



**Wilfak Engineering Limited v Kenya Ports Authority (Civil Suit E193 of 2020)
[2024] KEHC 15816 (KLR) (Commercial and Tax) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E193 OF 2020
A MABEYA, J
DECEMBER 13, 2024**

BETWEEN

WILFAK ENGINEERING LIMITED PLAINTIFF

AND

KENYA PORTS AUTHORITY DEFENDANT

RULING

1. Before Court is the application dated 15/8/2024. It was brought under Articles 25,50,159(2)(d) of *the Constitution*, sections 1A, 1B and 3A of the *Civil Procedure Act*, section 139 of the Public Procurement and Disposal Act and Orders 9 rule 9, 45 and 51(1) of the Civil Procedure Rules.
2. The application sought to review, vary and or set aside the consent orders of 9/9/2022 and that the Court adopts the terms of the draft consent annexed to the application. It was premised on the grounds set out on the face of it and the affidavit of Sammy Maina Kamau of even date.
3. It was the applicant's contention that at the time the parties adopted the consent orders on 9/9/2022, certain issues or material factors were not taken into account. That the parties made a mistake by failing to factor in variation process and rates as well as the duration of the contract which formed the basis of the consent.
4. It was averred that pursuant to the said mistake, the applicant has been unable to deliver its obligations under the contract. That the parties are agreeable to a review of the consent orders in order to pave way to the new consent orders.
5. The respondent filed a replying affidavit sworn by Eng G Nyaga dated 22/10/2024. It was the respondent's contention that the applicant had not met the threshold for setting aside the consent orders. That the parties had negotiated the terms of the contract and recorded the consent which was



adopted as an order of the Court. That the applicant had misled the Court by stating that the consent was recorded before the new terms were included in the consent.

6. The respondent further contended that the applicant had failed to perform its part of the contract and could not attribute that failure on the review of the consent. That the applicant had not demonstrated any fraud, mistake or undue influence in the recording of the consent.
7. The application was canvassed by way of written submissions which I have considered. The applicant submitted that, at the time of the consent, the parties made an error on an important element of the contract which is price fluctuation or variation which would affect the terms of the consent. Counsel submitted that failure to include the price fluctuation or variation has had a negative impact on the applicant and as a result, the applicant had been unable to deliver on its obligations. That this position had been supported by the Attorney General in an advisory to the defendant.
8. I have considered the rival averments and the submissions on record. The circumstances under which a consent order can be set aside were considered by the Court of Appeal for East Africa in the case of *Broke Bond Liebig (T) Ltd V Mallya (1975) E.A. 266*. It was stated that: -

“The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani V Kassan (1952)19 EACA 131* where the following passage from Section on judgments and orders, 7th Edition vol. 1, P. 124 was approved:

Prima Facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on 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 the court to set aside an agreement”.

For his part Ag. Vice President Mustafa had this to say:

“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 the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the 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 material facts and there could have been no mistake or misunderstanding.”

9. In the case of *Board of Trustees National Social Security Fund versus Micheal Mwalo [2015] eKLR*, it was held: -

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”



10. From the foregoing, it is clear that a consent order can only be varied or set aside if it is shown that it was obtained through fraud, non-disclosure of material facts, mistake, or any other valid reason by which a contract can be rescinded.
11. In the present case, the applicant sought to set aside the consent order on the grounds that the order had not taken into account the price fluctuation or variation and that therefore, the applicant was unable to perform part of its obligation. In its rebuttal, the respondent stated that the parties had negotiated the terms of their contract and recorded the consent willingly. That the applicant chose to rely on an advisory by the Attorney General and the same did not form part of the negotiations.
12. From the record, it is clear that the applicant only stated that the parties had not taken into consideration price fluctuations. What the applicant did not tell the Court is, was it in the contemplation of the parties that there would be price fluctuations? Had there been such fluctuations and if so, to what extent they had affected both its obligations and the consent? To what extent could that failure fit in the grounds for setting aside the consent?
13. While the advisory by the Attorney General may have been important, the same came after the recording the consent. It could not be a basis for setting aside but for review under Order 45 of the Civil Procedure Act. The application before court was not under that provision and the Court could not therefore consider it on that basis. In any event, it was not shown that the advisory fits in the grounds or circumstances of setting aside a consent order as stated in the case law set out above.
14. Accordingly, I find the application to be without merit and the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE

