrate blamed the Advocates on unfounded assumptions of failing to exercise due diligence and it's an indication that the application was not considered in light of interests of justice.



10. It submits that even if the Advocates failed to exercise due diligence, the same is a human phenomenon and mistakes of counsel should not be visited on an innocent litigant. It has relied inter alia on *Intercountries Importers and Exporters Limited –vs- Teleposta Pension Scheme Registered Trustees & 5 others* [2019] eKLR where the Court of Appeal stated;

“The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig vs Mallya* (1975) EA 266 where Mustafa Ag. VP stated thus;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

And in the case of *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR Hancox JA cited Setton on Judgments and orders (7th Edition) Vol 1 page 124, and reiterated that;

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and 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 the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”

Respondent’s Submissions

11. The respondent submits that a consent judgment can only be varied on grounds which would allow for a contract to be vitiated. That the grounds include but are not limited to; fraud, collusion, illegality, mistake, an agreement being contrary to the policy of court, absence of sufficient material facts and ignorance of material facts. It relied inter alia on the case of *Paul Kiplagat Keter –vs- John Koech* (2021) eKLR where the 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.”

12. It submits that the appellant’s basis of the fraud allegation is a discovery from the pleadings made post judgment. It contends that the appellant had more than ample time to review the documents as they were at its disposal from the time they were served to the time the consent was recorded. Further, it submits that the appellant did not place any evidence before the trial court to show that there was an attempt to conceal material facts.
13. The respondent submits that there was no iota of evidence placed before the trial court to prove allegations of fraud, misrepresentation and/or mistake. It contends that the appellant was not coerced or rushed into entering the consent as the matter was adjourned severally to allow for negotiations. Further, it contends that this is an overt effort to retry the entire suit where there is a valid consent judgment.



14. It submits that the occurrence of the accident is not in dispute as well as the fact that its motor vehicle was damaged as a result of the accident. It contends that the appellant's submissions have largely dwelt on the issue of the 'Advocate's mistake' which is a new issue not raised in the lower court. Further, it submits that the standard of proof where fraud is alleged is slightly higher than the balance of probabilities and the appellant is yet to tender any evidence of fraud.

Duty of Court

15. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. In this case however, there were no witnesses in the trial court.
16. I have carefully considered the record, the rival submissions and the authorities cited by each party. The issue that arises for determination is whether the appellant has placed sufficient material before this court to support the argument that the consent judgment in the trial court should have been set aside.

Analysis

17. The parties are in agreement that the general principle of law is that a consent judgment or order has the effect of a contract and can only be set aside on grounds which would justify setting aside of a contract.
18. The respondent claim in the plaint dated 9th November 2020 was set out at paragraph 5 which states inter alia that the accident occurred on 12th November 2017 when the defendant's driver drove m/v registration no. KBA 517P/ZD5634 and rammed into the rear of the plaintiff's m/v registration no KCM 896A leading to extensive damage, huge repair costs and losses.
19. The revised assessment report dated 16th March 2018 shows that the m/v required a 2fully dressed cabin, front bumper, RHS door step garnish. Cabin mountings, cabin tilt bracket, steering York, front bumper brackets, cabin lock mechanisms, air cleaner snorkel, right front tyre,
20. The report states that "consistent with the damage the vehicle was hit at the front RHS by a rigid third party object while stationary or while in motion"
21. It is this evidence that is the basis for the Notice of Motion filed on 30th November 2021 in the trial court (the application) where the major ground relied on by the appellant was that the evidence presented by the respondent did not support the averments in the plaint. That while the claim in the plaint was to the effect that the vehicle was been hit from behind; the evidence presented showed that the damage was on the front part. The appellant agreed that the said discovery had been made after recording the consent in court.
22. It is evident from the record and submissions by appellant's counsel that if he had applied his mind properly to the pleadings and documents served by the respondent, the probability is that he would not have agreed to compromise the suit. From the application, the mistake is duly admitted and said to have been inadvertent.
23. In dismissing the application, the trial magistrate expressed herself as follows;

"There was no indication from the defendant as to any other documents that the plaintiff failed to disclose to them in an attempt to conceal the material facts. Further, the defendant's statements had also been filed in court on 14/06/2021 before the consent was entered. In addition, no further documents were filed in court after the consent was recorded other than the instant application. Having observed that parties duly exchanged documents, I am



at pains to understand what fraud was actuated by the plaintiff. I agree with the plaintiff that the defendant based his application on big words like fraud but there were no proper grounds to support the same. Instead of alleging fraud, counsel should have been honest enough to admit the mistake/error was on his part.”

24. From the above analysis, the learned trial magistrate found no basis for the alleged fraud but found that that indeed there was mistake by appellant’s counsel. The court went on to conclude that that no proper grounds had been advanced in support of the application. Upon perusal of the application it is emerges that the application was based on two fronts: alleged fraud on the part of the respondent who did not set out the particulars of damage of the m/v in the plaint. and what counsel describes as ‘inadvertent, drastic mistake on the part of the applicant’s counsel as demonstrated in the affidavit sworn by Winnie Awuor Paul, Legal Officer of the applicant’s insurer. It is urged that this mistake should not be visited on the applicant. Counsel is saying that due to their failure to pay attention to details, that the disparity between the pleadings and evidence was not noticed in good time and that disparity suggested that fraud may have been committed in the suit.
25. The plaint is plain. There is no description of the damage caused to the m/v. This only comes out in the documents filed with the plaint and the statements made by both drivers, which do not support the averment in the plaint that the m/v was hit from behind. This disparity is glaring and it is contended by the applicant that had they been aware of this disparity they would not have entered into the consent as it is. Both the applicant and the respondent are in agreement that the plaintiff’s m/v was rammed from the rear by the defendant’s m/v. How the same sustained extensive damage to the front is not explained in the documents that are before the court. The question is whether that is sufficient ground to set aside the consent.
26. There is no dispute that an accident happened on the material date between the two m/vehicles. There is also no dispute that during the negotiations for the out of court settlement documents with respect to the damage to the m/v, the cost of repairs etc. were shared across the board and that is how the liability was agreed on. The basis of the negotiations must have been the pleadings and the documents. The pleadings were made by the parties. The documents were shared by the parties; applicant’s counsel cannot say that they did not notice all the information in the documents shared on the damage to the m/vehicle. How then did they enter into the negotiations, and finally settle on the consent? If then it is true that counsel did not see all these, then I can only conclude, just like the learned trial magistrate that he entered into the consent on behalf of his client ignorant of the very material fact that the pleadings and the evidence presented to him were not at parity. Had he applied his mind to these facts he would perhaps not have entered into those terms.
27. The truth of the matter is that an accident happened. That the plaintiff pleaded that the motor vehicle was rammed from behind by the defendant’s m/v, that the plaintiff did not set out the particulars of the damage to the m/v in the pleadings, that the m/v did not have damages to the rear.
28. It is my considered view that these are grounds upon which this court could interfere with the specific consent in this matter, because the manner in which the accident happened goes to the root of the matter in as far as liability is concerned.
29. In the circumstances I am of the view that the consent was entered when one party was ignorant of the material fact of the actual damages to the plaintiff’s motor vehicle. To that extent it is only fair and just that the consent be set aside



Determination

- i. Having held as herein above, the consent entered into between the parties on the 14th October 2021 be and is hereby set aside
- ii. The matter be and is hereby remitted back to the Kilungu Magistrate's Court for hearing and determination in the manner provided for by law. Parties are at liberty to still pursue an out of court settlement.
- iii. Each party to bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER 2023

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MUMBUA T MATHEKA

JUDGE

Nelima CA

Maithya for Ngulli for appellant

N/A for respondent

Appellant's Advocates

Ngulli & Co. Advocates

Respondents' Advocates

Joe Ngigi & Co. Advocates

